The Washington Association Of Prosecuting Attorneys

MEMORANDUM

To: All Prosecuting Attorneys

From: Pam Loginsky, Staff Attorney

Date: May 1, 2020

Re: Governor's Emergency Powers

INTRODUCTION

The supreme executive power is vested in the governor, Wash. Const. art. III, § 2, with a corresponding responsibility to "see that the laws are faithfully executed," Wash. Const. art. III, § 5. In responding to a state of emergency or invasion, the governor's constitutional duties may be implicated. *See generally* Jim Rossi, *State Executive Lawmaking in Crisis*, 56 Duke L.J. 237, 240 (2006) (arguing that state executives possess inherent constitutional authority to respond during times of crisis). In Washington, however, the governor's power to respond to state emergencies is regulated by statute. The legislature has broadly authorized gubernatorial responses to emergencies.

This memorandum discusses the legislatively granted powers. Which, if any entities, may alter those powers and the impact of a governor's emergency powers on constitutional rights are also addressed.

LEGISLATIVELY DELEGATED EMERGENCY POWERS

In 1951, the Washington Legislature adopted the Washington Civil Defense Act of 1951, Laws of 1951, chapter 178, to ensure that the state can protect the public peace, health, and safety, and to preserve the lives and property of the people of the state from disasters arising from "fire, flood, storm, earthquake, or other natural causes." Laws of 1951, ch. 178, § 2(1). In 1969, the legislature enacted a comprehensive bill for dealing with public disorders, disasters, and riots that was largely codified in chapter 43.06 RCW. *See* Laws of 1969, chapter 186. Both of these acts

> evidence a clear intent by the Legislature to delegate requisite police power to the Governor in times of emergency. The necessity for such delegation is readily apparent:
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> > In times of natural catastrophe or civil disorder, immediate and decisive action by some component of state government is essential. The legislative police power can of course be exercised to deal with crises affecting the public health, safety, and welfare. In practice, however,

> the ravages of nature and the exigencies of rioting, labor strife, and civil rights emergencies usually necessitate prompt governmental response. Since the executive is inherently better able than the legislature to provide this immediate response, state chief executives have frequently been given substantial discretionary authority in the form of emergency powers to deal with anticipated crises. Consequently, when public emergencies arise, the center of governmental response is usually the governor's office.
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> (Footnote omitted.) Comment, Constitutional and Statutory Bases of Governors' Emergency Powers, 64 Mich. L. Rev. 290, 290 (1956).

Cougar Business Owners Assoc. v. State, 97 Wn.2d 466, 474-75, 647 P.2d 481 (1982), *abrogated on other grounds by Yim v. City of Seattle*, 194Wn.2d 682, 451 P.3d 694 (2019).

The 1951 Civil Defense Act which is now codified in chapter 38.52 RCW applies to emergencies or disasters. An "emergency or disaster""means an event or set of circumstances which: (i) Demands immediate action to preserve public health, protect life, protect public property, or to provide relief to any stricken community overtaken by such occurrences; or (ii) reaches such a dimension or degree of destructiveness as to warrant the governor proclaiming a state of emergency pursuant to RCW 43.06.010." RCW 38.52.010(9)(a).

The governor is granted general supervision and control in the event of an emergency or disaster that is beyond local control. RCW 38.52.050(1); RCW 38.522.020(1)(b). In performing his or her duties in times of emergency or disaster the governor is "authorized and empowered:

> (a) To make, amend, and rescind the necessary orders, rules, and regulations to carry out the provisions of this chapter within the limits of the authority conferred upon him [or her] herein, with due consideration of the plans of the federal government;
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> (b) On behalf of this state, to enter into mutual aid arrangements with other states and territories, or provinces of the Dominion of Canada and to coordinate mutual aid interlocal agreements between political subdivisions of this state;
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> (c) To delegate any administrative authority vested in him [or her] under this chapter, and to provide for the subdelegation of any such authority;
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> (d) To appoint, with the advice of local authorities, metropolitan or regional area coordinators, or both, when practicable;
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> (e) To cooperate with the president and the heads of the armed forces, the emergency management agency of the United States, and other appropriate federal officers and agencies, and with the officers and agencies of other states in matters pertaining to the emergency management of the state and nation.

RCW 38.52.050(3).

The 1969 act authorized the governor to proclaim a state of emergency in a written document that is filed with the secretary of state. Laws of 1969, chapter 186, § 2, now codified at RCW 43.06.210. The state of emergency may be state-wide or location specific and it may be declared when "public disorder, disaster or riot exists within this state or any part thereof which affects life, health, property or the public peace." Laws of 1969, chapter 186, § 8, now codified at RCW 43.06.010(12). Once a state of emergency is declared, it continues until the governor issues a proclamation declaring its termination. RCW 43.06.210. The governor must terminate a state of emergency proclamation when order has been restored to the affected area. *Id.*

In subsequent years, the legislature both expanded and contracted the governor's emergency powers. *See* Laws of 2019, ch. 472, § 2; Laws of 2008, ch. 181, § 1; Laws of 2003, ch. 53, § 222. Current RCW 43.06.220 now provides that:

> (1) The governor after proclaiming a state of emergency and prior to terminating such, may, in the area described by the proclamation issue an order prohibiting:
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> (a) Any person being on the public streets, or in the public parks, or at any other public place during the hours declared by the governor to be a period of curfew;
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> (b) Any number of persons, as designated by the governor, from assembling or gathering on the public streets, parks, or other open areas of this state, either public or private;
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> (c) The manufacture, transfer, use, possession or transportation of a molotov cocktail or any other device, instrument or object designed to explode or produce uncontained combustion;
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> (d) The transporting, possessing or using of gasoline, kerosene, or combustible, flammable, or explosive liquids or materials in a glass or uncapped container of any kind except in connection with the normal operation of motor vehicles, normal home use or legitimate commercial use;
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> (e) The sale, purchase or dispensing of alcoholic beverages;
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> (f) The sale, purchase or dispensing of other commodities or goods, as he or she reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace;
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> (g) The use of certain streets, highways or public ways by the public; and
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> (h) Such other activities as he or she reasonably believes should be prohibited to help preserve and maintain life, health, property or the public peace.
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> (2) The governor after proclaiming a state of emergency and prior to terminating such may, in the area described by the proclamation, issue an order or orders concerning waiver or suspension of statutory obligations or limitations in the following areas:
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> (a) Liability for participation in interlocal agreements;
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> (b) Inspection fees owed to the department of labor and industries;
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> (c) Application of the family emergency assistance program;

(d) Regulations, tariffs, and notice requirements under the jurisdiction of the utilities and transportation commission;

(e) Application of tax due dates and penalties relating to collection of taxes;

(f) Permits for industrial, business, or medical uses of alcohol; and

(g) Such other statutory and regulatory obligations or limitations prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency if strict compliance with the provision of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency, unless (i) authority to waive or suspend a specific statutory or regulatory obligation or limitation has been expressly granted to another statewide elected official, (ii) the waiver or suspension would conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state, or (iii) the waiver or suspension would conflict with the rights, under the First Amendment, of freedom of speech or of the people to peaceably assemble. The governor shall give as much notice as practical to legislative leadership and impacted local governments when issuing orders under this subsection (2)(g).

(3) In imposing the restrictions provided for by RCW 43.06.010, and 43.06.200 through 43.06.270, the governor may impose them for such times, upon such conditions, with such exceptions and in such areas of this state he or she from time to time deems necessary.

(4) No order or orders concerning waiver or suspension of statutory obligations or limitations under subsection (2) of this section may continue for longer than thirty days unless extended by the legislature through concurrent resolution. If the legislature is not in session, the waiver or suspension of statutory obligations or limitations may be extended in writing by the leadership of the senate and the house of representatives until the legislature can extend the waiver or suspension by concurrent resolution. For purposes of this section, "leadership of the senate and the house of representatives" means the majority and minority leaders of the senate and the speaker and the minority leader of the house of representatives.

(5) Any person willfully violating any provision of an order issued by the governor under this section is guilty of a gross misdemeanor.

The statute creates two categories of governor authority. Governor Inslee has issued emergency proclamations that fall within each category with respect to the current COVID-19 emergency caused by the novel cornonavirus, SARS CoV 2. Subsection (1) of RCW 43.06.220 authorizes the governor to prohibit activities for the entire length of the emergency. Orders issued under this subsection, such as the "Stay Home, Stay Healthy" orders, which were issued pursuant to RCW 43.06.220(1)(h), do not require legislative approval.

The second category of gubernatorial authority is more constrained. The governor may waive or suspend statutory obligations, limitations, or regulations in a number of areas. RCW 43.06.220(2). An initial order issued pursuant to this authority may not exceed 30 days. Subsequent orders may

be issued but only with the consent of the legislature. RCW 43.06.220(4). When the legislature is not in session, an extension an order suspending or waiving statutory obligations, limitations, or regulations beyond 30 days is only valid when the leadership of the senate and the house of representatives approve the extension in writing. *Id.*

The legislature may, whenever it is in session, amend RCW 43.06.220 and the other related statutes in the same manner as any other law.

DECISION TO DECLARE AN EMERGENCY

Declaring an emergency is a discretionary act of the governor. *In re Recall of Inslee*, 194 Wn.2d 563, 573, 451 P.3d 305 (2019); *Cougar Business Owners Assoc.*, 97 Wn.2d at 470-71 (Governor's actions in declaring and responding to an emergency were "authorized by statute and were entirely discretionary"); RCW 43.06.010(12) ("The governor *may*, . . . proclaim a state of emergency"). The governor does not have a duty to declare a state of emergency.

When a state officer has discretion to act, the courts generally lack the power to compel the officer to exercise that discretion in a specific manner. Courts will also not preemptively act to restrain a governor's ability to declare an emergency. *See Morgan v. Rhodes*, 456 F.2d 608, 610 (6th Cir. 1972), *rev'd on other grounds by Gillian v. Morgan*, 413 U.S. 1 (1973). The reason for this limitation is that the responsibility for maintaining public peace and welfare on a day-to-day basis is lodged with the executive branch of government. Dealing with an emergency that threatens either requires an immediacy of action that is not possible for judges. *Id.* at 611(quoting *United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir. 1971)).

A state of emergency declaration is not, however, immune from judicial review. Review of the governor's emergency declaration though is highly deferential. *Moyer v. Peabody*, 212 U.S. 78, 84-85, 29 S. Ct. 235, 53 L. Ed. 410 (1909); *Sterling v. Constantin*, 287 U.S. 378, 399-400, 77 L. Ed. 375, 53 S. Ct. 190 (1932). Courts inquire whether the executive's declaration was made in good faith and whether there was a factual basis for it. *Sterling*, 287 U.S. at 400; *see also Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974). With respect to both of these inquiries, the governor's findings are treated as virtually conclusive. *See Scheuer v. Rhodes*, 416 U.S. 232, 250, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183, 188 (1984); *Sterling*, 287 U.S. at 399; *Moyer v. Peabody*, 212 U.S. at 84. In fact, between 1974 and 2019 only one trial court has ruled that a governor's emergency proclamation is inappropriate. *See* Karen J. Pita Loor, *When Protest is the Disaster: Constitutional Implications of State and Local Emergency Power*, 43 Seattle U. L. Rev. 1, 3 (2019) (citing *United States v. Virgin Islands*, 363 F.3d 276 (3d Cir. 2004).

HOW TO RESPOND TO THE EMERGENCY

Even when a declaration of emergency is made in good faith and factually supported, a court possesses the ability to determine whether the executive actions contravene constitutional rights.

Sterling. 287 U.S. at 400-02. The courts are mindful, however, that the invocation of emergency powers necessarily restricts activities that would normally be constitutionally protected. Accordingly, court review is quite deferential to gubernatorial emergency orders.

The degree to which a response to an emergency may limit or restrict the exercise of constitutional rights will depend upon the type of emergency. In an early constitutional challenge to a mandatory vaccination law, the United States Supreme Court noted that "All rights are subject to such reasonable conditions … essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will." *Jacobson v. Massachusetts*, 197 U.S. 11, 26-27, 25 S. Ct. 358, 49 L. Ed. 2d 643 (1905) (quoting *Crowley v. Christensen*, 137 U.S. 86, 89 (1980)). Both the principles of self defense and necessity allow a community to protect itself against an epidemic of disease that threatens the safety of its members. *Id.* at 27. Police powers at such times are considerable and will authorize regulations that are levied as a means to "meet and suppress the evils of a[n] ... epidemic that imperiled an entire population." *Id.* at 30-31. A Court will only intervene to protect a citizen from a selected means of protecting the welfare of the community if a grant or exercise of police power is arbitrary, unreasonable, or far beyond what was reasonably required to ensure the public's safety. *Id.* at 28.

Washington's appellate court opinions regarding review of the governor's emergency orders stem from damages actions related to the volcanic activity of Mount St. Helens in 1980. Governor Ray responded to the volcanic activity by declaring a state of emergency on April 3, 1980. In order to mitigate the possible loss of life related to this emergency, Governor Ray created two zones around the mountain to which access was largely restricted to official government, law enforcement, scientific, search and rescue activity. *See* Executive Orders 80-05, 80-09, 80-11, and 80-15. Governor Ray's decisions regarding the date the exclusionary zones were imposed, the location of the zones, and the timing of decisions to remove locations from the zones were all challenged in post-emergency actions for damages.

A group of business owners from Cougar brought a suit seeking damages for the taking of property without compensation, trespass, and interference with business expectations. *Cougar Business Owners Ass'n*, 97 Wn.2d at 470-71. They argued that Governor Ray declared the emergency too soon, included Cougar in the restricted "red zone," and did not remove Cougar from that zone quickly enough. *Id.,* at 467. At the same time, personal representatives of individuals who were killed in the May 18, 1980, eruption brought an action against the State for wrongful death. *See Karr v. State*, 53 Wn. App. 1, 765 P.2d 316 (1988). This group of plaintiffs argued that the governor acted negligently in defining the exclusionary zones and that her failure to include the location where their loved ones stood at the time of the eruption resulted in their deaths. *Id.*, at 7.

Washington courts rejected both sets of arguments finding that Governor Ray made policy decisions after balancing risks and advantages, and imposed restrictions that were reasonably related to the emergency. *See Cougar Business Owners Ass'n*, 97 Wn.2d at 471-78; *Karr*, 53 Wn. App. at 9-10. The Supreme Court noted that allowing suits from individuals who disagree with a governor's

decisions regarding how best to respond to an emergency would only result in different determinations by different courts in different forums. *See Cougar Business Owners Ass'n*, 97 Wn.2d at 480.

The Washington Supreme Court first determined that restrictions imposed by the governor following a declaration of emergency fall within the exercise of police powers. *Cougar Business Owners Ass'n*, 97 Wn.2d at 477. The governor's exercise of police powers are presumed constitutional and will be upheld if any state of facts either known or which could be reasonably assumed affords support for them. *Cougar Business Owners Assoc.*, 97 Wn.2d at 478.

The governor has considerable discretion in deciding which restrictions to impose in response to an emergency. Court review of a governor's decisions is extremely limited. A court will not examine the governor's motives, the factual justification for the restrictions, or the wisdom of a particular restriction. *Cougar Business Owners Ass'n*, 97 Wn.2d at 488. A police power regulation will be upheld so long as it is "reasonably necessary."

A governor's emergency restrictions will satisfy the "reasonableness" standard if the interests of the public require the action and the means chosen for the accomplishment of the purpose are not arbitrary or irrational. *See generally Yim v. City of Seattle*, 194Wn.2d 682, 451 P.3d 694 (2019). If it is debatable whether the means chosen will lessen or eliminate the emergency, the courts will uphold the limitations. *See Cougar Business Owners Ass'n*, 97 Wn.2d at 477-79.

Recently, the Washington Supreme Court heard a case in which a number of prisoners sought an order to compel the governor to adopt specific strategies for dealing with the current COVID-19 emergency. The Court rejected the request in a 5-4 order that contains no guidance for evaluating similar requests. *See* Colvin v. Inslee, Order No. 98317-8 (Wash. Apr. 23, 2020).

Other courts specifically reject judicial intervention in how to respond to an emergency. An example of this restraint followed the Missouri governor's decision to allow a state agency to deploy equipment to repair roads after massive flooding in that state. After the declaration of disaster, a judge in one of the counties issued a "preliminary order of Mandamus," ordering the state to release "three motor graders, three dump trucks, one front end loader and competent operators for the equipment" for use by the county. *State ex rel. Missouri Highway & Transportation Commission v. Pruneau*, 652 S.W.2d 281, 284 (Mo. App. 1983). County sheriffs arrived at storage sheds armed with the judicial order and attempted to seize the equipment. *Id.* In reviewing the legality of the county and the county judge's actions, a state appellate court determined that the state's management of the disaster took priority and deferred to the state agency, commenting that otherwise "we would have all chiefs and no Indians, and a Hydra without a head." *Id.* at 289 Recognizing the floodgate that such claims invited for the judiciary, the court refused to intervene, noting that "the ensuing brouhaha of claims of priority and superior need would be intolerable." *Id.*

Federal and other state cases involving challenges to conditions imposed pursuant to a governor's emergency powers arise in the context of litigants seeking an injunction based on a violation of a

specific constitutional right. To date, courts have reached the following results with respect to COVID-19 emergency orders[1]:

1. Social Distancing and Business Closures

The most comprehensive review of a governor's emergency social distancing order was undertaken by the Pennsylvania Supreme Court in *Friends of Devito v. Wolf*, No. 68 MM 2020, 2020 Pa. Lexis 1987 (PA Apr. 13, 2020).[2] In an action brought by four businesses and one individual seeking relief from the governor's executive order compelling the closure of the physical operations of all non-life sustaining business to reduce the spread of the novel coronavirus, the Pennsylvania Supreme Court held that (1) the policy decision to close businesses rather than leaving businesses open to maintain the free flow of business is a policy choice for the governor to make so long as the means chosen to meet the emergency are reasonably necessary for the purpose of combating the ravages of COVID-19; (2) the decision to close businesses and to enforce social distancing to mitigate and suppress COVID 19 is tailored to the nature of the emergency as they mitigate and suppress the continued spread of COVID-19; and (3) because COVID-19 does not spread "at" a particular location, the restrictions may properly be imposed in areas of the state where the disease has not been detected.

The Court rejected a number of constitutional challenges to the executive order, holding that (1) the governor's order did not violate separation of powers doctrine as the legislature specifically authorized the governor to issued such orders during an emergency; (2) although the executive order prohibited the businesses from using their property, it did not constitute a takings without compensation as the order is an exercise of police powers; (3) due to the onset of the rapid spread of COVID-19, procedural due process is satisfied by the governor's creation of a means by which a business that has been categorized as "non-life sustaining" can be re-categorized; and (4) the order does not violate equal protection as it treats similarly situated persons alike.

The Court also rejected the First Amendment claims made by a political candidate, who was prevented from using his principle place of business for operations related to his campaign. After noting that the constitutional rights to free speech and assembly are not absolute, the Court held that the Executive Order was content neutral, was narrowly tailored to restrict in-person gatherings to promote social distancing, and did not otherwise prohibit alternative means of communication or virtual gathering.

The United States District Court for the Southern District of Ohio reached the same conclusions as those of the Pennsylvania Supreme Court. *See Hartman v. Acton*, No. 2:20-CV-1952 (U.S. S.D. Ohio Apr. 21, 2020).

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[1]The summary includes cases addressing emergency orders issued by health departments or authority as the analysis is identical to orders issued by governors.

[2]The concurring and dissenting opinion may be found here.

2. Non-Essential or Non-Life Sustaining Businesses and the Right to Bear Arms

Courts have split on whether firearm stores and gun ranges are essential, with a number of courts finding that the constitutional right to keep and bear arms preclude the governor from closing them in response to the COVID-19 pandemic. *Compare Lynchburg Range & Training, LLC v. Northam*, No. CL2000033 (Va. Cir. Apr. 27, 2020) (decision based on the state constitution and state law), *with Civil Rights Def. Firm, P.C. v. Wolf*, No. 63 MM 2020 (Pa. Mar. 22, 2020) (denying motion to compel governor to make some allowance for the purchase and sale of firearms under his order closing all non-essential businesses).

3. Social -Distancing and the Free Exercise of Religion

Many emergency orders extend social-distancing restrictions to religious gatherings. A number of courts have rejected challenges brought by churches and other religious groups under the Free Exercise Clause of the First Amendment to the Constitution of the United States. These courts reject the challenges on the grounds that the orders are neutral and generally applicable and are a reasonable time, place, and manner restriction that does not violate the challengers' First Amendment rights to assemble. *See, e.g.*, *Legacy Church, Inc. v. Kunkel*, No. CIV 20-0327 (U.S. D. N.M. Apr. 17, 2020); *Gish v. Newsom*, No. EDCV 20-755 JGB (Kkx) (U.S. C. D. Ca. Apr. 23, 2020); *Maryville Baptist Church v. Beshear*, No. 3:20-cv-278-DJH (U.S. W.D. Ky. Apr. 18, 2020). These cases are consistent with the Supreme Court's statement that "[t]he right to practice religion freely does not include liberty to expose the community . . . to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166-67, 64 S.Ct. 438, 88 L. Ed. 2d 645 (1944).

One court granted a restraining order that allows churches and other religious facilities to hold in-person worship services attended by more than ten individuals provided that the congregants follow rigorous social-distancing and safety protocols applicable to similar secular facilities. *See, eg.*, *First Baptist Church v. Kelly*, No. 20-1102-JWB (U.S. D. Kan. Apr. 18, 2020). Another court granted a more limited restraining order. *See On Fire Christian Ctr. v. Fischer*, No. 3:20-CV-264-JRW (U.S. W.D. Ky. Apr. 11, 2020) (finding that a ban on public gatherings during the pandemic, which would obviously be a valid public heath measure, was unconstitutional when used to prevent a drive-through Easter Sunday church service in which parishioners remained in their cars and had no direct personal contact).

4. Restrictions on Non-Essential Medical Procedures

There have been a number of challenges by abortion providers and individuals to emergency executive orders that postponed non-essential surgeries/procedures in response to the COVID-19 pandemic. These challenges have not been to the bans per se, just to the classification of pre-viability abortions as non-essential. Some courts have granted some relief, while others have sustained the restrictions as written. *Compare, e.g., Adams & Boyle, P.C. v. Slatery*, No. 20-5408 (6th Cir. Apr. 24, 2020) (carving out exceptions to the ban on non-urgent medical procedures for patients who would lose their ability to obtain an abortion in the state, would be forced to undergo

a lengthier and more complex procedure, or will need to increase the number of visits if their procedures are delayed until the expiration of the executive order); *Robinson v. Attorney General*, No. 20-11401-B (11th Cir. Apr. 23, 2020) (affirming preliminary injunction against abortions that are not necessary for the mother's life or health on the grounds that the restrictions would not in fact free up hospital space for COVID-19 patients or PPE for medical providers), *with In re Rutledge*, No. 20-1791 (8th Cir. Apr. 22, 2020) (ordering the dissolution of an order restraining the state from enforcing its emergency health directive against surgical abortions); *In re Abbott*, no. 20-50296 (5th Cir. Apr. 20, 2020) (vacating most of the district court's injunction prohibited enforcement of an order that banned most medical procedures with respect to abortion on the grounds that courts may not usurp a state's authority to craft measures responsive to a public health emergency) ; *In re Abbott*, 954 F.3d 772 (5th Cir. 2020) (vacating restraining order that created a blanket exception for abortion on the grounds that the order usurped the state's authority to craft measures responsive to a public health emergency).

5. Elections

The most successful challenges to the specific application of emergency orders has been in the context of elections. While the courts did not ease the stay-at home orders in these cases, they did suspend or ease other statutes that the stay-at-home orders prevented the petitioner from strictly satisfying. *Esshaki v. Whitmer*, No. 2:20-CV-10831-TGB (U.S. E.D. Mich. Apr. 20, 2020) (reducing the number of required signatures for ballot access, extending the due date for signatures, and requiring the State to design a "user-friendly" system for collecting signatures through the use of electronic mail); *Libertarian Party of Ill. v. Pritzker*, No. 20-cv-2112 (U.S. N.D. Ill. Apr. 23, 2020) (granting similar relief in light of the nearly insurmountable hurdle posed to independent candidates by the shelter-at-home executive orders); *Goldstein v. Secretary of the Commonwealth*, 484 Mass. 516 (Apr. 17, 2020) (same); *Seventh Cong. Dist. Republican Comm. v. Va. Dep't of Elections*, No. CL20001640-00(Va. Cir. Apr. 14, 2020) (extending the deadline that a political committee must meet to complete its nomination for a non-primary method); *Garbett v. Herbert*, No. 2:20-cv-245-RJS (U.S. D. Utah Apr. 29, 2020) (proportionally reducing signature requirement).

Other challenges to election laws have been less successful. *See, e.g., Republican National Committee v. Democratic National Committee*, No. 19A1016, 589 U.S. ___ (Apr. 6, 2020) (vacating federal district court that extended the time by which absentee ballots must be received to be counted in a scheduled election); *Wisconsin Legislature v. Evers*, No. 2020AP608-OA (Wis. Apr. 6, 2020) (neither the Wisconsin Constitution nor the statutes granting the governor special authority in a time of emergency allow the governor to suspend elections or rewrite election law).

6. Prison or Jail Releases

A number of prisoners have sought court orders to compel the governor to reduce prison and/or jail populations by granting early releases, furloughs, commutations, and pardons. These challenges have largely been denied on the grounds that the prisoners did not establish that the governor and/or corrections department had demonstrated deliberate indifference to the risks COVID-19 posed to

inmates. *See, e.g., Valentine v. Collier*, No. 20-20207 (5th Cir. Apr. 22, 2020); *Colvin v. Inslee*, Order No. 98317-8 (Wash. Apr. 23, 2020); *Disability Rights Montana v. Montana Judicial Districts 1-22, Montana Courts of Limited Jurisdiction, Montana Department of Corrections, and Montana Board of Pardons and Parole*, No. OP 20-0189 (Montana Supreme Court April 14, 2020). Courts have also rejected these requests on separation of powers grounds. *See, e.g., Comm. for Pub. Counsel Servs. v. Chief Justice of Trial Court*, ___ N.E.3d __, 484 Mass. 431, 450-53 (2020) *Comm. for Pub. Counsel Servs.*, 484 Mass. at 450-453.

TERMINATING A STATE OF EMERGENCY

RCW 43.06.210 states "That the governor must terminate said state of emergency proclamation when order has been restored in the area affected." The phrase "when order has been restored" means a time when the "public disorder, disaster, energy emergency, or riot" which led the Governor to declare the state of emergency no longer exists. Despite the use of the word "must," the Washington Supreme Court has held that "The Governor's discretion is the same in determining both the start and end of such an occurrence." *Cougar Business Owners Ass'n*, 97 Wn.2d at 475-76.

BINDING EFFECT ON LOCAL GOVERNMENTS

The governor exercises general police powers in entering emergency proclamations. Counties, cities, and towns may make and enforce local regulations that do not conflict with the governor's emergency proclamations, but they may not adopt any regulations that conflict with them. *See* Wash. Const. art XI, § 11 ("Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.").

County legislative authorities that adopt inconsistent regulations or ordinances expose their residents to adverse consequences. A county resident or business whose conduct complies with the local regulation or ordinance is still subject to criminal prosecution for violating the governor's emergency proclamation. *See* RCW 43.06.220(5). The sanctions for violating this law by an individual includes jail and/or fines, while a business can be ordered to pay up to two hundred and fifty thousand dollars ($250,000.00). *See* RCW 9A.20.021 and RCW 10.01.100(1)(d).

County legislative authorities that adopt inconsistent regulations or ordinances may expose the county to civil liability for financial and other harms experienced by people who rely upon the county's declaration that an emergency has ended. Because such a declaration or orders that are inconsistent with a governor's emergency proclamation(s) are unconstitutional, there may not be insurance coverage for these claims.

Individual commissioners may face criminal prosecution and loss of office if they vote in favor of a local regulation or ordinance that conflicts with a governor's emergency proclamation. Such a commissioner may be deemed an accomplice to a business or person who enters a restricted zone

or engages in prohibited conduct. *See* RCW 9A.08.020(3)(a)(i) (a person is an accomplice of a person who commits a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she encourages such other person to commit it). When a governor's emergency proclamation has been adopted by the local board of health or local health officer, the adoption of an inconsistent regulation of ordinance can result in prosecution for violating RCW 70.05.120(4) ("Any person . . .violating or refusing or neglecting to obey any of the rules, regulations or orders made for the prevention, suppression and control of dangerous contagious and infectious diseases by the local board of health or local health officer or administrative officer or state board of health ... is guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not less than twenty-five dollars nor more than one hundred dollars or to imprisonment in the county jail not to exceed ninety days or to both fine and imprisonment.").

An elected official who is convicted of a crime committed in his or her official capacity, in addition to the criminal penalties, forfeits his or her office and is disqualified from "ever afterward holding any public office in this state." RCW 9.92.120. *See also State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 427-28, 367 P.2d 985 (1962) (the term "malfeasance" in RCW 9.92.120 includes neglect of duty and anything that is positively unlawful). A conviction of any offense that constitutes a violation of an elected official's oath creates an immediate vacancy in the elected official's office. *See* RCW 42.12.010(5).