

Filed: June 12, 2020

IN THE SUPREME COURT OF THE STATE OF OREGON

ELKHORN BAPTIST CHURCH,  
an Oregon non-profit corporation;  
CALVARY CHAPEL NEWBERG,  
an Oregon non-profit corporation;  
CALVARY CHAPEL LINCOLN CITY,  
an Oregon non-profit corporation;  
CALVARY CHAPEL SOUTHEAST PORTLAND,  
an Oregon non-profit corporation;  
NEW HORIZON CHRISTIAN FELLOWSHIP,  
an Oregon non-profit corporation;  
CAMAS VALLEY CHRISTIAN FELLOWSHIP,  
an Oregon non-profit corporation;  
PEOPLES CHURCH, an Oregon non-profit corporation;  
PREPARE THE WAY, an Oregon non-profit corporation;  
BEND COMMUNITY CHURCH,  
an Oregon non-profit corporation;  
COVENANT GRACE CHURCH,  
an Oregon non-profit corporation;  
JEDIDIAH MCCAMPBELL, an individual;  
RONALD OCHS, an individual;  
BRIAN NICHOLSON, an individual;  
JAMES B. THWING, an individual;  
MARK RUSSELL, an individual;  
PHIL MAGNAN, an individual;  
RONALD W. RUST, an individual;  
TRAVIS HUNT, an individual;  
MASON GOODKNIGHT, an individual;  
MARK MAYBERRY, an individual;  
LORI MAYBERRY, an individual;  
BENJAMIN STEERS, an individual;  
MICHAEL CARROLL, an individual;  
KEVIN J. SMITH, an individual;  
POLLY JOHNSON, an individual;  
BENJAMIN BOYD, an individual;  
ANNETTE LATHROP, an individual;  
ANDREW S. ATANSOFF, an individual;  
SHERRY L. ATANSOFF, an individual;  
MICAH AGNEW, an individual; and  
ANGELA ECKHARDT, an individual,

Plaintiffs-Adverse Parties,

and

RED ROCK COWBOY CHURCH,  
an Oregon non-profit corporation, et al.,

Plaintiffs,

and

BILL HARVEY, SAM PALMER, GLENN PALMER,  
JERRY SHAW, MATTHEW R. CUNNINGHAM,  
DONALD A. JAY, JACOE A. BROWN,  
SAMUEL N. BROWN, VIRGINIA STEGEMILLER,  
B. DAVID HURLEY, and DOUGLAS W. HILLS,

Intervenors-Adverse Parties,

v.

KATHERINE BROWN, Governor of the State of Oregon,  
and DOES 1 THROUGH 50,

Defendants-Relators.

(CC 20CV17482) (SC S067736)

Original proceeding in mandamus.\*

Submitted on the briefs June 3, 2020.

Ray D. Hacke, Pacific Justice Institute, Salem, filed the brief for plaintiffs-adverse parties.

Kevin L. Mannix, Salem, filed the brief for intervenors-adverse parties.

Benjamin Gutman, Solicitor General, Salem, filed the brief for defendants-relators. Also on the brief was Ellen F. Rosenblum, Attorney General.

Aruna A Masih, Bennett Hartman, Attorneys at Law, LLP, Portland, filed the brief on behalf of *amicus curiae* Oregon Nurses Association. Also on the brief was Thomas K. Doyle, General Counsel, Oregon Nurses Association, Tualatin.

Luke D. Miller, Military Disability Lawyer, LLC, Salem, filed the brief on behalf of *amicus curiae* New Civil Liberties Alliance.

Paul Janzen, Janzen Legal Services, LLC, Beaverton, filed the brief on behalf of *amicus curiae* Kelly Barnett.

Before Balmer, Nakamoto, Flynn, Duncan, Nelson, and Garrett, Justices.\*\*

PER CURIAM

Peremptory writ of mandamus to issue immediately, in terms consistent with this opinion.

Garrett, J., concurred in the judgment and filed an opinion, in which Balmer, J., joined.

\*On petition for peremptory or alternative writ of mandamus from an order of the Baker County Circuit Court, Matthew B. Shirtcliff, Judge.

\*\*Walters, C.J., did not participate in the consideration or decision of this case.

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DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Defendants-Relators.

No costs allowed.

Costs allowed, payable by:

Costs allowed, to abide the outcome on remand, payable by:

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1 PER CURIAM

2 This case comes to this court during a pandemic. As we all know, a novel  
3 coronavirus was first detected in late 2019, and it has spread rapidly across the globe,  
4 killing hundreds of thousands of people. Even more people have fallen ill, and healthcare  
5 systems in cities around the world have been overwhelmed, including in the United  
6 States. As the virus has spread, government leaders have taken actions to protect people  
7 in their jurisdictions from illness and death. They have done so in constantly changing  
8 circumstances, and they have responded to new information about the virus and its effects  
9 as it has become available. In this state, as in others, the Governor has issued executive  
10 orders to respond to the threat posed by the virus and the illness it causes, COVID-19.  
11 Because the virus spreads through close personal contact and through the air, some of the  
12 orders have restricted the size of gatherings and required that people maintain specified  
13 distances between themselves and others. Relatedly, other orders have closed schools  
14 and businesses. The restrictions have had substantial consequences for individuals and  
15 entire economies. It is unknown how long those consequences will last, just as it is  
16 unknown how long it will be before there is a cure or vaccine for COVID-19.

17 There have been and will continue to be debates about how best to respond  
18 to the threat posed by the coronavirus. Those debates include debates about what balance  
19 the government should strike between protecting lives and protecting liberties. To the  
20 extent that those debates concern policy choices, they are properly for policymakers.  
21 That is, those difficult choices must be made by the people's representatives in the  
22 legislative and executive branches of the government. As the United States Supreme

1 Court stated more than a century ago, "It is no part of the function of a court \* \* \* to  
2 determine which of two modes is likely to be the most effective for the protection of the  
3 public against disease." *Jacobson v. Massachusetts*, 197 US 11, 30, 25 S Ct 358, 49 L Ed  
4 643 (1905). Chief Justice Roberts reiterated that point less than a month ago, when he  
5 stated that "'the safety and health of the people'" is principally entrusted to the states'  
6 political leaders. *South Bay United Pentecostal Church v. Newsom*, No 19A1044, 590  
7 US \_\_, \_\_ S Ct \_\_, \_\_ L Ed 2d \_\_, 2020 WL 2813056 at \*1 (May 29, 2020) (Roberts,  
8 C.J., concurring) (quoting *Jacobson*, 197 US at 38).

9           Of course, in our system of government, with its three separate branches  
10 structured to check and balance the powers of each other, the courts do have a role to  
11 play. That role is to determine whether the other branches have exceeded the legal limits  
12 on their authority. As the Supreme Court also stated in *Jacobson*, courts have the  
13 authority to intervene when political leaders attempting to protect the public against an  
14 epidemic act in "an arbitrary, unreasonable manner" or in a way that goes "far beyond  
15 what [is] reasonably necessary." 197 US at 28. But, as Chief Justice Roberts recently  
16 observed, when political leaders "'undertake[] to act in areas fraught with medical and  
17 scientific uncertainties,' their latitude 'must be especially broad.'" *South Bay United*  
18 *Pentecostal Church*, 2020 WL 2813056 at \*1, (Roberts, C.J., concurring) (quoting  
19 *Marshall v. United States*, 414 US 417, 427, 94 S Ct 700, 38 L Ed 2d 618 (1974)). "That  
20 is especially true where \* \* \* a party seeks emergency relief in an interlocutory posture,  
21 while local officials are actively shaping their response to changing facts on the ground."  
22 2020 WL 2813056 at \*2.

1           It is within that broader context -- a global pandemic caused by a new and  
2 rapidly spreading virus, during which conditions change on a daily basis and significant  
3 restrictions have been imposed and caused economic harm -- that this case comes to us.  
4 However, as in all cases, it is important to focus on the particular issue presented. And,  
5 in this particular case, at this particular time, the issue presented is narrow.

6           This case is a mandamus proceeding. It arises out of a civil action filed in  
7 Baker County Circuit Court. That action is still pending in the circuit court. In it,  
8 plaintiffs, Elkhorn Baptist Church and several other churches and individual churchgoers,  
9 challenge the executive orders that the Governor has issued in response to the  
10 coronavirus pandemic. Because a plaintiff's pleadings frame the issues before a court, it  
11 is necessary to be clear about what plaintiffs have alleged in their complaint. As detailed  
12 in our discussion below, \_\_\_ Or at \_\_\_ (slip op at 16:10 - 17:3), plaintiffs' claim is that  
13 the Governor's orders have expired by operation of law.

14           In the underlying civil action, plaintiffs asked the circuit court for a  
15 preliminary injunction. A preliminary injunction is an extraordinary remedy. It is an  
16 order that is issued while a case is still being litigated. Here, plaintiffs asked the circuit  
17 court to enjoin the enforcement of the Governor's orders while their civil action is  
18 pending. They based their request on their claim that the orders have expired by  
19 operation of law. Among other things, they argued that the orders violated a statutory  
20 time limit.

21           The circuit court issued the requested preliminary injunction. It did so  
22 based on its conclusion that, as plaintiffs argued, the duration of the orders had exceeded

1 a statutory time limit.

2           The Governor then filed a petition for a writ of mandamus, asking this court  
3 to vacate the preliminary injunction. In a mandamus proceeding, this court will order a  
4 circuit court to vacate a preliminary injunction if the circuit court based the preliminary  
5 injunction on a "fundamental legal error" or acted "outside the permissible range" of its  
6 discretion. *State ex rel Keisling v. Norblad*, 317 Or 615, 623, 860 P2d 241 (1993). Thus,  
7 the particular issue in this case is whether the circuit court erred in taking the  
8 extraordinary action of issuing a preliminary injunction.

9           For the reasons explained below, the circuit court erred in concluding that  
10 the Governor's executive orders violated a statutory time limit as plaintiffs had argued.  
11 The circuit court's statutory analysis cannot be reconciled with the statutory text and  
12 context, and is directly at odds with how the legislature intended the statute to apply. The  
13 Governor issued the orders pursuant to ORS chapter 401, which authorizes the Governor  
14 to declare a state of emergency that continues until it is terminated either by the Governor  
15 or the Legislative Assembly. The orders are not subject to the statutory time limit on  
16 which plaintiffs relied, which is set out in ORS chapter 433. Because the circuit court's  
17 conclusion about the statutory time limit was fundamental to its issuance of the  
18 preliminary injunction, it is necessary to vacate the preliminary injunction.

## 19 I. HISTORICAL AND PROCEDURAL FACTS

### 20 A. *The Executive Orders*

21           In response to the pandemic, Governor Brown has issued 21 executive  
22 orders. In the orders, the Governor has exercised emergency powers granted by the

1 legislature through statutes. The Governor issued her first executive order related to the  
2 coronavirus pandemic, Executive Order (EO) 20-03, on March 8, 2020. As mentioned,  
3 the coronavirus was first detected in late 2019. In early 2020, the virus spread and caused  
4 outbreaks in Europe and the Middle East. Some of the first known cases in the United  
5 States were identified in January 2020 in Washington state, Oregon's neighbor to the  
6 north. EO 20-03 describes the circumstances that existed at that time. It states:

7 "As of March 8, 2020, there are 14 presumptive or confirmed  
8 coronavirus cases in Oregon, 430 cases in the United States, and 101,927  
9 cases worldwide, in a total of 94 countries. In the United States, there have  
10 been 19 deaths, and worldwide there have been 3,468 deaths. On January  
11 30, 2020, the International Health Regulations Emergency Committee of  
12 the World Health Organization declared the outbreak a 'public health  
13 emergency of international concern.' On January 31, 2020, the Secretary of  
14 the U.S. Department of Human Services declared a public health  
15 emergency for the United States. Two counties in Oregon and several  
16 states also have declared states of emergency in response to the coronavirus  
17 outbreak, including California and Washington."

18 The Governor issued EO 20-03 pursuant to ORS 401.165. The order  
19 begins:

20 "ORS 401.165 *et seq.* empowers the Governor to declare a state of  
21 emergency upon determining that an emergency has occurred or is  
22 imminent. Pursuant to that authority, I find that the novel infectious  
23 coronavirus has created a threat to public health and safety, and constitutes  
24 a statewide emergency under ORS 401.025(1)."

25 ORS 401.165(1) provides that the Governor "may declare a state of  
26 emergency by proclamation \* \* \* after determining that an emergency has occurred or is  
27 imminent." For the purposes of ORS 401.165, "[e]mergency' means a human created or  
28 natural event or circumstance that causes or threatens widespread loss of life, injury to  
29 person or property, human suffering or financial loss, including but not limited to \* \* \*



1 disease." ORS 401.025(1).

2           As discussed in greater detail below, \_\_\_ Or at \_\_\_ (slip op at 24:7 - 29:11),  
3 the declaration of a state of emergency pursuant to ORS 401.165 gives the Governor the  
4 authority to exercise certain powers and to take certain actions. The powers include, but  
5 are not limited to, "all police powers vested in the state by the Oregon Constitution in  
6 order to effectuate the purposes of [chapter 401]." ORS 401.168(1); *see also* ORS  
7 401.168 to 401.198 (setting out additional powers). In addition, if the Governor declares  
8 a state of emergency pursuant to ORS 401.165, the Governor may implement any action  
9 authorized by certain statutes in ORS chapter 433 relating to public health emergencies,  
10 specifically, ORS 433.441 to 433.452. ORS 433.441(4).

11           A state of emergency declared pursuant to ORS 401.165 is not limited to a  
12 specific number of days. ORS 401.192(4) provides, "The powers granted to the  
13 Governor by ORS 401.165 to 401.236 shall continue until termination of the state of  
14 emergency." ORS 401.204(1) provides that "[t]he Governor shall terminate the state of  
15 emergency by proclamation when the emergency no longer exists, or when the threat of  
16 an emergency has passed." In addition, ORS 401.204(2) provides that the state of  
17 emergency "may be terminated at any time by a joint resolution of the Legislative  
18 Assembly."

19           EO 20-03 includes specific directions and orders to state agencies. Among  
20 other things, it states that the Oregon Health Authority and the state Public Health  
21 Director "shall take all actions necessary and authorized under ORS 401.651 to 401.670,  
22 ORS 433.443, and ORS 431A.015" to respond to the emergency. EO 20-03 concludes by

1 stating that the declared state of emergency "shall exist for sixty days" from the date of  
2 the order, "unless extended or terminated earlier by the Governor." Thus, EO 20-03 was  
3 due to expire on May 7, 2020. On May 1, 2020, it was extended to July 6, 2020, by EO  
4 20-24.

5 As the coronavirus spread across the county, the Governor issued additional  
6 executive orders. The threat posed by the virus was met with increasingly restrictive  
7 actions to protect the health and lives of Oregonians. On March 12, 2020, the Governor  
8 issued EO 20-05, which prohibited "large social, spiritual, and recreational gatherings of  
9 250 people or more." That order provided that the gatherings

10 "include, but are not limited to, community, civic, public, leisure, faith-  
11 based, and sporting events, concerts, conventions, fundraisers, and any  
12 similar events or activities, if a distance of at least three (3) feet between  
13 individuals cannot be maintained."

14 On March 17, 2020, the Governor issued EO 20-07, which reduced the number of  
15 persons permitted at such gatherings to 25. EO 20-07 also prohibited the consumption of  
16 food and drink at restaurants and other similar establishments. Subsequent executive  
17 orders closed schools, required the postponement of elective and non-urgent medical  
18 procedures in order to conserve personal protective equipment, and imposed a temporary  
19 moratorium on residential evictions for non-payment of rent. *See* EO 20-08 (closing  
20 schools); EO 20-09 (suspending in-person instruction at higher education institutions);  
21 EO 20-10 (preserving personal protective equipment); EO 20-11 (imposing temporary  
22 moratorium on residential evictions).

23 On March 23, 2020, the Governor issued EO 20-12, designated as the "Stay

1 Home, Save Lives" order. Among other things, EO 20-12 requires "social distancing" at  
2 non-essential social and recreational gatherings. It provides:

3 "Non-essential social and recreational gatherings of individuals outside of a  
4 home or place of residence (e.g., parties, celebrations, or other similar  
5 gatherings and events) are prohibited immediately, regardless of size, if a  
6 distance of at least six feet between individuals cannot be maintained."

7 In addition to requiring social distancing at non-essential social and recreational  
8 gatherings, EO 20-12 orders the closure of certain businesses and imposes social  
9 distancing requirements on others.

10 Since the Governor issued EO 20-03, the coronavirus has continued to  
11 spread. The number of deaths in this country has grown from 19 on March 8, 2020, to  
12 more than 110,000, on June 8, 2020. *See* Johns Hopkins University, *COVID-19*  
13 *Dashboard*, <https://coronavirus.jhu.edu/map.html> (accessed June 8, 2020). Worldwide,  
14 the number of deaths grew from 3,486 to more than 403,300 during that same period. *Id.*

15 The spread of the coronavirus has not been uniform. It has affected some  
16 areas more than others. In Oregon, 159 people have died from COVID-19 as of June 8,  
17 2020. That number, while tragic, is relatively low. As plaintiffs themselves  
18 acknowledge, the Governor may deserve "a colossal amount of credit for keeping the  
19 death toll so low."

20 However, the restrictions imposed by the Governor's executive orders have  
21 had an undeniable cost. Businesses have been shuttered and jobs have been lost.  
22 Oregon's unemployment rate rose from 3.5 percent in March 2020, to 14.2 percent in

1 April 2020.<sup>1</sup>

2           Some of the Governor's executive orders address the economic  
3 ramifications of the restrictions imposed by other orders. As mentioned, one executive  
4 order imposes a temporary moratorium on residential evictions. EO 20-11. Another  
5 imposes a temporary moratorium on the termination of certain rental agreements. EO 20-  
6 13. A third protects federal relief payments from garnishment so that the payments can  
7 be used for essential needs. EO 20-18.

8           As recounted above, the restrictions imposed in the executive orders have  
9 changed over time in response to changing circumstances. Previously, they were  
10 tightened; now, they are being loosened. On May 14, 2020, the Governor issued EO 20-  
11 25, to begin the process of reopening the state. That order established a three-phase  
12 process for reducing restrictions on a county-by-county basis. On June 5, 2020, the  
13 Governor issued EO 20-27, which further defines the phased reopening process and  
14 rescinds and replaces EO 20-25. The process set out in EO 20-27 allows counties to  
15 move from phase to phase as they meet requirements related to their capacities to limit  
16 the spread of the coronavirus and care for those who fall seriously ill because of it.

17 B. *The Underlying Civil Action*

18           In the civil action that underlies this mandamus proceeding, plaintiffs filed

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<sup>1</sup> State of Oregon Employment Department, *COVID-19 Leads to Oregon's Record Job Losses in April*, at <https://www.qualityinfo.org/documents/10182/73818/Employment+in+Oregon?version=1.80> (accessed June 10, 2020).

1 a complaint, naming Governor Brown and other officials as defendants.<sup>2</sup> Because a  
2 plaintiff's complaint frames the issues before a court, it is important to be clear about the  
3 claims that plaintiffs make in their complaint.<sup>3</sup> Plaintiffs request two forms of relief:  
4 declaratory relief and injunctive relief. *See* ORS 28.010 (authorizing declaratory  
5 judgment actions); ORS 28.020 (providing for declaratory judgments regarding statutory  
6 and constitutional rights); ORS 28.080 (providing for further relief based on a declaratory  
7 judgment, if necessary or proper). Their requests for relief are based on a specific legal  
8 theory: that the Governor's executive orders violate time limits.

9           Plaintiffs acknowledge that, in her first executive order regarding the  
10 coronavirus pandemic, the Governor declared a state of emergency pursuant to ORS  
11 401.165, described above. Nevertheless, plaintiffs base their time-limit claim on  
12 provisions that, by their terms, relate to other types of declarations. Specifically, they  
13 rely on provisions in ORS chapter 433, which relate to declarations of public health  
14 emergencies, and provisions in Article X-A of the Oregon Constitution, which relate to

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<sup>2</sup> Plaintiffs' complaint states that they have not yet identified the other officials, who, they allege, are "legally responsible for the events and happenings" referred to in the complaint. Plaintiffs name the other officials as "Does" and state that they will amend the complaint to identify them once their "names and capacities" are ascertained. *See* ORCP 20 H ("When a party is ignorant of the name of an opposing party and so alleges in a pleading, the opposing party may be designated by any name, and when such party's true name is discovered, the process and all pleadings and proceedings in the action may be amended by substituting the true name.").

<sup>3</sup> Plaintiffs amended their original complaint. The operative complaint is their second amended complaint. All references to plaintiffs' complaint in this opinion are to that complaint.

1 declarations of catastrophic disasters.

2           ORS 433.441(1) provides that, "[u]pon the occurrence of a public health  
3 emergency, the Governor may declare a state of public health emergency as authorized  
4 by ORS 433.441 to 433.452 to protect the public health." To do so, the Governor must  
5 issue a "proclamation" that identifies, among other things, the nature of the public health  
6 emergency and the political subdivision or geographic area subject to the proclamation.  
7 ORS 433.441(2). "A proclamation of a state of public health emergency expires when  
8 terminated by a declaration of the Governor or no more than 14 days after the date the  
9 public health emergency is proclaimed unless the Governor expressly extends the  
10 proclamation for an additional 14-day period." ORS 433.441(5). Thus, a proclamation  
11 of a public health emergency expires no later than 28 days from the day it is proclaimed.

12           Article X-A of the Oregon Constitution concerns "catastrophic disasters"  
13 and provides that "the Governor may invoke the provisions of this Article if the Governor  
14 finds and declares that a catastrophic disaster has occurred." Or Const, Art X-A, § 1(3).  
15 The declaration of a catastrophic disaster gives the Governor and the legislature  
16 extraordinary powers; it overrides more than ten other provisions of the state constitution,  
17 including provisions that impose requirements for spending money and passing bills. *Id.*  
18 §§ 1-5. If the Governor declares a catastrophic disaster, the provisions that grant the  
19 extraordinary powers "shall cease to be operative not later than 30 days following the  
20 date the Governor invoked [the provisions]," unless the legislature extends their  
21 operation. *Id.* § 6(1), (2).

22           Relying on the 28-day maximum time limit in ORS 433.441(5) and the 30-

1 day time limit in Article X-A, section 6(1), plaintiffs' complaint asks the circuit court for  
2 six declarations, each of which relates to their time-limit claims.<sup>4</sup> Accordingly, in their  
3 prayer for relief at the conclusion of their complaint, plaintiffs ask the court to declare  
4 that all the Governor's executive orders issued in response to the coronavirus pandemic  
5 "have expired by operation of law."<sup>5</sup>

6 After plaintiffs filed their complaint, a group of individuals, including local

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<sup>4</sup> In their complaint, plaintiffs ask the circuit court to make the following declarations:

- EO 20-03 -- the Governor's initial executive order, which provides that the state of emergency "shall exist for 60 days, \* \* \* unless extended or terminated earlier by the Governor" -- expired 30 days after it issued by operation of Article X-A, § 6(1);
- The 60-day duration of EO 20-03 violates ORS 433.441(5) and Article X-A, § 6(1);
- EO 20-24, which extended EO 20-03 for 60 days, "is facially unconstitutional" because it violates the durational limitation in Article X-A;
- All the orders issued in furtherance of EO 20-03 "are invalid, having terminated by operation of law or being unconstitutional";
- EO 20-12 is unconstitutional because it "allows [the] Governor to impinge constitutionally protected rights as long as she sees fit -- even after [the] duration of the state of emergency set forth in [the Governor's] own orders has terminated"; and
- Plaintiffs are free to resume holding and attending religious gatherings.

<sup>5</sup> Plaintiffs' complaint refers to only 19 of the Governor's 21 executive orders issued in response to the coronavirus to date. EO 20-25 had not been issued when plaintiffs filed their complaint. It was issued on May 14, 2020, the day the circuit court held a hearing on plaintiffs' motion for a preliminary injunction. The parties alerted the court to EO 20-25, and the court included it in the preliminary injunction. EO 20-27, which replaces EO 20-25, was issued on June 5, 2020.

1 government officials, business owners, and churchgoers, filed a motion to intervene in  
2 the case, and the circuit court granted the motion. Intervenors filed their own complaint,  
3 in which they included their own statement of facts, but adopted all the other sections of  
4 plaintiffs' complaint.

5 Plaintiffs sought a preliminary injunction to enjoin enforcement of the  
6 Governor's executive orders while their civil action is pending.<sup>6</sup> ORCP 79 governs  
7 preliminary injunctions, and it provides, in part, that a court may issue a preliminary  
8 injunction

9 "[w]hen it appears that a party is entitled to relief demanded in a pleading,  
10 and such relief, or any part thereof, consists of restraining the commission  
11 or continuance of some act, the commission or continuance of which during  
12 the litigation would produce injury to the party seeking the relief[.]"

13 ORCP 79 A(1)(a). When determining whether to issue a preliminary injunction, courts  
14 consider, among other things, the likelihood that the party requesting the injunction will  
15 ultimately prevail on the merits of its claim and whether, if the injunction is not issued,  
16 the party will be irreparably harmed during the litigation of the claim. *State ex rel. v.*  
17 *Mart*, 135 Or 603, 613, 283 P 459 (1931); *City of Portland v. Baker*, 8 Or 356, 365  
18 (1880). Courts also balance the harm to the movant against harm to the opposing party  
19 and the public if the injunction is issued. *State ex rel. v. Duncan*, 191 Or 475, 500, 230  
20 P2d 773 (1951); *Booth-Kelly Lumber Co. v. Eugene*, 67 Or 381, 384, 136 P 29 (1913).

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<sup>6</sup> The day after filing their complaint, plaintiffs filed a motion for a temporary restraining order. The circuit court and the parties have since treated the motion as one for a preliminary injunction.



1           Plaintiffs filed a memorandum in support of their request for a preliminary  
2 injunction. Regarding their entitlement to relief, plaintiffs again asserted that the  
3 Governor's executive orders violated the time limits in ORS 433.441(5) and Article X-A,  
4 section 6(1). In keeping with that argument, plaintiffs asked the circuit court to issue "a  
5 preliminary injunction prohibiting [the] Governor from enforcing any and all orders  
6 issued in response to the pandemic." (Capitalization modified.)

7           Regarding the harm that they would suffer if the circuit court did not issue  
8 the preliminary injunction, plaintiffs asserted that the Governor's executive orders  
9 interfered with their ability to practice their religion. In connection with that assertion,  
10 they cited Article I, sections 2, 3, and 26, of the Oregon Constitution, which protect the  
11 rights to worship, freely exercise religious opinions, and assemble.<sup>7</sup>

12           It bears emphasizing that all the declarations that plaintiffs request in their  
13 complaint are based on their time-limit claims and that, when arguing for the preliminary  
14 injunction, plaintiffs argued that they were likely to succeed on those claims. Plaintiffs  
15 have not requested any declaration relating to whether the executive orders violate their  
16 constitutional rights to freely exercise their religion or assemble,<sup>8</sup> and they sought a

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<sup>7</sup> Article I, section 2, provides, "All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences." Article I, section 3, provides, "No law shall in any case whatever control the free exercise, and enjoyment of religeous [*sic*] opinions, or interfere with the rights of conscience." Article 1, section 26, provides, "No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good; nor from instructing their Representatives; nor from applying to the Legislature for redress of greviances [*sic*]."

<sup>8</sup> The fifth of the six declarations that plaintiffs sought refers to EO 20-12

1 preliminary injunction to enjoin the enforcement of *all* the orders, not only those that  
2 could affect their ability to practice their religion. As recounted above, the orders cover a  
3 range of subjects. Some concern medical responses to the pandemic; others concern  
4 economic issues, such as evictions and garnishments of relief funds.

5           The Governor objected to plaintiffs' motion for a preliminary injunction,  
6 contending that the executive orders were issued pursuant to ORS 401.165 and were not  
7 subject to the time limits in ORS 433.441(5) and Article X-A, section 6(1). The  
8 Governor also contended that the relevant facts weighed overwhelmingly against  
9 interfering with the state's ongoing efforts to slow the spread of the coronavirus; she  
10 asserted that enjoining enforcement of the orders "would pose a public health risk and  
11 create an unreasonable risk of exacerbating the spread of COVID-19, infecting, and  
12 potentially killing, many others."

13           On May 18, 2020, the circuit court issued an order granting plaintiffs'  
14 motion for a preliminary injunction. As it explained in a letter opinion accompanying the  
15 order, the court based its ruling on its understanding of the interplay of the Governor's  
16 emergency powers under ORS chapters 401 and 433. The court concluded that ORS  
17 401.165, which authorizes the Governor to declare a state of emergency, and ORS  
18 433.441, which authorizes the Governor to declare a public health emergency, "are in

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"impinging" on plaintiffs' constitutional rights, but the explanation that follows -- that the order allows the Governor to impinge on those rights "even after the duration of the state of emergency set forth in her orders has terminated -- indicates that requested declaration is based on time limitations, rather than a stand-alone violation of constitutionally protected religious freedoms.

1 conflict over the length of time the Governor's orders last" because chapter 401 does not  
2 limit the duration of a state of emergency to a specific number of days, but chapter 433  
3 limits the duration of a public health emergency to 14 days, unless it is extended for an  
4 additional 14 days. After concluding that the statutes conflicted, the court held that  
5 chapter 433 controls because "it is the more specific statute[.]" Because several of the  
6 Governor's executive orders implement actions that chapter 433 expressly authorizes, the  
7 court concluded that the orders were subject to the time limit in chapter 433, which the  
8 court concluded was a maximum of 28 days (the original 14 days, plus a single 14-day  
9 extension). Consequently, the court ruled that, once the maximum 28-day period had  
10 expired, EO 20-03 and all of the subsequent orders "were rendered null and void."

11           The circuit court, however, rejected plaintiffs' argument based on Article X-  
12 A, which allows the Governor to declare a catastrophic disaster. It explained that "the  
13 Governor was not required to invoke the provisions of Article X-A" because the article  
14 "clearly states that the Governor has discretion to implement the constitutional provisions  
15 because the Governor '*may* invoke the provisions of this Article.'" (Quoting Or Const,  
16 Art X-A, § 1(3) (emphasis added)). Thus, the court concluded that the Governor's  
17 executive orders were not subject to the 30-day time limit set out in Article X-A.

18           The circuit court then considered factors relevant to whether it should  
19 exercise its discretion to issue a preliminary injunction. First, the court concluded that,  
20 because plaintiffs had demonstrated that the Governor's executive orders had exceeded  
21 the 28-day time limit in ORS chapter 433, plaintiffs were likely to succeed on the merits  
22 of their claim. Then, the court concluded that plaintiffs and intervenors had shown that



1 this court may order a circuit court to vacate a preliminary injunction if the injunction  
2 was based on a "fundamental legal error" or if the circuit court acted "outside the  
3 permissible range" of its discretion. *Keisling*, 317 Or at 623.

4 A. *ORS Chapters 401 and 433*

5 We begin with the question of whether the circuit court erred in concluding  
6 that the Governor's executive orders are subject to a 28-day time limit under ORS chapter  
7 433. To resolve that question, we must interpret the statutes in ORS chapters 401 and  
8 433 that relate to emergency declarations. When interpreting a statute, our task is to  
9 ascertain the intent of the legislature that enacted it. *State v. Gaines*, 346 Or 160, 171,  
10 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d  
11 1143 (1993). To do so, we look first to the text of the statute, which is the best evidence  
12 of the legislature's intent. *Gaines*, 346 Or at 171. To inform our understanding of the  
13 text, we consider its context, which includes related statutes and the statutory framework  
14 within which the statute was enacted. *PGE*, 317 Or at 611; *Polacek and Polacek*, 349 Or  
15 278, 284, 243 P3d 1190 (2010). In addition to the statute's text and context, we consider  
16 any relevant legislative history. *Gaines*, 346 Or at 171-72, 178.

17 "[W]hen multiple statutory provisions are at issue in a case, this court, if  
18 possible, must construe those statutes in a manner that will give effect to all of them."  
19 *Powers v. Quigley*, 345 Or 432, 438, 198 P3d 919 (2008) (internal quotation marks  
20 omitted). We are to avoid a construction that creates a conflict or renders one statute  
21 ineffective. *Vaughn v. Pacific Northwest Bell Telephone*, 289 Or 73, 83, 611 P2d 281  
22 (1980). Instead, the statutes "should be read together and harmonized, if possible."

1 *Powers*, 345 Or at 438 (internal quotation marks omitted).

2 In the following sections, we review the statutes in ORS chapters 401 and  
3 433 relating to emergency declarations and explain what powers they give the Governor,  
4 what limits they impose, and how they relate to each other.

5 1. *ORS chapter 401*

6 We begin with the statutes in ORS chapter 401, specifically ORS 401.165  
7 to 401.204. ORS 401.165(1) authorizes the Governor to declare "a state of emergency."  
8 Specifically, it provides, "The Governor may declare a state of emergency by  
9 proclamation \* \* \* after determining that an emergency has occurred or is imminent."  
10 The proclamation must specify "the geographical area covered by the proclamation," and  
11 the area "shall be no larger than necessary to effectively respond to the emergency."  
12 ORS 401.165(5). For the purposes of chapter 401, "emergency" is defined by ORS  
13 401.025(1) as "a human created or natural event or circumstance that causes or threatens  
14 widespread loss of life, injury to person or property, human suffering or financial loss,  
15 including but not limited to \* \* \* disease[.]"<sup>10</sup> Thus, the legislature has expressly

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<sup>10</sup> In full, ORS 401.025(1) provides:

"(1) 'Emergency' means a human created or natural event or circumstance that causes or threatens widespread loss of life, injury to person or property, human suffering or financial loss, *including but not limited to:*

"(a) Fire, explosion, flood, severe weather, landslides or mud slides, drought, earthquake, volcanic activity, tsunamis or other oceanic phenomena, spills or releases of oil or hazardous material as defined in ORS 466.605, contamination, utility or transportation emergencies, *disease*, blight, infestation, civil disturbance, riot, sabotage, acts of terrorism and

1 authorized the Governor to declare a state of emergency in response to a disease.

2 Under ORS chapter 401, the Governor has broad authority during a state of  
3 emergency. Of particular relevance here, ORS 401.168(1) provides that, during a state of  
4 emergency, the Governor has "the right to exercise, within the area designated in the  
5 proclamation, all police powers vested in the state by the Oregon Constitution in order to  
6 effectuate the purposes of this chapter."<sup>11</sup>

7 The term "police power" refers to "the whole sum of inherent sovereign  
8 power which the state possesses, and, within constitutional limitations, may exercise for  
9 the promotion of the order, safety, health, morals, and general welfare of the public."  
10 *Union Fishermen's Co. v. Shoemaker*, 98 Or 659, 674, 193 P 476 (1920). The police  
11 power "extends to all the great public needs[.]" *Christian et al v. La Forge*, 194 Or 450,

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war; and

"(b) A rapid influx of individuals from outside this state, a rapid migration of individuals from one part of this state to another or a rapid displacement of individuals if the influx, migration or displacement results from the type of event or circumstance described in paragraph (a) of this subsection."

(Emphases added.) Thus, ORS 401.025(1) defines "emergency" and includes a nonexclusive list of examples of emergencies.

<sup>11</sup> ORS 401.168 also gives the Governor the authority to suspend any agency orders or rules if strict compliance with them "would in any way prevent, hinder, or delay mitigation of the effects of the emergency," "to direct any agencies in the state government to utilize and employ state personnel, equipment and facilities for the performance of any activities designed to prevent or alleviate actual or threatened damage due to the emergency," and "to provide supplemental services and equipment to local governments to restore any services in order to provide for the health and safety of the citizens of the affected area." ORS 401.168(2) - (3).

1 467, 242 P2d 797 (1952) (internal quotation marks omitted). "Public health is, of course,  
2 one of the important factors giving rise to the exercise of the police power[.]" *State v.*  
3 *Hudson House, Inc. et al*, 231 Or 164, 172, 371 P2d 675 (1962). The state may exercise  
4 its police power in many ways, including through "[i]nspection laws, quarantine laws,  
5 [and] health laws of every description[.]" *State ex rel. v. Farmers Union Creamery*, 160  
6 Or 205, 214, 84 P2d 471 (1938) (quoting *Nebbia v. New York*, 291 US 502, 510, 54 S Ct  
7 505, 78 L Ed 940 (1934) (internal quotation marks and citation omitted)). As the United  
8 States Supreme Court held in *Jacobson*, 197 US at 25, when affirming a city regulation  
9 requiring residents to be vaccinated against smallpox, a state's police power includes the  
10 power to enact reasonable regulations for the protection of "the public health and the  
11 public safety." Through the police power, a community can "protect itself against an  
12 epidemic of disease which threatens the safety of its members." *Id.* at 27. Thus, through  
13 the enactment of ORS 401.168(1), the legislature has given the Governor authority to  
14 exercise the state's police powers during a state of emergency, and those powers include  
15 the power to regulate conduct for public health and safety.

16           Other statutes within ORS chapter 401 describe some of the actions that the  
17 Governor may take during a state of emergency. For example, ORS 401.175 specifies  
18 that the Governor may assume control of emergency operations and law enforcement  
19 activities, close roads and highways, designate persons to coordinate relief work, and  
20 require the aid of public or quasi-public agencies. As another example, ORS 401.188(2)  
21 authorizes the Governor to "issue, amend and enforce rules and orders" to "[p]rescribe  
22 and direct activities in connection with the use \* \* \* of materials, services and facilities,



1 including \* \* \* health and medical care[,] \* \* \* education[,] \* \* \* and other essential civil  
2 needs."

3           Although they are broad, the Governor's emergency powers under ORS  
4 chapter 401 are not unlimited. To the contrary, they are limited both by statutes and by  
5 the state and federal constitutions.

6           The Governor's emergency powers under ORS chapter 401 are limited by  
7 statute in several ways. First, they are required to be exercised in a manner consistent  
8 with the reason for which they are granted; that is, they must be exercised to address the  
9 declared emergency. As quoted above, ORS 401.168(1) provides that the Governor can  
10 exercise the state's police powers "to effectuate the purposes of this chapter." Similarly,  
11 ORS 401.175(1), which authorizes the Governor to assume control over emergency  
12 operations, provides that the Governor may "do all things deemed advisable and  
13 necessary to alleviate the immediate conditions," and ORS 401.188(3) authorizes the  
14 Governor to take actions "that may be necessary for the management of resources  
15 following an emergency." Second, the Governor's emergency powers under chapter 401  
16 may be exercised only during a declared state of emergency, which ORS 401.204(1)  
17 requires the Governor to "terminate by proclamation when the emergency no longer  
18 exists, or when the threat of an emergency has passed." Third, the Governor's emergency  
19 powers are limited in that they can be terminated by the legislature. ORS 401.204(2)  
20 provides, "The state of emergency proclaimed by the Governor may be terminated at any  
21 time by joint resolution of the Legislative Assembly," which can convene itself to issue

1 such a resolution. Or Const, Art IV, § 10a.<sup>12</sup>

2 In addition, the Governor's emergency powers under ORS chapter 401 are  
3 limited by the state and federal constitutions. Therefore, although the state's police  
4 powers include the power to impose reasonable public safety regulations, courts may  
5 intervene if the regulations exceed constitutional limits. As the Supreme Court observed  
6 in *Jacobson*,

7 "[I]t might be that an acknowledged power of a local community to protect  
8 itself against an epidemic threatening the safety of all might be exercised in  
9 particular circumstances and in reference to particular persons in such an  
10 arbitrary, unreasonable manner, or might go so far beyond what was  
11 reasonably required for the safety of the public, as to authorize or compel  
12 the courts to interfere for the protection of such persons."

13 197 US at 28.

14 Thus, when the Governor declares a state of emergency pursuant to ORS  
15 401.165, the Governor has express authority to take the actions specified in ORS 401.165  
16 to 401.236, subject to statutory and constitutional limits. In addition to those actions, the  
17 Governor also has express authority to take the actions specified in certain statutes in  
18 ORS chapter 433 relating to public health emergencies. That authority is found in ORS  
19 433.441(4), which provides, "If a state of emergency is declared as authorized under ORS

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<sup>12</sup> Article IV, section 10a, of the Oregon Constitution provides:

"In the event of an emergency the Legislative Assembly shall be convened by the presiding officers of both Houses at the Capitol of the State at times other than required by section 10 of this Article upon the written request of the majority of the members of each House to commence within five days after receipt of the minimum requisite number of requests."

*See also* ORS 171.015 (implementing Art IV, § 10a).

1 401.165, the Governor may implement any action authorized by ORS 433.441 to  
2 433.452." Those actions include closing facilities, regulating goods and services, and,  
3 controlling or limiting "entry into, exit from, movement within, and the occupancy of  
4 premises in any public area subject to or threatened by a public health emergency" as  
5 reasonably necessary to respond to the emergency. ORS 433.441(3). They also include  
6 seeking assistance under the Emergency Management Assistance Compact. ORS  
7 433.446.

8           The Governor's emergency powers under ORS chapter 401 are not limited  
9 to a specific number of days. Instead, they continue until the state of emergency is  
10 terminated. ORS 401.192(4) provides, "The powers granted to the Governor by ORS  
11 401.165 to 401.236 shall continue until termination of the state of emergency." As  
12 mentioned, ORS 401.204(1) requires the Governor to issue a proclamation terminating  
13 the state of emergency when the emergency no longer exists or when the threat of  
14 emergency is passed, and ORS 401.204(2) provides that the legislature may terminate a  
15 state of emergency at any time by joint resolution.

16           The legislature has provided that the rules and orders that the Governor  
17 issues pursuant to her emergency authority under ORS chapter 401 "shall have the full  
18 force and effect of law both during and after the declaration of a state of emergency."  
19 ORS 401.192(1). The legislature has also expressly addressed how any conflict between  
20 the statutes in chapter 401 and any other laws, ordinances, rules, or orders should be  
21 resolved: the statutes in chapter 401 control. ORS 401.192(1) provides, "All existing  
22 laws, ordinances, rules and orders inconsistent with ORS 401.165 to 401.236 shall be

1 inoperative during the period of time and to the extent such inconsistencies exist."

2           In sum, ORS 401.165 authorizes the Governor to declare a state of  
3 emergency in response to, among other things, a circumstance that threatens widespread  
4 loss of life, injury, or human suffering -- specifically including disease. Through ORS  
5 401.165 and related statutes, the legislature has given the Governor broad authority to act,  
6 including the authority to exercise all police powers vested in the state. Those powers  
7 include the power to regulate conduct in order to protect the community "against an  
8 epidemic of disease which threatens the safety of its members." *Jacobson*, 197 US at 27.  
9 In addition to the actions specified in ORS chapter 401, the Governor may also  
10 implement any action authorized by ORS 433.441 to 433.452. The Governor's  
11 emergency powers continue until the termination of the state of emergency, either by the  
12 Governor or the legislature. If any of the statutes in chapter 401 relating to emergencies  
13 conflict with any other laws, ordinances, rules and orders, then the statutes in chapter 401  
14 control.

15           Thus, the ORS chapter 401 emergency statutes indicate that the Governor  
16 has the statutory authority to declare a state of emergency to respond to the coronavirus  
17 pandemic, which, in turn, enables her to take actions to protect public health, including  
18 restricting gatherings and requiring social distancing -- pursuant to ORS 401.168(1)  
19 (granting police powers) and ORS 433.411(3) (authorizing control of movements). The  
20 chapter 401 emergency statutes also indicate that the Governor's authority to take those  
21 actions continues until either the Governor or the legislature terminates the state of  
22 emergency in the manner specified in ORS 401.204. As we explain in the following

1 section, the ORS chapter 433 emergency statutes support that conclusion.

2           2.     *ORS chapter 433*

3                    ORS chapter 433 concerns public health, and a series of statutes in that  
4 chapter concerns public health emergencies, ORS 433.441 to 433.452. One of those  
5 statutes, ORS 433.441, gives the Governor the authority to declare "a public health  
6 emergency." To do so, the Governor issues a proclamation, which must specify, among  
7 other things, the nature of the public health emergency and the political subdivision or  
8 geographic area subject to the proclamation. ORS 433.441(2).

9                    Like the Governor's authority to declare a state of emergency under ORS  
10 chapter 401, the Governor's authority to declare a public health emergency under chapter  
11 433 is discretionary. The Governor "may" declare such an emergency. ORS 401.165(1);  
12 ORS 433.441(1). The Governor is not required to do so, even if the conditions justifying  
13 a declaration exist. When the Governor does declare a public health emergency, the  
14 Governor may make use of the emergency powers granted by ORS 433.441 to 433.452.

15                    The statutes in ORS chapter 433 regarding public health emergencies were  
16 enacted to give the Governor an additional tool with which to respond to public health  
17 emergencies. They were not intended to prevent the Governor from declaring a state of  
18 emergency under chapter 401. That is clear from a statute in chapter 433 itself: ORS  
19 433.441(4), which provides that "[n]othing in ORS 433.441 to 433.452 limits the  
20 authority of the Governor to declare a state of emergency under ORS 401.165." In  
21 addition, the powers granted by ORS 433.441 to 433.452 are not powers that may be used  
22 *only* during a public health emergency declared under ORS 433.441(1). ORS 433.441(4)

1 expressly provides that the same powers may be used during a state of emergency  
2 declared under ORS 401.165: "If a state of emergency is declared as authorized under  
3 ORS 401.165, the Governor may implement any action authorized by ORS 433.441 to  
4 433.452."

5           Thus, when faced with a public health emergency, the Governor may  
6 declare a state of emergency under ORS chapter 401 or a public health emergency under  
7 ORS chapter 433. Declaring a state of emergency under chapter 401 gives the Governor  
8 greater authority: it enables the Governor to take all the actions authorized by the  
9 emergency provisions in both chapters 401 and 433. By contrast, if the Governor  
10 declares a public health emergency under ORS 433.441, the Governor's emergency  
11 powers are more limited.

12           In addition, unlike an emergency declared under ORS 401.165, a  
13 "proclamation of a state of public health emergency expires \* \* \* no more than 14 days  
14 after the date the public health emergency is proclaimed unless the Governor expressly  
15 extends the proclamation for an additional 14-day period." ORS 433.441(5). That  
16 durational limit is, by its express terms, a limit on the duration of a public health  
17 emergency declared under ORS 433.441. Nothing in the text of ORS 433.441 limits the  
18 duration of an emergency declared under chapter 401, nor does it limit the Governor's use  
19 of chapter 433 powers during an emergency declared under chapter 401.

20           Another provision in ORS chapter 433 indicates that the legislature did not  
21 intend ORS 433.441(5) to limit the duration of a state of emergency declared under ORS  
22 chapter 401 or the Governor's use of chapter 433 powers during such an emergency.

1 ORS 433.443(4)(a) provides that, during a public health emergency, the Public Health  
2 Director and local public health administrators may gather and use individually  
3 identifiable health information until the public health emergency expires *or* a related state  
4 of emergency declared under chapter 401 terminates. Specifically, ORS 433.443(4)  
5 provides:

6           "(a) During a declared state of public health emergency, the Public  
7 Health Director and local public health administrators shall be given  
8 immediate access to individually identifiable health information necessary  
9 to:

10           "(A) Determine the causes of an illness related to the public health  
11 emergency;

12           "(B) Identify persons at risk;

13           "(C) Identify patterns of transmission;

14           "(D) Provide treatment; and

15           "(E) Take steps to control the disease.

16           "\* \* \* \* \*

17           "(d) Upon expiration of the state of public health emergency, the  
18 Public Health Director or local public health administrators may not use or  
19 disclose any individually identifiable health information that has been  
20 obtained under this section. *If a state of emergency that is related to the*  
21 *state of public health emergency has been declared under ORS 401.165, the*  
22 *Public Health Director and local public health administrators may*  
23 *continue to use any individually identifiable information obtained as*  
24 *provided in this section until termination of the state of emergency."*

25 (Emphasis added.) Thus, ORS 433.443(4)(d) provides that the Public Health Director  
26 and local public health administrators can take actions to track and control the spread of a  
27 disease, and those actions can continue for more than 28 days, if the Governor declares a  
28 state of emergency under ORS 401.165. That, in turn, indicates that the legislature

1 intended that a public health emergency under chapter 433 could coincide with or be  
2 followed by a state of emergency under chapter 401.

3 One of the reasons that the ORS chapter 433 emergency statutes were  
4 enacted was to give the Governor an option for responding to a public health emergency  
5 by taking a step short of declaring a state of emergency under chapter 401. The  
6 legislative history of the chapter 433 statutes, which we discuss next, makes that clear.

7 The original ORS chapter 433 emergency statutes were enacted in 2003, as  
8 a result of the passage of House Bill (HB) 2251. Or Laws 2003, ch 555. Dr. Grant  
9 Higginson, then the state Public Health Officer for the Department of Human Services  
10 (DHS), was the primary proponent of HB 2251,<sup>13</sup> which, among other things, authorized  
11 the Governor to declare a "state of impending public health crisis." HB 2251, § 1  
12 (2003).<sup>14</sup>

13 When HB 2251 was before the Senate Human Resources Committee,

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<sup>13</sup> See Testimony, Senate Human Resources Committee, HB 2251, June 11, 2003, Ex G (statement of Dr. Grant Higginson).

<sup>14</sup> The phrase "impending public health crisis" was not defined in HB 2251. The bill did not distinguish between an impending crisis and an emergency. But the bill provided that "[t]he Governor may proclaim an impending public health crisis when there is a threat to public health that is 'imminent and likely to be widespread, life-threatening and of a scope that requires immediate medical action as authorized by sections 1 to 5 and 11' of [the bill]." Among other things, those sections authorized DHS to adopt reporting requirements to obtain information from health care providers, institutions, and facilities; create diagnostic and treatment protocols; order public health measures, including temporary isolation and quarantine; and impose civil penalties. HB 2251, § 1 - 5 (2003). As detailed below, \_\_\_ Or at \_\_\_ (slip op at 37:14 - 38:10), the phrase "state of impending public health crisis" was amended to "public health emergency" in 2007.



1 Higginson explained to the committee that the Governor already had the power to declare  
2 a state of emergency under ORS 401.165. Audio Recording, Senate Human Resources  
3 Committee, HB 2251, June 11, 2003, at 00:43:12 (comments of Dr. Grant Higginson),  
4 <http://records.sos.state.or.us/ORSOSWebDrawer/Record/4179270#> (accessed June 9,  
5 2020); Testimony, Senate Human Resources Committee, HB 2251, June 11, 2003, Ex G  
6 (statement of Dr. Grant Higginson). But, as Higginson explained, some public health  
7 situations that require an immediate response might not be perceived as giving rise to the  
8 need for a declaration of a state of emergency under provisions like ORS 401.165. To  
9 illustrate that point, he referred to the anthrax attacks that followed the September 11,  
10 2001, terrorist attacks. He noted that, "even during the height of the anthrax attacks,  
11 when over 30,000 people were being treated with prophylactic antibiotics and the  
12 national pharmaceutical stockpile was mobilized, no Governor made an emergency  
13 declaration." Testimony, Senate Human Resources Committee, HB 2251, June 11, 2003,  
14 Ex G (statement of Dr. Grant Higginson). Passage of HB 2251, Higginson said, would  
15 give the state an "additional tool that is in proportion to the situation being faced" and,  
16 therefore, would be "more likely to be effectively used." *Id.* For example, in a situation  
17 similar to the anthrax attacks, it would enable DHS to impose reporting requirements or  
18 provide treatment guidance, without requiring the declaration of a state of emergency  
19 under ORS 401.165. *Id.*

20 In a later hearing before the House Health and Human Service Committee,  
21 Higginson explained that HB 2251 did not affect the Governor's ability to declare a state  
22 of emergency under ORS chapter 401. He walked legislators through the sections of the

1 bill, pointing out that sections 1(1) and 1(2) authorized the Governor to proclaim a state  
2 of impending public health crisis in certain circumstances. Audio Recording, House  
3 Health and Human Services Committee, HB 2251, Apr 30, 2003, at 00:00:45 (comments  
4 of Dr. Grant Higginson),  
5 <http://records.sos.state.or.us/ORSOSWebDrawer/Record/4168693> (accessed June 9,  
6 2020). He then described section 1(3), now codified as ORS 433.441(4), and he stated  
7 that the bill "in no way affects the Governor's ability to declare a state of emergency and  
8 that, in the case of a state of emergency, the Governor could do anything that's in this  
9 bill." *Id.* at 00:01:40.

10           Indeed, the provisions of HB 2251 were premised on the understanding that  
11 the proclamation of a state of impending public health crisis pursuant to section 1 of the  
12 bill, now codified as ORS 433.441, could be followed by a declaration of a state of  
13 emergency under ORS chapter 401. The bill contained the provision, now codified at  
14 ORS 433.443(4)(d) and quoted above, that states that officials can take actions to track  
15 and control the spread of a disease and that those actions can continue for more than 28  
16 days, if the Governor declares a state of emergency under ORS 401.165. HB 2251, § 23.

17           Thus, the emergency provisions set out in HB 2251 were intended to give  
18 the Governor an additional option for responding to an impending public health crisis,  
19 particularly one that is more limited in scope. Accordingly, HB 2251 included a  
20 durational limit on the proclamation of a state of impending public health crisis. It  
21 provided that such a proclamation "expires when terminated by a declaration of the  
22 Governor or no more than 14 days after the date it is proclaimed unless the proclamation

1 is expressly extended for an additional 14-day period." HB 2251 § 1(4).

2 But that time limit, which is now codified as ORS 433.441(5), was not  
3 intended to apply to the Governor's declaration of a state of emergency under ORS  
4 chapter 401 or any other law. As one of the proponents of HB 2251 explained to the  
5 Senate Human Resources Committee, a proclamation under HB 2251 could coincide  
6 with, or be followed by, a declaration of a state of emergency by the Governor, which  
7 gives the Governor "much broader" powers. Audio Recording, Senate Human Resources  
8 Committee, HB 2251, June 11, 2003, at 00:51:47 (comments of Scott Gallant),  
9 <http://records.sos.state.or.us/ORSOSWebDrawer/Record/4179270#> (accessed June 9,  
10 2020). Thus, the legislature intended HB 2251 to provide an optional step that the  
11 Governor can take before declaring a "full-blown" state of emergency in response to a  
12 public health emergency. *Id.* at 00:40:45 (comments of Dr. Grant Higginson).

13 In 2007, the legislature amended the ORS chapter 433 emergency  
14 provisions, through HB 2185 (2007). Or Laws 2007, ch 445. HB 2185 served several  
15 purposes. One purpose was to update the terms and phrases used in chapter 433. Dr.  
16 Susan Allan, the Public Health Director of DHS, was the primary proponent of HB 2185.  
17 Testimony, Joint Emergency Preparedness and Ocean Policy Committee, HB 2185, Apr  
18 24, 2007, Ex G (statement of Dr. Susan Allan). In testimony in support of the bill before  
19 the Joint Emergency Preparedness and Ocean Policy Committee, she explained that the  
20 then-existing public health statutes used a variety of terms and phrases, and that, to  
21 eliminate confusion, the drafters of HB 2185 had tried to use terms and phrases that were  
22 consistent with those used in model acts and by other jurisdictions. Audio Recording,

1 Mar 2, 2007, Joint Emergency Preparedness and Ocean Policy Committee, HB 2185, Mar  
2 2, 2007, at 00:19:30 (statement by Dr. Susan Allen)  
3 <http://records.sos.state.or.us/ORSOSWebDrawer/Record/4215506#> (accessed June 9,  
4 2020). One of the updates was to change the phrase "impending public health crisis" to  
5 "public health emergency." HB 2185, § 1. Consequently, upon the passage of HB 2285,  
6 ORS 433.441(1) was amended to provide, as it does today, "Upon the occurrence of a  
7 public health emergency, the Governor may declare a state of public health emergency as  
8 authorized by ORS 433.441 to 433.452."

9 Another purpose of HB 2185 was to establish, by statute, the position of the  
10 state Public Health Director. HB 2185, § 1; Exhibit B, Joint Committee on Emergency  
11 Preparedness and Ocean Policy, HB 2185, Mar 2, 2007 (summary of HB 2185 submitted  
12 by DHS). As a result of the creation of that position, the statutes that had provided that  
13 DHS could take certain actions were amended to provide that the Public Health Director  
14 could take those actions. *E.g.*, HB 2185, § 24. A related purpose of HB 2185 was to  
15 clarify the authority of the Public Health Director. Accordingly, the bill specified actions  
16 that the director could take with, and without, a declaration by the Governor. HB 2185,  
17 § 5; HB 2185, § 24.

18 HB 2185 also specified actions that the Governor could take during a  
19 declared public health emergency. It provided that the Governor could, among other  
20 things,

21 "Close, order the evacuation of or the decontamination of any facility the  
22 Governor has reasonable cause to believe may endanger public health \* \* \*

1           "\* \* \* \* \*

2           "Control or limit entry into, exit from, movement within and the occupancy  
3           of premises in any public area subject to or threatened by a public health  
4           emergency if such actions are reasonable and necessary to respond to the  
5           public health emergency."

6           HB 2185, § 23. In doing so, the bill expanded the actions that the Governor could take  
7           upon declaring a public health emergency under ORS chapter 433, but did not take the  
8           further step of declaring an emergency under chapter 401.

9                         Notably, HB 2185 did not alter ORS 433.441, which states, "Nothing in  
10           ORS 433.441 to 433.452 limits that authority of the Governor to declare a state of  
11           emergency under ORS 401.055. If a state of emergency is declared as authorized under  
12           ORS 401.055, the Governor may implement any action authorized by ORS 433.441 to  
13           433.452." Thus, the 2007 amendments are consistent with the view that, although the  
14           Governor may respond to a public health situation that meets the definition of "public  
15           health emergency" under ORS 433.442 by making a declaration under chapter 433,  
16           which gives rise to certain specified powers, the Governor may also respond to such an  
17           emergency by making a declaration under chapter 401, which gives rise to greater  
18           powers, if the public health emergency also meets the definition of "emergency" under  
19           ORS 401.025.

20                         In her testimony about HB 2185, when asked about the Governor's power  
21           to respond to an emergency, Allan explained -- as Higginson had in 2003 -- that the  
22           Governor could exercise emergency powers under ORS chapter 401. Audio Recording,  
23           Apr 24, 2007, Joint Emergency Preparedness and Ocean Policy Committee, HB 2185,

1 Apr 24, 2007 at 1:29:00 (statement by Dr. Susan Allen),  
2 <http://records.sos.stte.or.us/ORSOSWebDrawer/Record/4215639#>(accessed June 9,  
3 2020). Specifically, she explained that the Governor has "general emergency powers"  
4 pursuant to which the Governor "can do a lot of things in an emergency." *Id.* She  
5 clarified that those powers "have nothing to do with" HB 2185. *Id.* She further clarified  
6 that, when exercising those powers, it was possible that the Governor could "take control  
7 over whatever might seem to be necessary in an emergency" and that HB 2185 did not  
8 "erase that power." *Id.*

9 To summarize: The legislature enacted the original ORS chapter 433  
10 emergency statutes in 2003 to give the Governor "an additional tool" to respond to public  
11 health emergencies. Those statutes enable the Governor to exercise certain emergency  
12 powers as an alternative to declaring a "full blown" state of emergency under ORS  
13 chapter 401. Audio Recording, Senate Human Resources Committee, HB 2251, June 11,  
14 2003, at 00:40:45 (comments of Dr. Grant Higginson),  
15 <http://records.sos.state.or.us/ORSOSWebDrawer/Record/4179270#>. Those statutes were  
16 not, however, intended to limit the Governor's authority under ORS chapter 401. Indeed,  
17 chapter 433 expressly provides, "Nothing in ORS 433.441 to 433.452 limits that authority  
18 of the Governor to declare a state of emergency under ORS 401.055. If a state of  
19 emergency is declared as authorized under ORS 401.055, the Governor may implement  
20 any action authorized by ORS 433.441 to 433.452." ORS 433.441(4).

21 If the Governor proclaims a public health emergency pursuant to ORS  
22 chapter 433, "the "proclamation \* \* \* expires" no more than 28 days after the emergency

1 is proclaimed. Nothing in the terms of the 28-day time limit indicates that it applies to a  
2 state of emergency under ORS chapter 401. To the contrary, the statutes in chapter 433  
3 and their legislative history show that the 28-day time limit was not intended to apply to a  
4 state of emergency under chapter 401.<sup>15</sup> *See, e.g.*, ORS 433.443(4)(d).

5           Thus, the ORS chapter 401 and chapter 433 emergency provisions do not  
6 conflict. Instead, they are compatible. They were intended to work, and do work,  
7 together.

8           3.     *The circuit court's ruling regarding ORS chapters 401 and 433*

9           As recounted above, in the civil action that underlies this mandamus  
10 proceeding, the circuit court concluded that the Governor's executive orders violated the  
11 28-day time limit in ORS chapter 433. But, for the reasons just explained, that  
12 conclusion was incorrect. The Governor declared a state of emergency pursuant to ORS  
13 401.165. That declaration gave the Governor broad authority, including the authority to  
14 exercise "all police powers vested in the state by the Oregon Constitution." ORS  
15 401.168(1). And, those powers are not subject to the 28-day time limit.

16           Moreover, the Governor's emergency powers under ORS chapter 401  
17 include the power to "implement any action authorized by ORS 433.441 to ORS  
18 433.452." ORS 433.441(4). Therefore, in exercising her authority pursuant to the

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<sup>15</sup> This case does not present the question whether, if the Governor declares a public health emergency pursuant to ORS chapter 433, the Governor can issue a second declaration pursuant to that chapter after the first expires. Consequently, we need not, and do not, address that question.

1 declaration of the state of emergency under chapter 401, the Governor could order actions  
2 specified in chapter 433. Ordering those actions did not convert the Governor's chapter  
3 401 declaration into a chapter 433 declaration, and it did not make the executive orders  
4 subject to the 28-day time limit. Chapter 433 does not limit the Governor's authority  
5 under chapter 401.

6 Thus, the circuit court's issuance of the preliminary injunction was based on  
7 a fundamental legal error. The court concluded that the Governor's executive orders had  
8 violated the 28-day time limit and, therefore, that plaintiffs were likely to succeed on the  
9 merits of their requests for declaratory judgment and injunctive relief. That was an  
10 erroneous legal conclusion.

11 B. *Plaintiffs' and Intervenors' Alternative Arguments*

12 Before closing, we address two alternative arguments that plaintiffs and  
13 intervenors raise in this court, one of which the circuit court expressly rejected and the  
14 other of which it did not address.

15 1. *Article X-A, section 6(1)*

16 In the circuit court, plaintiffs argued that the Governor's executive orders  
17 are subject to a 30-day limit under Article X-A, section 6(1), of the Oregon Constitution,  
18 and were null and void because that 30-day time period had expired. The circuit court  
19 rejected that argument, and, to the extent that plaintiffs are raising it in this court, we also  
20 reject it.

21 The Governor issued the executive orders pursuant to ORS chapter 401,  
22 and Article X-A has no bearing on the Governor's authority to exercise her emergency



1 powers under chapter 401. Article X-A was intended to supplement, not supplant, the  
2 Governor's emergency powers under chapter 401. As its text and legislative history  
3 show, the purpose of Article X-A is to give the Governor the option of invoking  
4 additional emergency powers in the event of a catastrophic disaster.

5           As the circuit court noted, the Governor is not required to invoke her  
6 emergency powers under Article X-A, even if the circumstances would justify such an  
7 invocation. The terms of Article X-A itself make that clear. Article X-A provides that  
8 the Governor "*may* invoke the provisions of this Article if the Governor finds and  
9 declares that a catastrophic disaster has occurred." *Id.* § 1(3) (emphasis added). Thus,  
10 invocation of the emergency powers set out in Article X-A is discretionary.

11           For the purposes of Article X-A, a "catastrophic disaster" is "a natural or  
12 human-caused event that: (a) [r]esults in extraordinary levels of death, injury, property  
13 damage or disruption of daily life in this state; and (b) [s]everely affects the population,  
14 infrastructure, environment, economy, or government functioning of this state." *Id.*  
15 § 1(1). It includes, but is not limited to, events that meet those two requirements and are  
16 caused by earthquakes, tsunamis, public health emergencies, and acts of terrorism. *Id.*  
17 § 1(2). Circumstances that constitute an emergency for the purposes of ORS chapter 401  
18 may not rise to the level of a "catastrophic disaster." But even if they do, the Governor is  
19 not required to invoke Article X-A to address them.

20           The powers granted by Article X-A are extraordinary, and the Governor  
21 may reasonably decline to invoke them. The emergency powers that arise from a  
22 declaration of a catastrophic disaster pursuant to Article X-A far exceed those that arise

1 from a declaration of a state of emergency pursuant to ORS chapter 401. A declaration  
2 of a catastrophic disaster pursuant to Article X-A enables the Governor and the  
3 Legislative Assembly to override more than ten other state constitutional provisions.  
4 Among other things, it enables the Governor to use moneys for purposes other than those  
5 for which the legislature appropriated or allocated them. *Id.* § 2. It also reduces the  
6 number of legislators required to constitute a quorum and pass a bill. *Id.* §§ 3(2), (4). In  
7 addition, it authorizes the legislature to enact laws to use highway fund moneys for any  
8 purpose, spend moneys that would otherwise go to tax refunds, and exceed the state debt  
9 limit. *Id.* §§ 4(1)(a), (b), (c). Those powers and others are set out in sections 1 to 5 of  
10 Article X-A. Given their extraordinary nature, they are appropriately time-limited by  
11 section 6(1) of Article X-A, which provides that "the provisions of sections 1 to 5 of this  
12 Article, once invoked, shall cease to be operative not later than 30 days following the  
13 date the Governor invoked the provisions of sections 1 to 5," unless the legislature  
14 extends the operation of those sections prior to the expiration of the 30-day period. *Id.*  
15 §§ 6(1), (2).

16 In sum, by its terms, Article X-A gives the Governor the option of invoking  
17 extraordinary powers in response to a catastrophic disaster and limits the time period  
18 during which those powers can be exercised, unless they are extended by the legislature.  
19 Nothing in the text of the Article X-A indicates that any part of Article X-A is intended to  
20 apply if the Governor does not declare a catastrophic disaster or invoke those  
21 extraordinary powers. To the contrary, the time limit is keyed to the invocation of the  
22 specific powers set out in sections 1 to 5 of the Article itself. Therefore, the text of the

1 Article X-A establishes that its 30-day time limit applies to, and only to, the extraordinary  
2 powers described in sections 1 to 5 of Article X-A.

3           The legislative history of Article X-A confirms that conclusion. Article X-  
4 A was added to the constitution as a result of the voters' approval of Ballot Measure 77  
5 (2012), which the legislature referred to them through House Joint Resolution 7 in 2011.  
6 The ballot title for the measure highlighted that the measure would give the Governor  
7 discretionary authority to invoke powers that would override constitutional limits. The  
8 caption of the title described the major effects of the measure as follows:

9           "Amends Constitution: Governor may declare 'catastrophic disaster'  
10           (defined); requires legislative session; authorizes suspending specified  
11           constitutional spending restrictions."

12 Official Voters' Pamphlet, Marion County, General Election, Nov 6, 2012, 42. In  
13 addition, the summary of the measure explained that the Governor already had *statutory*  
14 emergency powers and that the measure would give the Governor *constitutional*  
15 emergency powers. The summary -- which is statutorily limited to a specified number of  
16 words and, as a result, is terse -- begins:

17           "Amends Constitution. Currently, Governor has statutory, but not  
18           constitutional, authority to declare state of emergency and direct response  
19           to emergency. Measure grants Governor constitutional authority to declare  
20           and respond to natural or human-caused 'catastrophic disaster' (defined)."

21 *Id.* Similarly, the explanatory statement for the measure stated that a declaration of a  
22 catastrophic disaster would grant the Governor and the Legislative Assembly "new  
23 temporary powers not available under certain constitutional provisions and statutes[.]"

24 *Id.* at 45. Thus, the information provided to voters conveyed that the measure enabled the

1 Governor to invoke new constitutional powers in addition to her existing statutory  
2 powers. Nothing indicated that the measure would limit the Governor's statutory powers.

3 In sum, like its text, the legislative history of Article X-A shows that the  
4 article was intended to give the Governor an additional, separate tool for responding to  
5 certain types of emergencies. It was not intended to limit the Governor's authority under  
6 ORS chapter 401 or impose a time limit on the Governor's exercise of that authority.

7 In this case, plaintiffs acknowledge that the Governor's orders do not  
8 mention Article X-A, and they do not contend that the Governor has attempted to  
9 exercise any of the extraordinary emergency powers under sections 1 to 5 of Article X-A.  
10 Nevertheless, they contend that the Governor's order is subject to the 30-day limit of  
11 section 6(1) of Article X-A. As we understand it, plaintiffs' position is that, any time that  
12 the Governor declares a state of emergency pursuant to ORS chapter 401 in response to  
13 circumstances that meet the criteria for a catastrophic disaster, the Governor should be  
14 deemed to have declared a catastrophic disaster pursuant to Article X-A. That is  
15 incorrect. Chapter 401 and Article X-A authorize separate, discretionary declarations,  
16 which give rise to different emergency powers that are subject to different limits,  
17 including different time limits. As explained above, by its terms, the 30-day limit in  
18 section 6 of Article X-A applies to, and only to, invocations of the provisions of sections  
19 1 to 5 of Article X-A. It does not apply to a declaration of emergency under chapter 401,  
20 like the declaration in EO 20-03.

21 Intervenor's make a different argument regarding Article X-A. They  
22 contend that, because Article X-A includes a 30-day limit for catastrophic disasters, ORS

1 chapter 401 must include one for states of emergency, asserting that the constitutional  
2 amendment indicates an "intent to place a time limit on the Governor's extraordinary  
3 police powers when addressing emergencies such as catastrophic disasters and public  
4 health emergencies." That argument is unavailing, because it fails to recognize the  
5 substantial difference between the emergency powers under Article X-A -- which  
6 override basic constitutional limits on passing laws and spending moneys -- and the  
7 emergency powers under chapter 401.

8           2.     *Freedom of religion*

9           Plaintiffs' arguments before the circuit court and before this court have  
10 focused primarily on the idea that the Governor's executive orders have expired and,  
11 therefore, are null and void. However, before this court, they have also argued that the  
12 orders violate their state constitutional right to freely exercise their religion. In response,  
13 the Governor argues that that argument is not properly before this court because plaintiffs  
14 did not assert it in their complaint.

15           As detailed above, plaintiffs' complaint claims that the Governor's  
16 executive orders violated state statutory and constitutional time limits, and it seeks six  
17 declarations, each of which is based on the theory that the orders had expired. \_\_\_ Or at  
18 \_\_\_ (slip op at 16:10-17:3). In keeping with that theory, plaintiffs asked the circuit court  
19 to enjoin all of the orders, not only those that they contend affect their religious liberties.  
20 Plaintiffs *did* argue that the orders affected their religious practices, but they did so in  
21 connection with their argument about other factors that courts consider when determining  
22 whether to issue a preliminary injunction, specifically, whether the party requesting the

1 injunction will be irreparably harmed if the injunction is not issued and, if so, how the  
2 harm to that party compares to any harm that would be suffered by the other party and the  
3 public if the injunction is issued. In other words, plaintiffs did not assert a stand-alone  
4 free-exercise claim that the Governor's orders were invalid because they violate  
5 constitutionally protected religious freedoms. Moreover, plaintiffs did not base their  
6 preliminary injunction request on such a theory, as evidenced by the breadth of their  
7 request. And such a theory would not justify the preliminary injunction that the circuit  
8 court issued, which applies to all the Governor's coronavirus orders. It is not limited to  
9 those that, for example, limit the size of gatherings or close schools. Accordingly, we do  
10 not address that theory.<sup>16</sup>

### 11 III. CONCLUSION

12 As noted at the outset, this case is before this court for a determination

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<sup>16</sup> Furthermore, to prevail on such a theory, plaintiffs would have to prove that the Governor's executive orders violate their right to freely exercise of religious opinions, and it is well established under both the First Amendment's Free Exercise Clause and Article I, sections 2 and 3 of the Oregon Constitution that a regulation can affect a person's exercise of their religion without violating those provisions. *See, e.g., Prince v. Massachusetts*, 321 US 158, 166-67, 64 S Ct 438, 88 L Ed 645 (1944) ("The right to practice religion freely does not include liberty to expose the community \* \* \* to communicable disease[.]"). Again, as Chief Justice Roberts stated recently, "The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement \* \* \* and when [state officials] 'undertake to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'" *South Bay United Pentecostal Church*, 2020 WL 2813056 at 1, (Roberts, C.J., concurring) (quoting *Marshall v. United States*, 414 US 417, 427, 94 S Ct 700, 38 L Ed 2d 618 (1974)). "That is especially true where, as here, a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground." 2020 WL 2813056 at 1.

1 whether the circuit court erred in issuing a preliminary injunction based on its conclusion  
2 that the Governor's executive orders relating to the coronavirus violated a statutory time  
3 limit, specifically, the 28-day time limit in ORS chapter 433. As we have explained, the  
4 Governor's orders were issued pursuant to ORS chapter 401, and they are not subject to  
5 the time limit in chapter 433. Therefore, the circuit court's preliminary injunction was  
6 based on a legal error. Moreover, plaintiffs' alternative arguments do not provide a basis  
7 for maintaining the preliminary injunction. Accordingly, it is necessary to vacate the  
8 preliminary injunction.

9           Peremptory writ of mandamus to issue immediately, in terms consistent  
10 with this opinion.