

1 **Statement of Principles to Inform Emergency Management Act Reform**

2
3 **Summary**

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

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16 **Statement of Principles to Inform Emergency Management Act Reform**

17 **Section 1. Preamble:**

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

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

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

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

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

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

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43 WHEREAS, *Jacobson v. Massachusetts*ⁱ, held that (1) Police power belongs to state
44 legislatures; (2) any exercise of police power must be reasonably related to the specific harm
45 about which the government is concerned; and (3) any exercise of police power must not
46 "palpably invade the fundamental law [constitution]"; and

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48 WHEREAS, much state emergency management law was enacted almost 50 years ago and many
49 statutes have not been updated to reflect current threats and challengesⁱⁱ; and

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

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

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

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

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

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

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91 **V. Emergency powers should last only as long as necessary to secure legislative approval for**
92 **the emergency response**— Governors need the flexibility to declare an emergency without the
93 consent of the legislature because some emergencies arise so suddenly that it is impossible for
94 the legislature to respond rapidly enough. However emergency management acts should limit
95 the duration of a declaration of emergency to no more than 30-45 days before requiring

96 legislative approval before the declaration itself, or any orders related to it, may be renewed.
97 Consideration should be given to establishing a legislative lead commission to provide guidance
98 and make recommendations to the governor. These measures help to ensure that the
99 legislature partner with the governor during emergencies of longer duration conferring
100 legitimacy on both the executive and legislative branches for decisions made.
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102 **VI. Individual and Constitutional Liberties should be protected**— There is no emergency
103 exception to fundamental liberties secured by the federal and state constitutions. Neither
104 individual nor constitutional rights disappear during a state of emergency. Emergency
105 management acts should make it clear that constitutions are designed to limit the authority of
106 the government in all circumstances and any executive order or emergency declaration may not
107 unnecessarily or unreasonably curtail people’s fundamental liberties. When an order seeks to
108 limit or curtail the exercise of fundamental rights, the government should be required to
109 prove—using actual data, not conjecture—that any action taken to preserve public health and
110 safety is the most narrowly tailored and least restrictive option available.
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112 **VII. Governments Must Adhere to Basic Standards of Due Process**— Any government action
113 shutting down society for long periods of time has the potential to deprive people of property
114 and livelihoods. Legislatures should provide those impacted by the decisions the ability and
115 opportunity to be heard in court in an expedited manner. In any such hearing, the government
116 should bear the burden of establishing both the necessity and reasonableness of the emergency
117 order and should be required justly to compensate the individual harmed by such invasive
118 orders regardless of the ultimate reasonableness.
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120 **VIII. The Legislature should zealously guard its constitutional authority to establish policy and
121 to make law, especially criminal law**— Emergency management acts should not provide an
122 open-ended delegation of any legislative authority either to the governor or any unelected
123 bureaucrat. There may be times when empowering the governor or an unelected bureaucrat to
124 promulgate temporary standards, with potential criminal penalties, is necessary. In such cases,
125 there should be procedural safeguards and definitive standards with which the governor or
126 bureaucrat must comply before imposing such criminal sanctions for violating emergency
127 orders.
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ⁱ 197 U.S. 11 (1905)

ⁱⁱⁱ *See*, 1978 Emergency Preparedness Project; Final Report, p. 78 National Governors' Association.

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