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# THE CASE FOR STREAMLINING EMERGENCY DECLARATION AUTHORITIES AND ADAPTING LEGAL REQUIREMENTS TO EVER-CHANGING PUBLIC HEALTH THREATS

*Gregory Sunshine\**

## INTRODUCTION

Disasters can come from unforeseeable sources and create unforeseeable problems. The nation's response system is built to be flexible and responsive to all threats, including those we cannot predict. As a result, federal, state, and local governments adopted the National Incident Management System (NIMS), a framework developed by the U.S. Department of Homeland Security, for responding to all forms of emergencies, including terrorist attacks,<sup>1</sup> natural disasters,<sup>2</sup> oil spills,<sup>3</sup> and emerging infectious diseases.<sup>4</sup> NIMS's defining characteristics—a clear chain of command and flexible organizational structure—allow it to adapt to any situation.<sup>5</sup>

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<sup>1</sup> “ICS provides a flexible core mechanism for coordinated and collaborative incident management, whether for incidents where additional resources are required or are provided from different organizations within a single jurisdiction or outside the jurisdiction, or for complex incidents with national implications (such as an emerging infectious disease or a bioterrorism attack).” U.S. DEP’T OF HOMELAND SEC., NATIONAL INCIDENT MANAGEMENT SYSTEM 45 (2008).

<sup>2</sup> *Cf.* FED. EMERGENCY MGMT. AGENCY, HURRICANE SANDY FEMA AFTER-ACTION REPORT (2013).

<sup>3</sup> *See* FLA. COMM’N ON OIL SPILL RESPONSE COORDINATION, AN ANALYSIS OF THE EFFECTIVENESS OF THE USE OF THE INCIDENT COMMAND SYSTEM IN THE DEEPWATER HORIZON (DWH) INCIDENT 15 (2012).

<sup>4</sup> *See* U.S. DEP’T OF HOMELAND SEC., *supra* note 1, at 45.

<sup>5</sup> “NIMS is based on the premise that use of a common incident management framework will give emergency management/response personnel a flexible but standardized system for emergency management and incident response activities. NIMS is flexible because the system components can be utilized to develop plans, processes, procedures, agreements, and roles for all types of incidents; it is applicable to any incident regardless of cause, size, location, or complexity. Additionally, NIMS provides an organized set of standardized operational structures, which is critical in allowing disparate organizations and agencies to work together in a predictable, coordinated manner.” U.S. DEP’T OF HOMELAND SEC., *supra* note 1, at 6.

While NIMS creates a clear structure for emergency response, state and local responders must still operate within their respective jurisdiction's legal system. The law establishes both the powers and limitations for how government officials protect citizens' health and well-being.<sup>6</sup> While many laws have been drafted specifically for the benefit of responding to disasters,<sup>7</sup> complex and inflexible legal structures might impede efficient and effective responses.<sup>8</sup> To minimize this impact, streamlined and flexible legal systems are

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<sup>6</sup> Public health law is "the study of the legal powers and duties of the state . . . to ensure the conditions for people to be healthy and of the limitations on the power of the state to constrain the autonomy, privacy, liberty, proprietary, or other legally protected interests of individuals." LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW AND ETHICS: A READER* 9 (rev. 2d ed. 2010) (citation omitted).

<sup>7</sup> See, e.g., ALASKA STAT. ANN. § 26.23.010 (West 2007) ("The purposes of this chapter are to (1) reduce the vulnerability of people and communities of this state to damage, injury, and loss of life and property resulting from a disaster; (2) prepare for the prompt and efficient rescue, care, and treatment of persons victimized or threatened by a disaster; . . ."); IDAHO CODE ANN. § 46-1003 (West Supp. 2016) ("It is the policy of this state to plan and prepare for disasters and emergencies resulting from natural or man-made causes, enemy attack, terrorism, sabotage or other hostile action, and to implement this policy, it is found necessary: (1) To create an Idaho office of emergency management, to authorize the creation of local organizations for disaster preparedness in the political subdivisions of the state, and to authorize the state and political subdivisions to execute agreements and to cooperate with the federal government and the governments of other states. (2) To prevent and reduce damage, injury, and loss of life and property resulting from natural or man-made catastrophes, riots, or hostile military or paramilitary action. (3) To prepare assistance for prompt and efficient search, rescue, care, and treatment of persons injured, victimized or threatened by disaster."); IND. CODE ANN. § 10-14-03-7(a)(1)–(3) (West 2016) ("Because of the existing and increasing possibility of disasters or emergencies of unprecedented size and destructiveness that may result from manmade or natural causes, to ensure that Indiana will be adequately prepared to deal with disasters or emergencies or to prevent or mitigate those disasters where possible, generally to provide for the common defense, to protect the public peace, health, and safety, and to preserve the lives and property of the people of the state, it is found and declared to be necessary: (1) to provide for emergency management under the department of homeland security; (2) to create local emergency management departments and to authorize and direct disaster and emergency management functions in the political subdivisions of the state; (3) to confer upon the governor and upon the executive heads or governing bodies of the political subdivisions of the state the emergency powers provided in this chapter; . . ."); KY. REV. STAT. ANN. § 39A.010 (West 2015) ("It is the intent of the General Assembly to establish and to support a statewide comprehensive emergency management program for the Commonwealth, and through it an integrated emergency management system, in order to provide for adequate assessment and mitigation of, preparation for, response to, and recovery from, the threats to public safety and the harmful effects or destruction resulting from all major hazards . . ."); MISS. CODE ANN. § 33-15-2(2) (West 1999) ("It is the intent of the Legislature to reduce the vulnerability of the people and property of this state; to prepare for efficient evacuation and shelter of threatened or affected persons; to provide for the rapid and orderly provision of relief to persons and for the coordination of activities relating to emergency preparedness, response, recovery and mitigation among and between agencies and officials of this state, with similar agencies and officials of other states, with local and federal governments, with interstate organizations and with the private sector.");

<sup>8</sup> "During an emergency, laws serve crucial functions, including clarifying responsibilities, authorizing critical interventions, and protecting vulnerable populations. However, provisions of existing laws designed for normal, non-emergency circumstances may sometimes hinder emergency response efforts, thereby potentially endangering the public's health rather than protecting it." Daniel G. Orenstein, *When Law Is Not Law: Setting Aside Legal Provisions During Declared Emergencies*, 41 J.L. MED. & ETHICS 73, 73 (2013).

vital to address the unforeseeable circumstances that disasters create.<sup>9</sup> Centralized emergency response authorities and emergency declarations can act more efficiently than separate groups of officials and various types of emergency declarations.<sup>10</sup> Further, an adaptable legal system requires the ability to remove legal barriers. A streamlined and adaptable emergency response legal system allows disaster responders to react as quickly and efficiently as possible in our world of ever-changing threats.<sup>11</sup>

This Article makes the case for streamlining emergency declaration authority and creating an adaptable legal system. Part I describes the utility of emergency declarations, but gives examples of how that utility can be diminished when states divide specific emergency powers across various types of declarations.<sup>12</sup> Part II explores gubernatorial emergency powers to suspend or waive laws as an adaptable solution for removing legal barriers to an efficient and effective emergency response.<sup>13</sup> These arguments demonstrate that a streamlined and adaptable state legal system for emergency response is one that (1) provides a governor with the authority to issue one type of emergency declaration, (2) does not divide vital authorities across various declaration types, and (3) provides a governor with the unilateral power to remove statutory and regulatory barriers to an effective response.

## I. STREAMLINED EMERGENCY DECLARATIONS ARE NECESSARY TO ACTIVATE ALTERNATIVE LEGAL PROCEDURES

Emergency powers are a fundamental tool in legal preparedness.<sup>14</sup> However, legal mechanisms for activating these powers through emergency

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<sup>9</sup> *Id.* at 74 (“The multifaceted nature of waiver authority during declared emergencies illustrates the critical role such declarations play in effective response. Something as simple as a toll or payment schedule can impact response, and more complex systems (e.g., professional licensure) can inhibit volunteer assistance. Inclusion of waiver provisions in states’ emergency preparedness laws gives officials the flexibility to adapt to unanticipated and volatile circumstances.”).

<sup>10</sup> *See infra* Part I; *see also* James G. Hodge, Jr. et al., *The Legal Framework for Meeting Surge Capacity Through the Use of Volunteer Health Professionals During Public Health Emergencies and Other Disasters*, 22 J. CONTEMP. HEALTH L. & POL’Y 5, 23 (2005) (“Some states allow for the dual declaration of public health emergencies and general emergencies. These states face the potential for legislative confusion and duplication of efforts, which may detract from the implementation of efficient emergency management functions.”).

<sup>11</sup> *See Hodge, supra* note 10, at 23.

<sup>12</sup> *See infra* Part I.

<sup>13</sup> *See infra* Part II.

<sup>14</sup> *See* COMM. ON GUIDANCE FOR ESTABLISHING CRISIS STANDARDS OF CARE FOR USE IN DISASTER SITUATIONS, BD. OF HEALTH SCIS. POLICY, CRISIS STANDARDS OF CARE: A SYSTEMS FRAMEWORK FOR

declarations can be complex,<sup>15</sup> situation dependent,<sup>16</sup> and divided among specific executive officials.<sup>17</sup> Leadership turnover can also exacerbate confusion by creating knowledge gaps about which officials can exercise what authorities in which situations.<sup>18</sup> While emergency declaration powers provide a foundation for emergency response, a disparate system of state emergency declaration powers can create a gap in legal preparedness.

Emergency declarations provide government responders with vital tools to address the threats posed by disasters. State emergency declaration powers exist thanks to policymakers determining that—to respond to large-scale threats to the health and well-being of citizens—governors need special authorities for the purposes of mitigating the effects of such threats.<sup>19</sup> These “all-hazards” declarations—referred to by a variety of names, including “state of emergency,”<sup>20</sup> “disaster,”<sup>21</sup> or “emergency,”<sup>22</sup>—trigger powers that can be used to activate state emergency plans,<sup>23</sup> activate the state’s national guard,<sup>24</sup> and authorize the use of broad powers, including the power to commandeer property and supplies for government use.<sup>25</sup> All-hazards declarations can be contrasted with “public health emergencies” and “multi-level declarations.” Public health emergency declarations are specific emergency declarations that are limited to certain types of threats, such as diseases; multi-level declarations

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CATASTROPHIC DISASTER RESPONSE 1–57 (2012) (discussing the challenges to the legal environment posed by a declared emergency).

<sup>15</sup> See *infra* pages 399–402.

<sup>16</sup> See *infra* pages 403–06.

<sup>17</sup> See *infra* pages 399–402.

<sup>18</sup> James G. Hodge, Jr. & Evan D. Anderson, *Principles and Practice of Legal Triage During Public Health Emergencies*, 64 N.Y.U. ANN. SURV. AM. L. 249, 269 (2008) (“Duplicate state-emergency declarations add redundancy, complexity, and confusion to already muddied channels of communication, control, and accountability. Different state or local agencies may be legislatively or administratively responsible for coordinating simultaneous responses depending on the type of emergency declared. Thus, these statutory enactments can lead to confusion because they may vest similar authorities in divergent governmental agents, fail to set priorities for action when more than one governmental entity is authorized to respond, or grant conflicting powers.”).

<sup>19</sup> Rebecca Haffajee et al., *What Is a Public Health “Emergency”?*, 371 NEW ENG. J. MED. 986, 986 (2014) (“State laws providing public health emergency powers permit designated officials—typically governors and their top health officers—to take extraordinary legal actions. The laws provide flexibility in responding to emergency situations, when adherence to ordinary legal standards and processes could cost lives.”).

<sup>20</sup> See, e.g., CAL. GOV’T CODE § 8558(b) (West 2012).

<sup>21</sup> See, e.g., LA. STAT. ANN. § 29:723(2) (West Supp. 2016).

<sup>22</sup> See, e.g., KY. REV. STAT. ANN. § 39A.020(12) (West 2015).

<sup>23</sup> See, e.g., TEX. GOV’T CODE ANN. § 418.015(a) (West 2012).

<sup>24</sup> See, e.g., FLA. STAT. ANN. § 252.36(4) (West 2017).

<sup>25</sup> See, e.g., KAN. STAT. ANN. § 48-925(c)(4) (West 2008).

are based on the intensity of the threat or level of destruction.<sup>26</sup> Public health emergency and multi-level declarations can create complexity for an emergency response system by imbuing officials other than the governor—such as state health officials—with the power to declare emergencies and by limiting certain governmental powers—which may be necessary during all disasters—to specific types of disasters.<sup>27</sup> The creation of disparate emergency declaration types creates an unnecessary legal complexity that could burden disaster planners and responders and hinder rapid and effective emergency response.

Florida's recent response to the Zika virus outbreak demonstrated both the utility of emergency declaration authorities and the complexity created by disparate types of emergency declarations. Florida's first cases of travel-related Zika virus infection were announced on January 19, 2016.<sup>28</sup> On February 3, Florida Governor Rick Scott issued an emergency declaration to address the threat of Zika in the state.<sup>29</sup> In the declaration, Governor Scott ordered a number of emergency response actions, including designating the state health department as the agency in charge of coordinating the response, instructing all state agencies under the governor's direction to cooperate with the state health department, and requesting that agencies not under the governor's direction do the same.<sup>30</sup> Additionally, the governor ordered the state's Department of Environmental Protection and its Fish and Wildlife Conservation Commission to "support the Department of Agriculture and Consumer Services in any way as it develops extensive mosquito control plans to contain the spread of [Zika]."<sup>31</sup> By using these authorities, the governor established a clear chain of command for interagency cooperation.

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<sup>26</sup> "Some states may authorize the declaration of specific exigencies, which include 'state of war emergency,' 'major emergency,' 'civil preparedness emergency,' 'manmade emergency,' 'natural emergency,' 'technological emergency,' 'catastrophe,' and 'energy emergency.'" Hodge & Anderson, *supra* note 18, at 263–64.

<sup>27</sup> See *supra* note 18.

<sup>28</sup> Kara Dapena et al., *Miami-Dade County Hit Hard*, MIAMI HERALD, <http://www.miamiherald.com/news/health-care/article66790817.html> (last visited Sept. 22, 2017); Carli Teproff, *Two Cases of the Zika Virus Found in Miami-Dade*, MIAMI HERALD (Jan. 19, 2016, 8:34 PM), <http://www.miamiherald.com/news/health-care/article55538970.html>.

<sup>29</sup> Fla. Exec. Order No. 16-29 (Feb. 3, 2016), <http://www.flgov.com/wp-content/uploads/pdfs/EO1629.pdf>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

The governor issued another Zika emergency declaration four months later on June 23.<sup>32</sup> The new declaration greatly expanded the list of affected counties covered by the initial emergency declaration and activated additional vital emergency powers related to funding the response activities.<sup>33</sup> One such power, codified at FLA. STAT. ANN. § 252.37(2), states that:

If the Governor finds that the demands placed upon [emergency management] funds in coping with a particular disaster declared by the Governor as a state of emergency are unreasonably great, she or he may make funds available by transferring and expending moneys appropriated for other purposes, by transferring and expending moneys out of any unappropriated surplus funds, or from the Budget Stabilization Fund.<sup>34</sup>

By activating this authority, the Governor diverted \$26.2 million in state funds to the response efforts.<sup>35</sup> As of October 2016, shortly after Congress passed the Zika Response and Preparedness Act,<sup>36</sup> at least \$73.2 million in state funds had been diverted to Florida's efforts to combat Zika.<sup>37</sup> This allocation relied

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<sup>32</sup> Fla. Exec. Order No. 16-149 (June 23, 2016), [http://www.flgov.com/wp-content/uploads/orders/2016/EO\\_16-149.pdf](http://www.flgov.com/wp-content/uploads/orders/2016/EO_16-149.pdf). The June 23, 2016 declaration was a new emergency declaration, rather than a renewal of the previous declaration. Per Florida law, emergency declarations automatically expire after 60 days, unless renewed by the governor. FLA. STAT. ANN. § 252.36(2) (West 2017). As a result, the governor's first Zika emergency declaration expired on April 3, 2016. The June 23, 2016 declaration, issued after the initial declaration had expired, has been continuously renewed within the sixty-day window as of October 3, 2017. See Fla. Exec. Order No. 17-260 (Oct. 3, 2017), [http://www.flgov.com/wp-content/uploads/orders/2017/EO\\_17-260.pdf](http://www.flgov.com/wp-content/uploads/orders/2017/EO_17-260.pdf); Fla. Exec. Order No. 17-211 (Aug. 4, 2017), [http://www.flgov.com/wp-content/uploads/orders/2017/EO\\_17-211.pdf](http://www.flgov.com/wp-content/uploads/orders/2017/EO_17-211.pdf); Fla. Exec. Order No. 17-115 (Apr. 10, 2017), [http://www.flgov.com/wp-content/uploads/orders/2017/EO\\_17-115.pdf](http://www.flgov.com/wp-content/uploads/orders/2017/EO_17-115.pdf); Fla. Exec. Order No. 17-43 (Feb. 10, 2017), [http://www.flgov.com/wp-content/uploads/orders/2017/EO\\_17-43.pdf](http://www.flgov.com/wp-content/uploads/orders/2017/EO_17-43.pdf); Fla. Exec. Order No. 16-288 (Dec. 15, 2016), [http://www.flgov.com/wp-content/uploads/orders/2016/EO\\_16-288.pdf](http://www.flgov.com/wp-content/uploads/orders/2016/EO_16-288.pdf); Fla. Exec. Order No. 16-233 (Oct. 18, 2016), [http://www.flgov.com/wp-content/uploads/orders/2016/EO\\_16-233.pdf](http://www.flgov.com/wp-content/uploads/orders/2016/EO_16-233.pdf); Fla. Exec. Order No. 16-193 (Aug. 19, 2016), [http://www.flgov.com/wp-content/uploads/orders/2016/EO\\_16-193.pdf](http://www.flgov.com/wp-content/uploads/orders/2016/EO_16-193.pdf); Fla. Exec. Order No. 16-149 (June 23, 2016), [http://www.flgov.com/wp-content/uploads/orders/2016/EO\\_16-149.pdf](http://www.flgov.com/wp-content/uploads/orders/2016/EO_16-149.pdf).

<sup>33</sup> Fla. Exec. Order No. 16-149 (June 23, 2016).

<sup>34</sup> FLA. STAT. ANN. § 252.37(2) (West 2017).

<sup>35</sup> News Release, Rick Scott, Governor of Fla., Following Washington's Failure to Authorize Federal Zika Funding, Gov. Scott to Allocate \$26.2 Million for Zika Preparedness (June 23, 2016), <http://www.flgov.com/2016/06/23/following-washingtons-failure-to-authorize-federal-zika-funding-gov-scott-to-allocate-26-2-million-for-zika-preparedness/>.

<sup>36</sup> Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and Preparedness Act, Pub. L. No. 114-223, 130 Stat. 857 (2016).

<sup>37</sup> Governor Scott announced the money to be spent over the course of four months as follows: \$26.2 million on June 23; \$5 million on August 22; \$10 million on September 16; \$25 million on September 22; and \$7 million on October 11. News Release, Rick Scott, Governor of Fla., Gov. Scott: Additional \$7 Million Allocated to Miami-Dade County to Combat Spread of Zika (Oct. 11, 2016), <http://www.flgov.com/2016/10/11/gov-scott-additional-7-million-allocated-to-miami-dade-county-to-combat-spread-of-zika-2/>; News Release, Rick Scott, Governor of Fla., Gov. Scott Authorizes \$25 Million in State Funds for Zika Virus Vaccine Research

entirely on the Governor's use of emergency declarations as a vital legal mechanism to combat the threat that was facing the state.

At the same time, Florida's use of emergency response authorities in the fight against Zika demonstrated how disjointed executive authorities can complicate an emergency response. Like other states that have emergency declaration authorities unique to certain threats,<sup>38</sup> Florida allows specific authorities to be invoked only during a declared public health emergency. Florida defines a public health emergency as "any occurrence, or threat thereof, whether natural or manmade, which results or may result in substantial injury or harm to the public health from infectious disease, chemical agents, nuclear agents, biological toxins, or situations involving mass casualties or natural disasters."<sup>39</sup> The only party that may declare a public health emergency is the State Health Officer, who must consult with the governor if possible before doing so.<sup>40</sup> Without a public health emergency declaration from the State Health Officer, officials cannot use unique emergency response authorities, including issuing orders to allocate prescription drugs to certain geographic areas, temporarily reactivating certain healthcare practitioners' licenses, or ordering individuals to be examined, tested, vaccinated, treated, isolated, or quarantined.<sup>41</sup>

Florida's two-declaration approach required Governor Scott, in his February and June 2016 emergency declarations, to "direct the State Health Officer and Surgeon General, Dr. John Armstrong, to declare a public health emergency" in the affected counties.<sup>42</sup> Complying with this order, Dr. Armstrong issued a public health emergency declaration, ordering a meeting of

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and Development (Sept. 22, 2016), <http://www.flgov.com/2016/09/22/gov-scott-authorizes-25-million-in-state-funds-for-zika-virus-vaccine-research-and-development/>; News Release, Rick Scott, Governor of Fla., Gov. Scott: In Absence of Federal Action, State Allocating \$10 Million More to Fight Zika (Sept. 16, 2016), <http://www.flgov.com/2016/09/16/gov-scott-in-absence-of-federal-action-state-allocating-10-million-more-to-fight-zika/>; News Release, Rick Scott, Governor of Fla., Gov. Scott: We Will Provide \$5 Million in Additional Zika Preparedness Funding to Miami-Dade County (Aug. 22, 2016), <http://www.flgov.com/2016/08/22/gov-scott-we-will-provide-5-million-in-additional-zika-preparedness-funding-to-miami-dade-county/>; News Release, Rick Scott, Governor of Fla., *supra* note 35.

<sup>38</sup> See Lainie Rutkow et al., *The Public Health Workforce and Willingness to Respond to Emergencies: A 50-State Analysis of Potentially Influential Laws*, 42 J.L. MED. & ETHICS 64, 66–67 (2014) (discussing states that have specific powers tied to public health emergency declarations).

<sup>39</sup> FLA. STAT. ANN. § 381.00315(1)(c) (West Supp. 2017).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* § 381.00315(1)(c)(1)–(4).

<sup>42</sup> Fla. Exec. Order No. 16-149 (June 23, 2016), [http://www.flgov.com/wp-content/uploads/orders/2016/EO\\_16-149.pdf](http://www.flgov.com/wp-content/uploads/orders/2016/EO_16-149.pdf); Fla. Exec. Order No. 16-29 (Feb. 3, 2016), [http://www.flgov.com/wp-content/uploads/orders/2016/EO\\_16-29.pdf](http://www.flgov.com/wp-content/uploads/orders/2016/EO_16-29.pdf).



representatives from various county agencies and boards for affected counties, the development of action plans by each county health officer to be submitted to state health department's incident command offices, and the development of "an outreach program for local medical professionals to increase awareness and access to diagnostic tools."<sup>43</sup> As Zika spread, Dr. Armstrong issued an additional public health emergency declaration extending the same requirements to newly affected counties.<sup>44</sup> Media outlets widely misreported Dr. Armstrong's declaration as a public health emergency declaration by the Governor, thus demonstrating the confusion that having two unique types of declarations can create.<sup>45</sup> Although Florida's response to Zika did not require issuance of quarantine orders or reactivation of healthcare professionals' licenses, had those actions been necessary, media reports likely would have indicated that those public health emergency-specific authorities had been activated and ready for use when that was not, in fact, the case.

The challenges that this kind of system poses go beyond semantics. A jurisdiction can be best prepared by integrating legal authorities seamlessly into plans, exercises, and procedures. This integration must clearly and comprehensively describe when and how those powers may be used. Consider a state whose emergency plan has processes to reactivate healthcare licenses—including those of retired healthcare professionals—during an emergency, and included those reactivations in its exercises. That state would train its leaders and medical community to consider a public health emergency as a trigger for licensure reactivation. If response leaders then heard in a real-world event—either through the media or by word of mouth—that the governor had declared

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<sup>43</sup> Press Release, Fla. Dep't of Health, Declaration of Public Health Emergency (Feb. 3, 2016), [http://www.floridahealth.gov/\\_documents/newsroom/press-releases/2016/02/020416-declaration-public-health-emergency.pdf?utm\\_source=article](http://www.floridahealth.gov/_documents/newsroom/press-releases/2016/02/020416-declaration-public-health-emergency.pdf?utm_source=article).

<sup>44</sup> Press Release, Fla. Dep't of Health, Declaration of Public Health Emergency (Feb. 17, 2016), [http://www.floridahealth.gov/diseases-and-conditions/zika-virus/\\_documents/021716-declaration-fo-public-health-emergency-2-17-16.pdf](http://www.floridahealth.gov/diseases-and-conditions/zika-virus/_documents/021716-declaration-fo-public-health-emergency-2-17-16.pdf).

<sup>45</sup> See, e.g., Greg Allen, *Florida Governor Ramps Up Mosquito Fight to Stay Ahead of Zika*, NPR (Feb. 4, 2016, 6:42 PM), <http://www.npr.org/sections/health-shots/2016/02/04/465575180/florida-governor-ramps-up-mosquito-fight-to-stay-ahead-of-zika> ("In response, Florida's Gov. Rick Scott has declared a public health emergency in five counties in hopes of getting ahead of the virus's spread."); Korin Miller, *Florida Declares Zika Public Health Emergency: What Does That Mean, Exactly?*, YAHOO NEWS (Feb. 4, 2017), <https://www.yahoo.com/beauty/florida-zika-public-health-emergency-140738703.html> ("Florida's governor has issued a public health emergency in four of the state's counties after nine residents who had traveled to the Caribbean and Latin America were diagnosed with the Zika virus."); *Florida Governor Declares Health Emergency in Four Counties over Zika*, REUTERS, Feb. 3, 2016, <http://www.reuters.com/article/us-health-zika-florida/florida-governor-declares-health-emergency-in-four-counties-over-zika-idUSKCN0VC2S9> ("Florida Governor Rick Scott declared a public health emergency in four counties with travel-related cases of the Zika virus on Wednesday, and ordered state officials to increase mosquito control efforts in some of the most populous parts of the state.").

a public health emergency, they would, at best, have to clarify whether the licensure reactivation power had been activated. At worst, they could assume that they may begin contacting retired healthcare practitioners.

Disparate emergency declarations can also obfuscate legally mandated protections for emergency responders and healthcare providers participating in response activities. For example, following Hurricane Katrina, many in the field of emergency response law called for increasing liability protections for healthcare providers who participate in emergency response activities.<sup>46</sup> They argued that healthcare providers are more willing to serve in dangerous and distressing situations when they are protected from liability.<sup>47</sup> Maryland began providing these liability protections by passing the Catastrophic Health Emergencies Act in 2011.<sup>48</sup> Under the law, healthcare provider liability protections are provided only upon the declaration of a “catastrophic health emergency.”<sup>49</sup> However, the Act conditions the declaration of a catastrophic health emergency on a proclamation by the governor that “a situation in which extensive loss of life or serious disability is threatened imminently because of exposure to a *deadly agent*.”<sup>50</sup> Unlike Florida, which includes natural disasters in its definition of public health emergency, Maryland law defines a deadly agent only as:

- (1) anthrax, ebola, plague, smallpox, tularemia, or other bacterial, fungal, rickettsial, or viral agent, biological toxin, or other biological agent capable of causing extensive loss of life or serious disability;
- (2) mustard gas, nerve gas, or other chemical agent capable of causing extensive loss of life or serious disability; or
- (3) radiation at levels capable of causing extensive loss of life or serious disability.<sup>51</sup>

In the case of a natural disaster—such as a blizzard or hurricane—the governor would have to declare a “state of emergency” and activate a different set of emergency powers.<sup>52</sup> Since Maryland’s liability protection statute for healthcare providers during disasters states that providers are “immune from

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<sup>46</sup> James G. Hodge, Jr., *Law and the Public’s Health: Legal Issues Concerning Volunteer Health Professionals and the Hurricane-Related Emergencies in the Gulf Coast Region*, 121 PUB. HEALTH REP. 205, 205–06 (2006).

<sup>47</sup> Rutkow et al., *supra* note 38, at 64, 68.

<sup>48</sup> MD. CODE ANN., PUB. SAFETY § 14-3A-01–08 (West Supp. 2017).

<sup>49</sup> *Id.* § 14-3A-06.

<sup>50</sup> *Id.* § 14-3A-01(b) (emphasis added).

<sup>51</sup> *Id.* § 14-3A-01(c).

<sup>52</sup> *See id.* § 14-303(a).

civil or criminal liability if the health care provider acts in good faith and under a *catastrophic health emergency proclamation*,<sup>53</sup> such protections would not apply during a state of emergency declared by the governor.<sup>54</sup>

Maryland's volunteer healthcare provider disaster liability protections stand in contrast to Virginia's liability protections. Under Virginia law, a healthcare provider is protected from liability during a state of emergency:

[A]ny healthcare provider who responds to a disaster shall not be liable for any injury or wrongful death of any person arising from the delivery . . . of healthcare when (i) a state or local emergency has been . . . declared in response to such disaster, and (ii) the emergency and subsequent conditions caused a lack of resources, attributable to the disaster, rendering the healthcare provider unable to provide the level or manner of care that otherwise would have been required in the absence of the emergency and which resulted in the injury or wrongful death at issue.<sup>55</sup>

This protection applies in any type of disaster, including weather-related, biological, and man-made threats.<sup>56</sup> Due to these different types of declarations that activate disaster liability protections in Virginia and Maryland, if a

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<sup>53</sup> *Id.* § 14-3A-06 (emphasis added).

<sup>54</sup> *Id.* § 14-303.

<sup>55</sup> VA. CODE ANN. § 8.01-225.02(A) (West 2017).

<sup>56</sup> *Id.* § 8.01-225.02(B) (West 2017) (citation omitted) (“For purposes of this section: ‘Disaster’ means any ‘disaster,’ ‘emergency,’ or ‘major disaster as those terms are used and defined in § 44-146.16.”); *id.* § 44-146.16 (West 2014) (“‘Disaster’ means (i) any man-made disaster including any condition following an attack by any enemy or foreign nation upon the United States resulting in substantial damage of property or injury to persons in the United States and may be by use of bombs, missiles, shell fire, nuclear, radiological, chemical, or biological means or other weapons or by overt paramilitary actions; terrorism, foreign and domestic; also any industrial, nuclear, or transportation accident, explosion, conflagration, power failure, resources shortage, or other condition such as sabotage, oil spills, and other injurious environmental contaminations that threaten or cause damage to property, human suffering, hardship, or loss of life; and (ii) any natural disaster including any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, drought, fire, communicable disease of public health threat, or other natural catastrophe resulting in damage, hardship, suffering, or possible loss of life; . . . ‘Emergency’ means any occurrence, or threat thereof, whether natural or man-made, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property or natural resources and may involve governmental action beyond that authorized or contemplated by existing law because governmental inaction for the period required to amend the law to meet the exigency would work immediate and irrevocable harm upon the citizens or the environment of the Commonwealth or some clearly defined portion or portions thereof; . . . ‘Major disaster’ means any natural catastrophe, including any: hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm or drought, or regardless of cause, any fire, flood, or explosion, in any part of the United States, which, in the determination of the President of the United States is, or thereafter determined to be, of sufficient severity and magnitude to warrant major disaster assistance under the Stafford Act (P.L. 93-288 as amended) to supplement the efforts and available resources of states, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby and is so declared by him.”).

hurricane traveled up the Chesapeake Bay, caused Hurricane Katrina level destruction, and both Virginia and Maryland declared emergencies, only healthcare providers in Virginia would receive disaster liability protections, as a hurricane would not qualify as a “deadly agent” under Maryland law. This could cause confusion and a subsequent refusal by healthcare responders to volunteer to assist in response activities in Maryland.

Variations in disaster types are not just limited to states dividing natural disasters from disease-related emergencies, but also include states creating multiple levels of a broadly defined state of emergency. For example, Tennessee law defines three types of disasters: “catastrophic disaster,” “major disaster,” and “minor disaster.”<sup>57</sup> A catastrophic disaster is “a disaster that will require massive state and federal assistance, including immediate military involvement.”<sup>58</sup> A major disaster is “a disaster that will likely exceed local capabilities and require a broad range of state and federal assistance.”<sup>59</sup> A minor disaster is one that “is likely to be within the response capabilities of local government and to result in only a minimal need for state or federal assistance.”<sup>60</sup>

These unique disaster types in Tennessee correspond with unique authorities. For example, volunteer healthcare providers, including hospitals and community mental healthcare centers, can only receive liability protections during a catastrophic or major disaster.<sup>61</sup> The law does not provide liability protections during declared minor disasters. In states with laws like Tennessee’s, responders do not only need to parse out which powers align with

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<sup>57</sup> TENN. CODE ANN. § 58-2-101(5) (West 2014).

<sup>58</sup> *Id.* § 58-2-101(5)(A).

<sup>59</sup> *Id.* § 58-2-101(5)(B).

<sup>60</sup> *Id.* § 58-2-101(5)(C).

<sup>61</sup> *Id.* § 58-2-107(l) (“(1) If the governor of Tennessee declares an emergency in response to a catastrophic or major disaster, voluntary health care providers, including hospitals and community mental health care centers, participating in the Emergency Management Assistance Compact or Southern Regional Emergency Management Assistance Compact are immune from liability in providing the health care to victims or evacuees of the catastrophic or major disaster, as long as the services are provided within the limits of the provider’s license, certification or authorization, unless an act or omission was the result of gross negligence or willful misconduct. (2) If additional medical resources are required, the governor, by executive order, may provide limited liability protection to health care providers, including hospitals and community mental health care centers and those licensed, certified or authorized under titles 33, 63 or 68, and who render services within the limits of their license, certification or authorization to victims or evacuees of such emergencies; provided, however, that this protection may not include any act or omission caused by gross negligence or willful misconduct. (3) The duration of the protection provided by this subsection (l) shall not exceed thirty (30) days, but may be extended by the governor by executive order for an additional thirty (30) days, if required to ensure the provision of emergency medical services in response to the catastrophic or major disaster.”).

disease-related versus weather-related emergencies—but they might also need to determine which authorities align with different levels of destruction.

Qualifying liability protections by type of emergency can confuse responders and dissuade them from helping when and where they are needed most.<sup>62</sup> When emergency response teams are short staffed, affected communities take longer to recover. In 2016, the National Association of County and City Health Officials (NACCHO) released a report that analyzed survey responses from 2,533 local health authorities.<sup>63</sup> Of those, only 44% reported to NACCHO that they had reviewed legal authorities relevant to emergency preparedness and response.<sup>64</sup> Presumably, those jurisdictions can expect specific emergency declarations to activate specific response authorities, and might have built those triggers into plans and exercises. Yet, even in such jurisdictions, confusion regarding which powers correspond with which declaration could still occur. For the 56% of local health departments that did not report having reviewed legal authorities for response, the problems that ensue could be even worse. Health authorities can minimize this kind of confusion by streamlining emergency declarations for all hazard types and allowing only one entity to declare a state of emergency.

The emergency declaration authorities discussed in this Part serve as a vital first step in activating emergency powers and procedures to aid in disaster response. In theory, the utility of emergency declarations may extend to many specific areas of law, such as scopes of practice, procurement, and the collection and use of individuals' health data. In reality, the legal barriers to an effective response may only become apparent once a disaster has struck, making it difficult to anticipate exactly how a declaration should be utilized. The following Part will discuss a solution many—but not all—states have

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<sup>62</sup> “In a recent survey designed by the American Public Health Association . . . [a]most seventy percent of respondents answered that immunity from civil lawsuits would be an important (35.6%) or essential (33.8%) factor when considering whether to volunteer in an emergency.” Sharona Hoffman, *Responders' Responsibility: Liability and Immunity in Public Health Emergencies*, 96 GEO. L.J. 1913, 1917 (2008). In discussing the ambiguities surrounding various emergency response laws, Hodge and Anderson argue that “emergency managers, public health practitioners, healthcare workers, volunteers, and others may not be able to fully determine the legality of their actions during emergencies. Some responders may act without significant regard for any legal ramifications; others may choose not to act at all because of this legal uncertainty. Neither of these consequences is acceptable because each has the potential to ‘stymie [important] public health interventions.’” Hodge & Anderson, *supra* note 18, at 272 (alteration in original).

<sup>63</sup> NAT'L ASS'N OF CTY. & CITY HEALTH OFFICIALS, 2016 NATIONAL PROFILE OF LOCAL HEALTH DEPARTMENTS 12 (2016), [http://nacchoprofilestudy.org/wp-content/uploads/2017/04/ProfileReport\\_Final3b.pdf](http://nacchoprofilestudy.org/wp-content/uploads/2017/04/ProfileReport_Final3b.pdf).

<sup>64</sup> *Id.* at 104.

developed to address this challenge: granting state governors the broad authority to remove legal barriers to an emergency response.

## II. GUBERNATORIAL EMERGENCY SUSPENSION AUTHORITIES ARE NECESSARY FOR AN ADEQUATELY FLEXIBLE LEGAL SYSTEM TO MITIGATE THE EFFECTS OF UNFORESEEABLE THREATS AND THEIR IMPACT

One of the greatest tools to ensure legal systems can adapt in disaster situations is the authority to suspend or waive legal requirements. Laws are the “structures, norms, and rules that a society uses to resolve disputes, govern itself, and order relations between members of the society.”<sup>65</sup> Laws and legal authorities “proscribe practices thought to threaten health and prescribe practices thought to compliment it.”<sup>66</sup> But because disasters stress existing systems and resources, day-to-day legal requirements could hinder communities facing disasters rather than help them.<sup>67</sup> Consequently, some laws include language that waives certain requirements during declared emergencies that are specific to the authorities governed only by those specific laws.<sup>68</sup> While these authority-specific waivers and suspensions are useful, they do not provide the flexibility necessary to address unforeseen circumstances; such flexibility is only provided by broad emergency suspension powers.

The utility and limitations of authority-specific waivers and suspensions are demonstrated at both the federal and state levels. For example, Section 1135 of the Social Security Act authorizes the Secretary of Health and Human Services (HHS) to suspend requirements under Medicare, Medicaid, the Children’s Health Insurance Program, the Health Insurance Portability and Accountability Act, and the Emergency Medical Treatment and Labor Act upon a presidential emergency declaration and a public health emergency determination by the Secretary of HHS.<sup>69</sup> More recently, the 21st Century Cures Act of 2016<sup>70</sup> allows the Secretary of HHS to waive requirements—established by the Paperwork Reduction Act (PRA)—regarding the federal government’s collection of voluntary information after (1) declaring a public health emergency under the Public Health Service Act and (2) determining that

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<sup>65</sup> LAW IN PUBLIC HEALTH PRACTICE xxv (Richard A. Goodman et al. eds., 2d ed. 2007).

<sup>66</sup> Wendy E. Parmet, *Introduction: The Interdependency of Law and Public Health*, in LAW IN PUBLIC HEALTH PRACTICE, *supra* note 65, at xxvii, xxxi.

<sup>67</sup> “[P]rovisions of existing laws designed for normal, non-emergency circumstances may sometimes hinder emergency response efforts, thereby potentially endangering the public’s health rather than protecting it.” Orenstein, *supra* note 8, at 73.

<sup>68</sup> *Id.* (“Many states authorize waivers during declared emergencies . . .”).

<sup>69</sup> 42 U.S.C. § 1320b-5 (2012).

<sup>70</sup> 21st Century Cures Act, Pub. L. No. 114-255, 130 Stat. 1033 (2016).

the emergency necessitates a waiver of the PRA.<sup>71</sup> However, this waiver was added only after the federal government was forced to meet the PRA requirements during responses to recent disease outbreaks.<sup>72</sup>

States have used the same methods to add flexibility to their legal systems through statute- or regulation-specific waivers and suspensions. One domain in which states have provided authority-specific flexibility in declared emergencies is in the context of vaccination authorities.<sup>73</sup> Laws governing the administration of vaccines by pharmacists can be complex and full of conditions.<sup>74</sup> As of 2016, every state and the District of Columbia has granted pharmacists some form of authority to vaccinate individuals.<sup>75</sup> However, pharmacists' authority to vaccinate can come with many limitations, including limits on the ages of individuals who can receive a vaccination,<sup>76</sup> the types of vaccinations that may be administered, how those vaccines may be administered,<sup>77</sup> and requirements for third-party authorization.<sup>78</sup> Some of the most complex limitations mandate the age at which one can receive certain

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<sup>71</sup> *Id.* § 3087 (to be codified at 42 U.S.C. § 247d).

<sup>72</sup> For example, the CDC was required to file at least twelve notices of "Agency Forms Undergoing Paperwork Reduction Act Review" for forms related to the Zika response between May 23, 2016 and August 3, 2017. *See, e.g.*, Agency Forms Undergoing Paperwork Reduction Act Review, 82 Fed. Reg. 36,147 (Aug. 3, 2017); Agency Forms Undergoing Paperwork Reduction Act Review, 82 Fed. Reg. 32,554 (July 14, 2017); Agency Forms Undergoing Paperwork Reduction Act Review, 82 Fed. Reg. 31,063 (July 5, 2017); Agency Forms Undergoing Paperwork Reduction Act Review, 82 Fed. Reg. 26,930 (June 12, 2017); Agency Forms Undergoing Paperwork Reduction Act Review, 82 Fed. Reg. 18,464 (Apr. 19, 2017); Agency Forms Undergoing Paperwork Reduction Act Review, 82 Fed. Reg. 16,835 (Apr. 6, 2017); Agency Forms Undergoing Paperwork Reduction Act Review, 81 Fed. Reg. 71,098 (Oct. 14, 2016); Agency Forms Undergoing Paperwork Reduction Act Review, 81 Fed. Reg. 52,694 (Aug. 9, 2016); Agency Forms Undergoing Paperwork Reduction Act Review, 81 Fed. Reg. 46,677 (July 18, 2016); Agency Forms Undergoing Paperwork Reduction Act Review, 81 Fed. Reg. 44,866 (July 11, 2016); Agency Forms Undergoing Paperwork Reduction Act Review, 81 Fed. Reg. 44,865 (July 11, 2016); Agency Forms Undergoing Paperwork Reduction Act Review, 81 Fed. Reg. 32,332 (May 23, 2016).

<sup>73</sup> Cason D. Schmit & Matthew S. Penn, *Expanding State Laws and a Growing Role for Pharmacists in Vaccination Services*, 57 J. AM. PHARMACISTS ASS'N 661, 662 (2017) ("In some cases, statutes will provide governors authority to modify statutory or regulatory requirements in specified circumstances and may allow governors to expand pharmacists' vaccination authority for outbreak response after declaring a state of emergency.").

<sup>74</sup> Leila Barraza et al., *The Latest in Vaccine Policies: Selected Issues in School Vaccinations, Healthcare Worker Vaccinations, and Pharmacist Vaccination Authority Laws*, 45 J.L. MED. & ETHICS 16, 18 (2017).

<sup>75</sup> *Id.* (citing Cason Schmit & Allison Reddick, *Pharmacist Vaccination Laws*, POLICY SURVEILLANCE PROGRAM: A LAWATLAS PROJECT, <http://lawatlas.org/datasets/pharmacist-vaccination> (last updated Jan. 1, 2016)); *see also* Schmit & Reddick, *supra* ("This is a longitudinal dataset, displaying laws across all 50 states and the District of Columbia between January 1, 1990 and January 1, 2016.").

<sup>76</sup> Barraza et al., *supra* note 74, at 18.

<sup>77</sup> For example, as of 2015, Nevada limits pharmacist vaccination to nasal and injectable modes only, excluding oral and topical administration. Schmit & Reddick, *supra* note 75.

<sup>78</sup> Barraza et al., *supra* note 74, at 18.

vaccines from a pharmacist.<sup>79</sup> These complexities can create major barriers to achieving herd immunity in a pandemic, especially as new vaccines are developed or as “changes in recommendations for existing vaccines (e.g., expanded populations, changes in dosing) . . . make it difficult for state policy makers to keep pace.”<sup>80</sup>

Still, few states specifically exempt limitations on pharmacist vaccination authorities during formal emergency declarations. Prior to 2002, no states had such exceptions.<sup>81</sup> That year, New Mexico was the first to modify its pharmacist vaccination laws to include specific exceptions for disasters; Virginia followed in 2003.<sup>82</sup> As of 2015, of the forty-seven states that grant pharmacists express authority to vaccinate,<sup>83</sup> only ten states explicitly provided exceptions in their pharmacist vaccination laws for state-declared emergencies.<sup>84</sup> In the remaining jurisdictions, responders must find alternative legal mechanisms that allow for exceptions to pharmacist vaccination authorities, or must seek out other types of healthcare professionals to administer vaccines.

Unfortunately, relying on authority-specific waivers is only part of the solution. Used alone, authority-specific waivers require lawmakers to either anticipate how a disaster response might impact all authorities and build relevant provisions into law, or else add the waiver to the law after an emergency occurs (as was the case with the PRA waiver).<sup>85</sup> States must implement far more flexible solutions to deal with unforeseen threats.

The most adaptable method by far is allowing governors to suspend any statutes or regulations that inhibit response upon the declaration of an

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<sup>79</sup> For example, in Minnesota, a patient must be at least six to be administered influenza vaccines, but must be at least thirteen to be administered all other vaccines. MINN. STAT. ANN. § 151.01 (West Supp. 2017) (“Practice of pharmacy” means: . . . (5) participation in administration of influenza vaccines to all eligible individuals six years of age and older and all other vaccines to patients 13 years of age . . .”).

<sup>80</sup> Barraza et al., *supra* note 74, at 18.

<sup>81</sup> Schmit & Reddick, *supra* note 75.

<sup>82</sup> *Id.*

<sup>83</sup> Schmit & Penn, *supra* note 73, at 665.

<sup>84</sup> Schmit & Reddick, *supra* note 75; *see also* ARIZ. REV. STAT. ANN. § 32-1974(E)(2) (Supp. 2017) & ARIZ. ADMIN. CODE § 4-23-411(A)(6) (2017); FLA. STAT. ANN. § 465.189(1)(c) (West Supp. 2017); IND. CODE ANN. § 25-26-13-31.2(d) (West Supp. 2017); KY. REV. STAT. ANN. § 315.500 (West 2011); N.Y. EDUC. LAW § 6802(22) (McKinney Supp. 2017); UTAH CODE ANN. § 58-1-307(4)–(8) (West Supp. 2016); VA. CODE ANN. § 54.1-3408(P) (West Supp. 2017); MONT. ADMIN. R. 24.174.503(2) (2017); N.M. CODE R. § 16.19.4.9(C)(16)(c) (LexisNexis 2017); N.Y. COMP. CODES R. & REGS. tit. 8, § 63.9(b)(1)(ii)(b) (2017); OR. ADMIN. R. 855-019-0270(4) (2017).

<sup>85</sup> *See supra* notes 70–71 and accompanying text.



emergency. This tool has proved exceptionally useful. The 2015 HIV outbreak in Scott County, Indiana, demonstrated the efficiency of gubernatorial emergency suspension authorities as a means to remove legal barriers while legislative solutions are being pursued.

The HIV outbreak began with eleven confirmed cases in January; typically, the county saw fewer than five cases per year.<sup>86</sup> After an investigation, officials concluded that the cases “were linked to syringe-sharing partners injecting the prescription opioid oxymorphone.”<sup>87</sup> The county deployed a multifaceted response to prevent additional cases from spreading through shared needles.<sup>88</sup> This included “a public education campaign, establishment of an incident command center and a community outreach center, short-term authorization of syringe exchange, and support for comprehensive medical care, including HIV and hepatitis C virus care and treatment as well as substance abuse counseling and treatment.”<sup>89</sup> However, Indiana law prohibited the operation of needle exchanges at the time; violating the prohibition was punishable by criminal and civil penalties.<sup>90</sup> To remove this legal barrier, then-Governor Mike Pence declared an emergency on March 26, 2015.<sup>91</sup> By activating response authorities, the Governor gained the power to “[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 any of these provisions would in any way prevent, hinder, or delay necessary action in coping with the emergency.”<sup>92</sup> This enabled the Governor to suspend all statutes that would inhibit the operation of a needle exchange program to address the Scott County HIV epidemic, including any associated civil and criminal penalties.<sup>93</sup> The suspension authority allowed responders to act immediately.<sup>94</sup> In the meantime, the Indiana state legislature spent time crafting a longer-term solution to allow counties to establish needle-exchange programs.<sup>95</sup> Absent the governor’s agile emergency suspension

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<sup>86</sup> Caitlin Conrad et al., *Community Outbreak of HIV Infection Linked to Injection Drug Use of Oxymorphone — Indiana, 2015*, 64 MORBIDITY & MORTALITY WKLY. REP. 443, 443 (2015).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> IND. CODE ANN. §16-42-19-18 (West Supp. 2017); *id.* § 35-48-4-8.5(a)–(b); *id.* § 35-48-4-8.3(b)(1).

<sup>91</sup> Ind. Exec. Order No. 15-05 (Mar. 26, 2015), <http://www.in.gov/legislative/iac/20150401-IR-GOV150079EOA.xml.pdf>.

<sup>92</sup> IND. CODE ANN. § 10-14-3-12(d)(1).

<sup>93</sup> Ind. Exec. Order, *supra* note 91.

<sup>94</sup> *Id.*

<sup>95</sup> This response was codified in chapter 7.5 to title 41 of the Indiana Code and went into effect in May 2015. *See* IND. CODE ANN. § 16-41-7.5-1.

authority, responders would have been forced to wait until the state legislature was able to convene and act to remove the legal barrier to an effective response.

A gubernatorial emergency suspension authority lets states remove legal barriers quickly and effectively to aid a response effort. However, this power is not available in all states and not for all types of legal barriers. In a recent study, researchers from the Centers for Disease Control and Prevention's Public Health Law Program and the National Nurse-Led Care Consortium: Public Health Management Corporation analyzed the laws of the fifty states and the District of Columbia, to determine which jurisdictions authorize governors to broadly amend or suspend laws under a state-declared emergency.<sup>96</sup> Researchers found that forty-two state governors possess the authority to suspend either statutes or regulations during a disaster.<sup>97</sup> While forty-two of fifty-one jurisdictions might appear to be a near uniform adoption of this authority by states, upon closer examination, the data show that this authority extends to statutory requirements in only thirty-five of the states.<sup>98</sup> Yet, both regulations and statutes outline how the government should respond to emergencies. With that in mind, fifteen states and the District of Columbia cannot, under express authority, look to their government's chief executive to remove statutory barriers to effectuate an efficient response.<sup>99</sup> Those jurisdictions would either need to respond in a way that complied with existing laws or seek other means to removing legal barriers.<sup>100</sup> Gubernatorial emergency declaration authorities that allow for the suspension of statutes and regulations provide response leaders with a streamlined tool that is adaptable to all manner of unforeseen threats.

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<sup>96</sup> Kelly Thompson & Nick Anderson, *Emergency Suspension Powers*, POLICY SURVEILLANCE PROGRAM: A LAWATLAS PROJECT, <http://lawatlas.org/datasets/emergency-powers> (last updated June 1, 2016).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Brooke Courtney et al. argue that while states were able to utilize a variety of legal mechanisms to expand practitioner scopes of practice during the 2009 H1N1 Influenza pandemic, and no data is available to suggest that the diverse approaches inhibited the response, "[diverse approaches] could lead to significant response challenges, delays in providing care, and confusion during more catastrophic public health emergencies." Brooke Courtney et al., *Expanding Practitioner Scopes of Practice During Public Health Emergencies: Experiences from the 2009 H1N1 Pandemic Vaccination Efforts*, 8 *BIOSECURITY & BIOTERRORISM* 223, 229 (2010).

## CONCLUSION

Threats can take many forms. Some are predictable, but many are not. The U.S. emergency response system has rightfully adopted an all-hazards approach to dealing with threats. This approach requires uniform systems of response leadership. The adoption of NIMS as the de facto organizational structure for all types of threats, including natural disasters, oil spills, and disease emergencies, evinces this approach's strength. NIMS is characterized by a clear chain of command and a flexible organizational structure.<sup>101</sup> Our legal emergency response system must possess these traits, too. To that end, emergency response authorities should be centralized—not dispersed among groups of officials and various types of emergency declarations. Further, an adaptable legal system must be able to remove legal barriers, both seen and unforeseen. While legislatures and executive branch officials have anticipated some legal issues and built emergency waivers into legislation, an agile legal system allows governors to suspend both statutes and regulations for the period necessitated by a disaster. With a streamlined and adaptable emergency response system that does not divide vital authorities across various declaration types and provides a unilateral power to remove statutory and regulatory barriers to effective responses, disaster responders can ensure as quick and efficient a response as possible in a world of ever-changing threats.

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<sup>101</sup> U.S. DEP'T OF HOMELAND SEC., *supra* note 1, at 6; *see also supra* text accompanying note 5.