Statement of Principles to Inform Emergency Management Act Reform

Summary
The COVID-19 pandemic has revealed the weaknesses of emergency management policy in most states. Many of these laws are based on a model advanced during the 1970s and need to be updated to reflect current potential threats and challenges. The ambiguities in state emergency management acts along with open-ended declarations of emergency that do not require legislative approval or renewal have undercut legislative authority and counsel at a time when the legislature should partner with the executive to determine the best course of action for the state. Increased executive control has also led to gubernatorial overreach that has exacted a significant economic cost to individuals and commerce and has created a precedent for further erosion of the rule of law. This Statement of Principles is intended to inform updates to and reform of existing state emergency management acts that is intended to prevent future executive overreach at the state level and to facilitate legislative guidance.

Statement of Principles to Inform Emergency Management Act Reform
Section 1. Preamble:

WHEREAS, the COVID-19 pandemic has revealed flaws in and weaknesses of the emergency management policies in place in many states in the United States; and

WHEREAS, one of the most significant flaws inherent in many state emergency management laws is a reduction of, to the point of near elimination, legislative authority over and oversight of executive action during the emergency; and

WHEREAS, governors could benefit from the legitimacy conferred by legislative guidance and legislative partnership during times of emergency, however, guidance and partnership are not feasible when the legislature is cut out of the decision-making process; and

WHEREAS, the lack of legislative oversight and ability to restrain the executive once a state of emergency has been declared has led to an explosion of governors who have exceeded their statutory authority including the unilateral determination of what are or are not essential businesses and the closure of the former; and

WHEREAS, governors have taken advantage of the ambiguities of current emergency management laws in their states to engage in gubernatorial overreach that has had a corrosive effect on rule of law and separation of powers in their states; and

WHEREAS, optimally, all branches of government should be invested in protecting public health and safety as well as safeguarding the individual and constitutional rights of all the state’s citizens; and

WHEREAS, Jacobson v. Massachusetts, held that (1) Police power belongs to state legislatures; (2) any exercise of police power must be reasonably related to the specific harm about which the government is concerned; and (3) any exercise of police power must not “palpably invade the fundamental law [constitution]”; and
WHEREAS, much state emergency management law was enacted almost 50 years ago and many statutes have not been updated to reflect current threats and challenges; and

WHEREAS, the COVID-19 pandemic has laid bare the deficiencies in current emergency management laws providing an impetus for legislatures to revisit and reform emergency management codes, clarifying the authorities granted to the governor and other unelected bureaucrats.

Section 2. THEREFORE, LET IT BE RESOLVED that ALEC supports the following principles in regard to reforming state emergency statutes:

I. States should reject comprehensive emergency management acts in favor of acts tailored to specific types of emergencies—Natural disasters differ from acts of terrorism, which differ from epidemics and other health emergencies. Emergencies vary and demand the same variation in responses. State emergency management acts should look closely at different types of disasters or emergencies and narrowly tailor the government’s response for each one, taking into consideration factors such as the geographic impact, the likely duration, and the needs of government agencies to coordinate their activities.

II. Governors have important roles to play—Governors can rightly coordinate emergency responses across agencies and local jurisdictions, tap into state emergency funds, request funds from the federal government, and even cut through bureaucratic red-tape. The legislature should authorize maximum gubernatorial authority where the exercise of executive authority makes the government response more efficient and eliminates barriers.

III. Gubernatorial Authorities Should be Clearly Defined—Vague language empowers governors to claim broad authority to control conduct in the state and encourages courts to defer to the governor’s judgment. Any reform to emergency management acts should both clearly define the authorities the governor has in specific emergencies as well as the authorities the governor does not possess. This includes requiring the governor to limit a declaration of emergency to a specific geographic area, when appropriate and limiting the ability to declare a statewide emergency when the need does not exist.

IV. Unelected Officials Should Be Required to Follow Existing Law—Many emergency codes provide governors the ability to waive “regulatory statutes” and other laws prescribing government conduct. There is a qualitative, and quantitative, difference between laws governing executive agency standards such as occupational licensing, and laws requiring the government to follow certain rulemaking standards. While waiving licensing standards is a great idea, the government should be required to follow laws governing its own conduct, including laws requiring unelected officials to follow certain rulemaking processes before issuing an order that includes criminal penalties for violations, to adhere to a state’s communicable disease law for isolation and quarantine measures, and more.

V. Emergency powers should last only as long as necessary to secure legislative approval for the emergency response—Governors need the flexibility to declare an emergency without the consent of the legislature because some emergencies arise so suddenly that it is impossible for the legislature to respond rapidly enough. However emergency management acts should limit the duration of a declaration of emergency to no more than 30-45 days before requiring
legislative approval before the declaration itself, or any orders related to it, may be renewed. Consideration should be given to establishing a legislative lead commission to provide guidance and make recommendations to the governor. These measures help to ensure that the legislature partner with the governor during emergencies of longer duration conferring legitimacy on both the executive and legislative branches for decisions made.

VI. Individual and Constitutional Liberties should be protected — There is no emergency exception to fundamental liberties secured by the federal and state constitutions. Neither individual nor constitutional rights disappear during a state of emergency. Emergency management acts should make it clear that constitutions are designed to limit the authority of the government in all circumstances and any executive order or emergency declaration may not unnecessarily or unreasonably curtail people’s fundamental liberties. When an order seeks to limit or curtail the exercise of fundamental rights, the government should be required to prove—using actual data, not conjecture—that any action taken to preserve public health and safety is the most narrowly tailored and least restrictive option available.

VII. Governments Must Adhere to Basic Standards of Due Process — Any government action shutting down society for long periods of time has the potential to deprive people of property and livelihoods. Legislatures should provide those impacted by the decisions the ability and opportunity to be heard in court in an expedited manner. In any such hearing, the government should bear the burden of establishing both the necessity and reasonableness of the emergency order and should be required justly to compensate the individual harmed by such invasive orders regardless of the ultimate reasonableness.

VIII. The Legislature should zealously guard its constitutional authority to establish policy and to make law, especially criminal law — Emergency management acts should not provide an open-ended delegation of any legislative authority either to the governor or any unelected bureaucrat. There may be times when empowering the governor or an unelected bureaucrat to promulgate temporary standards, with potential criminal penalties, is necessary. In such cases, there should be procedural safeguards and definitive standards with which the governor or bureaucrat must comply before imposing such criminal sanctions for violating emergency orders.
1 197 U.S. 11 (1905)