THE ROLE OF STATE EMERGENCY POWERS IN CURBING THE OPIOID EPIDEMIC: A Case Study in Lessons Learned

Jeffrey Locke*
Lauren Dedon**

In 2017, over 72,000 Americans died of drug overdoses.

In response to the opioid epidemic, eight states have sought to "break glass in the case of emergency" and activate emergency powers to strengthen their overall statewide public health and public safety response efforts.

Despite limited precedent to guide the use of such powers with a longer-term public health epidemic, the collective response by these states offers significant policy and legal lessons learned for all states that face rising opioid fatalities. Additionally, the operational, policy, and regulatory strategies employed offer specific considerations for governors when crafting their own respective emergency responses.

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* Program Director, Homeland Security & Public Safety Division, National Governors Association.

** Senior Policy Analyst, Homeland Security & Public Safety Division, National Governors Association. The National Governors Association Center for Best Practices (NGA Center) would like to thank the countless state officials and national experts for their guidance and involvement in this work and their tireless commitment to ending the opioid epidemic. The NGA Center would also like to acknowledge the Centers for Disease Control and Prevention (CDC) for its generous support in developing this article. The contents of this article are solely the responsibility of the authors and do not necessarily represent the official views of the CDC.

This article is adapted in part from LAUREN DEDON, NAT'L GOVERNORS ASS'N, USING EMERGENCY DECLARATIONS TO ADDRESS THE OPIOID EPIDEMIC: LESSONS LEARNED FROM STATES (2018), https://www.nga.org/wp-content/uploads/2018/09/09-11-18-Issue-Brief-HSPS-Opioids-and-Emergency-Declarations.pdf [https://perma.cc/MZ7D-4GHX].

I. INTRODUCTION

The United States remains embroiled in a national opioid epidemic. "More than 70,200 Americans died from drug overdoses in 2017, including illicit drugs and prescription opioids—a [two]-fold increase in a decade."[1] From 1999 to 2016, more than 350,000 people died from an overdose involving any opioid, including prescription and illicit opioids.[2] On average, 130 Americans die every day from an opioid overdose.[3]

According to the Centers for Disease Control and Prevention (CDC), over 42,000 Americans died of an opioid overdose in 2016.[4] This staggering total represents a 28% increase over 2015,[5] and is driven, in part, by a surge in deaths from those fatally overdosing on illicit fentanyl—an inexpensive and powerful opioid that is up to fifty times more potent than heroin[6]—and other synthetic opiates. Data shows deaths related to synthetic opioids increased from 9,580 in 2015 to 19,413 in 2016.[7] These latest numbers represent a longer-term trend of rising opioid overdose fatalities, which has increased over 200% since 2000.[8] In 2015, an estimated 20.8 million people in the United States suffered from substance use disorders related to prescription opioids, and an estimated 591,000 people were addicted to heroin.[9]

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1. *Overdose Death Rates*, NAT'L INST. ON DRUG ABUSE (last updated Jan. 2019), https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates [https://perma.cc/A695-QMVK].

2. Puja Seth et al., *Overdose Deaths Involving Opioids, Cocaine, and Psychostimulants—United States, 2015–2016*, 67 MORBIDITY & MORTALITY WKLY REP. 349, 351 (2018), https://www.cdc.gov/mmwr/volumes/67/wr/pdfs/mm6712a1-H.pdf [https://perma.cc/UH4A-JSPW].

3. *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE (last updated Jan. 2019), https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis [https://perma.cc/ZLY5-ESWM].

4. Lawrence Scholl et al., *Drug and Opioid-Involved Overdose Deaths—United States, 2013–2017*, 67 MORBIDITY & MORTALITY WKLY REP. 1419, 1421 (2019), https://www.cdc.gov/mmwr/volumes/67/wr/pdfs/mm675152e1-H.pdf [https://perma.cc/7ARE-7T9F].

5. Seth et al., *supra* note 2, at 352.

6. *Synthetic Opioid Overdose Data*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 19, 2018), https://www.cdc.gov/drugoverdose/data/fentanyl.html [https://perma.cc/D5L7-62QN].

7. Seth et al., *supra* note 2, at 354 tbl.2.

8. Rose A. Rudd et al., *Increases in Drug and Opioid-Involved Overdose Deaths—United States, 2000–2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 1445, 1445 (2016), https://www.cdc.gov/mmwr/volumes/65/wr/pdfs/mm655051e1.pdf [https://perma.cc/PM3S-AWZ4].

9. JONAKI BOSE ET AL., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2015 NATIONAL SURVEY ON DRUG USE AND HEALTH 2, 11 (2016),

Furthermore, data shows 80% of heroin users start from misusing prescription opioids.[10] The sheer scale and scope of the opioid epidemic—with fatality totals that rival or surpass the HIV/AIDS epidemic at its peak—present policymakers at all levels with a series of vexing challenges and heartbreaking stories of the toll this crisis is taking.

At the federal level, on October 26, 2017, President Donald J. Trump directed the Department of Health and Human Services to declare the opioid epidemic a national public health emergency (PHE).[11] This emergency was initially declared for a ninety-day period and was later extended twice by then-Acting Secretary Eric Hargan for an additional ninety-day period on January 19, 2018 and April 20, 2018.[12] A White House statement issued with the original declaration noted that President Trump is "mobilizing his entire Administration to address drug addiction and opioid abuse by directing the declaration of a Nationwide Public Health Emergency to address the opioids crisis."[13]

These steps coincide with years of focus and action taken at the state level by governors and senior state officials to enact innovative strategies that utilize a variety of policy and programmatic levers to address the epidemic. There are numerous examples where states have taken the lead in combatting this epidemic, and the National Governors Association Center for Best Practices (NGA Center), in partnership with and support of the CDC, has supported states in developing and implementing such efforts. Between 2012 and 2015, the NGA Center provided technical assistance and training for thirteen states in developing and implementing comprehensive statewide

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https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR1-2015Rev/NSDUH-FFR1-2015Rev/NSDUH-FFR1-2015Rev/NSDUH-National%20Findings-REVISED-2015.pdf [https://perma.cc/Z3M4-VNEN].

10. *Opioid Overdose Crisis*, *supra* note 3.

11. U.S. DEP'T OF HEALTH & HUMAN SERVS., DETERMINATION THAT A PUBLIC HEALTH EMERGENCY EXISTS (Oct. 26, 2017), https://www.phe.gov/emergency/news/healthactions/phe/Pages/opioids.aspx [https://perma.cc/E3EY-9UDH].

12. U.S. DEP'T OF HEALTH & HUMAN SERVS., RENEWAL OF DETERMINATION THAT A PUBLIC HEALTH EMERGENCY EXISTS (Jan. 19, 2018), https://www.phe.gov/emergency/news/healthactions/phe/Pages/opioid-24Jan2018.aspx [https://perma.cc/JWT8-6VHN]; U.S. DEP'T OF HEALTH & HUMAN SERVS., RENEWAL OF DETERMINATION THAT A PUBLIC HEALTH EMERGENCY EXISTS (Apr. 20, 2018), https://www.phe.gov/emergency/news/healthactions/phe/Pages/opioid-20Apr2018.aspx [https://perma.cc/JJA5-SMMP].

13. Press Release, Office of the Press Sec'y, White House, President Donald J. Trump Is Taking Action on Drug Addiction and the Opioid Crisis (Oct. 26, 2017), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-taking-action-drug-addiction-opioid-crisis/ [https://perma.cc/57X7-FDLS].

action plans across both public health and public safety for addressing the opioid crisis.[14] The NGA Center provided year-long intensive technical assistance and training efforts for state team members, including governors' health and criminal justice policy advisors, state health officials, physician groups and other health care providers, attorneys general, legislators, the State Administering Agency (SAA) for criminal justice, and the Single State Agency (SSA) for substance abuse.[15]

In 2016, the NGA Center released *Finding Solutions to the Prescription Opioid and Heroin Crisis: A Road Map for States*.[16] This document was designed as a tool to help states respond to the opioid crisis across the continuum, from prevention through treatment and recovery, with effective public health and public safety strategies.[17] The strategies address the use of prescription opioids, illicit opioids, heroin, and synthetic opioids.[18] The road map has served as a foundation for several state opioid plans and was highlighted by the U.S. Department of Justice.[19]

In 2016 and 2017, the NGA Center provided a series of training and technical assistance opportunities to support thirteen states to address drug monitoring initiatives, increase treatment and recovery services for vulnerable populations (including justice-involved populations), and replicate Project ECHO teleconsultation clinics and trainings to enhance treatment quality and access.[20] These opportunities have yielded significant

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14. KELLY MURPHY ET AL., NAT'L GOVERNORS ASS'N, FINDING SOLUTIONS TO THE PRESCRIPTION OPIOID AND HEROIN CRISIS: A ROAD MAP FOR STATES 8 (2016), https://classic.nga.org/files/live/sites/NGA/files/pdf/2016/1607NGAOpioidRoadMap.pdf [https://perma.cc/RX5C-TM63].

15. *See generally id.*

16. *Id.* at 1.

17. *See id.* at 3.

18. *Id.*

19. Letter from Loretta E. Lynch, Attorney Gen., to Governors (Sept. 20, 2016), https://www.justice.gov/opioidawareness/file/894801/download [https://perma.cc/Q4XL-HG4N].

20. Of the thirteen states, some like Virginia and Minnesota participated in multiple trainings. *See* Kelly Murphy, Presentation at the 2017 Harold Rogers National PDMP Meeting (Sept. 7, 2017), https://www.pdmpassist.org/pdf/07-E4_Murphy.pdf [https://perma.cc/RJZ5-UZZP]; Press Release, Nat'l Governors Ass'n, States Stem Opioid Overdose Through Information Sharing (June 30, 2016), https://www.nga.org/news/states-stem-opioid-overdose-through-information-sharing/ [https://perma.cc/C3KQ-GKDT]; Press Release, Nat'l Governors Ass'n, States Improve Rural Access to Opioid Use Disorder Treatment (Oct. 21, 2019), https://www.nga.org/news/states-improve-rural-access-to-opioid-use-disorder-treatment/ [https://perma.cc/U8GX-R2RL]; Press Release, Nat'l Governors Ass'n, States Expand Opioid Addiction Treatment in Drug Courts, Corrections (Apr. 11, 2017), https://www.nga.org/news/press-releases/states-expand-opioid-addiction-treatment-in-drug-courts-corrections/ [https://perma.cc/Q7FV-M8PL].

results in the states that have participated, including legislation, executive orders, programmatic reforms, and the NGA Compact to Fight Opioid Addiction—a sign of collective action taken by governors to end the opioid crisis.[21] Outcomes from this work have included state-designed innovative drug-monitoring initiatives to track their own emerging drug trends; state-created data dashboards; data use agreements; statewide strategic plans; and report cards to monitor progress toward their goals in reducing the impacts of the opioid epidemic.[22] States have also focused on developing medication assisted treatment reentry programs in state correctional facilities.[23] Still others have improved treatment capacity through the creation of teleconsultation models to train new providers and peer recovery programs that connect individuals who have experienced an overdose to treatment and counseling services.[24] These efforts demonstrate states' commitment to addressing the crisis, but there is still a long way to go.

Continued escalation of opioid overdose fatalities has left states searching for new levers to address important public health and public safety objectives. One such lever is the use of emergency powers.[25] Some states have used emergency powers to provide governors with new avenues to enhance capabilities, coordination, and collaboration across state and local agencies.[26] State have also noted that emergency declarations may also allow governors to temporarily modify their state's legal framework to more quickly respond to an emergency.[27] Once an emergency declaration has been issued, a state government may also have authority to take certain "actions that are available

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21. During the 2016 NGA Winter Meeting, forty-six governors signed the NGA Compact to Fight Opioid Addiction and agreed that "collective action [was] needed" to end the opioid crisis. *Governors Sign Compact to Fight Opioid Addiction*, NAT'L GOVERNORS ASS'N (July 13, 2016), https://www.nga.org/news/governors-sign-compact-to-fight-opioid-addiction/ [https://perma.cc/NWA6-S34L] ("By signing the compact, governors [agreed] to redouble their efforts to fight the opioid epidemic with new steps to reduce inappropriate prescribing, change the nation's understanding of opioids and addiction and ensure a pathway to recovery for individuals suffering from addiction. This mark[ed] the first time in more than 10 years that governors [ ] developed a compact through NGA to spur coordinated action on an urgent national issue.").

22. *See A Compact to Fight Opioid Addiction*, NAT'L GOVERNORS ASS'N (July 13, 2016), http://natlgovassoc.wpengine.com/news/a-compact-to-fight-opioid-addiction/ [https://perma.cc/F64E-UTJC].

23. *See id.*

24. *See id.*

25. *See* Lainie Rutkow & Jon S. Vernick, *Emergency Legal Authority and the Opioid Crisis*, 377 NEW ENG. J. MED. 2512, 2512 (2017).

26. *See id.* at 2513.

27. *See id.* at 2512.

only for the duration of the emergency."[28] "These declarations and their accompanying powers give states flexibility to respond to exigent circumstances, including by reallocating state funds . . . , [overcoming regulatory barriers,] and mandating collaboration among public health and law-enforcement agencies."[29] However, before making such declarations and exercising emergency powers, governors and their senior state officials carefully considered whether this type of lever was appropriate for the actions that needed to be taken to address the epidemic in their states.[30] From 2014 to spring of 2018, eight states have activated their emergency powers in response to the opioid epidemic, including Alaska, Arizona, Florida, Maryland, Massachusetts, Pennsylvania, South Carolina, and Virginia.

This article is organized accordingly: Part II articulates the kind of emergency powers exercised to respond to the opioid epidemic, including disaster declarations and public health emergencies, and key features of the declaration process. Part III provides an overview of the pre-declaration process that states have used to evaluate whether emergency powers could apply to the opioid epidemic and how such powers could enhance existing state strategies. Part III also highlights the legal analysis that states have used in designing and executing the declaration. Part IV describes the emergency phase, including the operational implications for states and the types of discrete policy and regulatory strategies targeted. Part V provides an overview of lessons learned from states that utilized these powers to address the epidemic and offers specific recommendations for governors' offices to consider when designing and implementing their respective emergencies.

II. EMERGENCY POWERS DEFINED AND KEY FEATURES OF THE DECLARATION PROCESS

Every state has the legal authority to declare an emergency, disaster, and/or public health emergency. State laws specify how these legal declarations are made, most often through an executive order issued by the governor, though some states use other mechanisms (e.g., a statement from the health commissioner).[31] Many local and tribal governments have

28. *Id.* at 2513.

29. *Id.*

30. *Emergency Declarations in Eight States to Address the Opioid Epidemic*, ASTHO (Jan. 11, 2018), http://astho.org/StatePublicHealth/Emergency-Declarations-in-Eight-States-to-Address-the-Opioid-Epidemic/01-11-18/ [https://perma.cc/UR6F-RABH].

31. *See* Lainie Rutkow, *An Analysis of State Public Health Emergency Declarations*, 108 AM. J. PUB. HEALTH 1601, 1601 (2014).

analogous systems in place. States have utilized two types of emergency powers to address the opioid epidemic: disaster declarations or public health emergencies. Depending on the state, either may be declared via executive order.

As the lead executive official, governors are typically charged via constitutional provisions or statutes with protecting the public safety and welfare.[32] While each state's legal structure varies, every state vests executive powers with the governor to declare a state of emergency in response to a multitude of threats or hazards.[33] For example, governors are granted emergency powers through emergency management (or related) statutes to respond to disasters and carry out necessary responsibilities.[34] At least twenty-four states have codified their government's power to declare a public health emergency, with twenty-one states authorizing their respective governor to make that declaration determination.[35] Taken together, these two mechanisms have been the primary vehicles considered by state officials for use in declaring a state emergency for the opioid epidemic.

Historically, states and localities have used public health emergencies to respond to imminent threats and address needed policy objectives. Public health emergencies allow state and local governments to release funds, mobilize personnel and equipment, and waive certain legal impediments.[36] For example, in response to a potential infectious disease outbreak, states can use public health powers to quickly deploy emergency personnel and medical supplies (e.g., vaccines, antivirals).[37]

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32. *See* Patricia Sweeney & Ryan Joyce, *Gubernatorial Emergency Management Powers: Testing the Limits in Pennsylvania*, 6 PITT. J. ENVTL. PUB. HEALTH L. 149, 150 (2012).

33. *See id.*

34. *See* CARMEN FERRO, DAVID HENRY & THOMAS MACLELLAN, NGA CTR. FOR BEST PRACTICES, A GOVERNOR'S GUIDE TO HOMELAND SECURITY 3 (2010), https://www.nga.org/wp-content/uploads/2018/08/GovsGuidetoHomelandSecurity2010-FINAL.pdf [https://perma.cc/Z89G-T8KC].

35. Lainie Rutkow et al., *The Public Health Workforce and Willingness to Respond to Emergencies: A 50-State Analysis of Potentially Influential Laws*, 42 J.L. MED. & ETHICS 64, 66 (2014).

36. *See* Fazal R. Khan, *Ensuring Government Accountability During Public Health Emergencies*, 4 HARV. L. & POL'Y REV. 319, 320 (2010).

37. *See id.*

In 2016, alongside Hawaii[38] and Puerto Rico,[39] Florida Governor Rick Scott declared a public health emergency in four counties and directed his state health officer to take actions necessary to prevent the spread of the Zika virus and educate the public on prevention.[40] In 2015, former Indiana Governor Mike Pence, responded to a growing HIV outbreak by issuing a public health emergency to strengthen state coordination for HIV and substance use treatment, facilitate intergovernmental cooperation on a disaster response, and authorize local governments to establish targeted, short-term needle exchange programs.[41] Governor Pence's declaration reflected previous efforts by other government entities—such as the city of Philadelphia's public health emergency declared by Mayor Edward G. Rendell in 1992[42]—to use emergency powers to address the HIV epidemic through the establishment of syringe exchange programs.

Many exercises of emergency powers have been used to respond to natural disasters or acute and fast-moving public health crises, rather than prolonged public health challenges such as the opioid epidemic.[43] As states evaluated whether to use and apply emergency powers for the opioid epidemic, several questioned whether this was the most appropriate and judicious mechanism for seeking relief. In determining whether to issue a declaration, states examined previous uses of their statutory emergency schemes, analyzed other state opioid emergencies, and discussed whether they could move forward in activating emergency powers.[44]

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38. DAVID Y. IGE, GOVERNOR OF HAW., PROCLAMATION (Feb. 12, 2016), http://governor.hawaii.gov/wp-content/uploads/2016/02/160212_EmergencyProclamation_Dengue.pdf [https://perma.cc/U2HW-L85F].

39. U.S. DEP'T OF HEALTH & HUMAN SERVS., DETERMINATION THAT A PUBLIC HEALTH EMERGENCY EXISTS IN PUERTO RICO AS A CONSEQUENCE OF THE ZIKA VIRUS OUTBREAK (Aug. 12, 2016), https://www.phe.gov/emergency/news/healthactions/phe/Pages/zika-pr.aspx?TB_iframe=true&width=921.6&height=921.6 [https://perma.cc/QZ4A-44ZB].

40. *See* Fla. Exec. Order No. 16-29 (Feb. 3, 2016), https://www.flgov.com/wp-content/uploads/orders/2016/EO_16-29.pdf [https://perma.cc/53HY-6YBL].

41. *See* Ind. Exec Order No. 15-05 (Mar. 26, 2015), https://www.in.gov/governorhistory/mikepence/files/Executive_Order_15-05.pdf [https://perma.cc/QDP4-X45J].

42. Phila. Exec. Order No. 4-92 (July 27, 1992), https://www.phila.gov/ExecutiveOrders/Executive%20Orders/4-92.pdf [https://perma.cc/T3AS-FHAT].

43. *See* NETWORK FOR PUB. HEALTH LAW, EMERGENCY DECLARATION AUTHORITIES ACROSS ALL STATES AND D.C. (2015), https://www.networkforphl.org/_asset/gxrdwm/Emergency-Declaration-Authorities.pdf [https://perma.cc/RXX8-Q56D].

44. *See* James G. Hodge, Jr. et al., *Redefining Public Health Emergencies: The Opioid Epidemic*, 58 JURIMETRICS 1, 8–10 (2017).

To provide guidance to governors looking to advance opioid emergency declarations, NGA convened leading national experts—cabinet secretaries, state emergency managers, state public safety officials, governors' health policy advisors, public health experts, and academics—to discuss the latest research on effective emergency responses to the opioid epidemic. This report asserts that the use of state emergency powers offers a potentially useful pathway for states that have utilized all other policymaking vehicles (e.g., commissions, Task Forces) but face continued policy impediments requiring imminent removal and rising overdose fatalities.[45] Based on what has been learned from states, state emergency declarations can be useful in achieving specific policy objectives to address the escalating opioid epidemic. Additionally, states have grappled with how to set an appropriate duration of the emergency phase and manage its possible wind-down and conclusion. Therefore, based on the experience of states that have issued emergency declarations ("declaration states"), governors pursuing public health or disaster emergencies within the context of the opioid epidemic may wish to consider the following aspects in designing and implementing their declaration:

- Evaluate their respective statutory and legal landscape of the governor's emergency powers and/or the public health emergency powers;
- Debate and discuss internally and externally the rationale for declaring an emergency;
- Draft a declaration that addresses issues identified in the investigatory process;
- Engage stakeholders, including state officials, law enforcement, community health providers, and others early in the process;
- Develop metrics for process and outcome evaluation;
- Communicate a clear delineation of what success will look like and how the emergency phase will end; and
- Create a plan for post-declaration sustainability.[46]

45. MURPHY ET AL., *supra* note 14 at 5.

46. *See* Rutkow & Vernick, *supra* note 25, at 2513–14. *See generally* Rutkow, *supra* note 31.

Key features in this process identified by states to assist governors' offices in evaluating and delineating previous uses of emergency laws to address the opioid epidemic include:

- A record of previous attempts to identify and implement targeted public health and public safety strategies through statewide task forces, commissions, committees, and/or working groups;
- Analysis of how and why emergency legal authority is needed;
- Delineation of specific public health and public safety goals to achieve during the emergency that provide sufficient legal flexibility to address other aims should the epidemic continue to evolve;
- The potential impact the declaration can carry with the public and in helping expedite other unrelated efforts to the declaration's authority; and
- The operationalization and utilization of an incident command structure (or derivative emergency management structure).[47]

III. PRE-DECLARATION OVERVIEW: EVALUATING THE USE OF STATUTORY EMERGENCY POWERS TO ADDRESS EXIGENT GAPS AND NEEDS

Governors have the duty to ensure the safety and wellbeing of their respective states, and they carefully consider whether declaring a state of emergency is the right action. In determining whether exercising this type of gubernatorial power was an appropriate tool to utilize for the opioid epidemic, declaration states conducted a thorough analysis of how a declaration of emergency would impact the overall epidemic and what specific goals it would aim to achieve. This audit process included a scan of other state examples of opioid emergencies, an analysis of current gaps and needs within the state, an evaluation of applicable statutory and constitutional executive powers, and consensus on clear definitions of the parameters for success. Once these initial steps were complete, governors and key stakeholders were better positioned to make informed decisions as to whether

47. *See* Rutkow & Vernick, *supra* note 25, at 2513–14. *See generally* Rutkow, *supra* note 31.

to declare and what the potential short- and long-term impacts would mean for their states.

A. Identification of Needs and Gaps that Require Heightened Governmental Powers

Declaration states have weighed a mixture of factors when analyzing whether to declare a state of emergency or disaster for the opioid epidemic. One of their first steps in this process was to ask the simple question of why an emergency declaration was the appropriate option or lever to respond to existing opioid challenges. Some declaration states conducted a gap analysis to assess the state's current issues and needs. Governors and key state officials asked questions that include:

- What is the state's legal authority?
- What issues is it intended to solve?
- What is currently happening as a result of the epidemic?
- What should be happening?
- What services are needed and how do they need to be deployed?
- What data are available?
- What data are needed?
- Who are the key stakeholders?
- What does success look like?
- What new legal authorities can be exercised during and/or after the emergency phase?
- What political risks arise in declaring an emergency?
- Is there a better way to achieve similar results?
- What have other states with similar issues done related to emergency declarations?[48]

Although states vary in type and scope of executive authority, understanding lessons learned can help states anticipate potential challenges

48. *See generally* Rutkow & Vernick, *supra* note 25; Rutkow, *supra* note 31.

and pitfalls and be better positioned moving forward. Declaration states noted that conducting an internal and external audit process is crucial to long-term success and sustainability underlying the pre-declaration process.[49]

Declaration states also agreed that if a state chooses to declare an emergency or disaster declaration for the opioid epidemic, it must be for an identified goal. Most declaration states noted that exercising this type of authority should be used for more than just rhetorical or public-awareness raising purposes and should have additional objectives built into their declaration. After conducting a gap analysis, some states identified specific challenges that the declaration could address, alongside practical, concrete goals. For example, as in many states across the country, Arizona's data lag underscored the need for a declaration, as it previously took anywhere from six to eighteen months for overdose fatality data to be reported and received.[50] By declaring an emergency, the state removed certain programmatic and legal barriers to require enhanced surveillance and real-time reporting. Data were then acquired faster to more accurately target and deploy life-saving resources. Similarly in other states, a recognition that there were statutory or regulatory barriers preventing standing orders or enhanced distribution of naloxone helped them justify issuing a declaration. Determining the specific goal of the declaration and providing necessary flexibility to anticipate challenges were two additional steps in the pre-declaration process.[51]

Declaration states also examined whether their existing statutes provided a sufficient timeline to achieve their distinct objectives. Per statute, most emergency or public health emergency declarations last thirty or sixty days, with an option to renew the declaration at the end of each period.[52] States began to outline a pre-declaration, implementation, and post-declaration plan. They also discussed how this concentrated effort would fit with the state's longer-term response efforts. For post-declaration plans, declaration states spent considerable time either at the outset or during the emergency phase contemplating how to properly and appropriately prepare for the end of the emergency phase. States noted that it can be difficult to end an emergency if fatality rates continue to increase, notwithstanding progress in achieving the state's targeted policy strategies through the emergency declaration.

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49. *Cf.* Rutkow & Vernick, *supra* note 25; Rutkow, *supra* note 31.

50. *See* ARIZ. DEP'T OF HEALTH SERVS., ARIZONA OPIOID EMERGENCY RESPONSE JUNE 2017 TO JUNE 2018, at 3 (2018), https://www.azdhs.gov/documents/prevention/womens-childrens-health/injury-prevention/opioid-prevention/2017-opioid-emergency-response-report.pdf [https://perma.cc/AV5J-CYFU].

51. *See* Hodge et al., *supra* note 44, at 10.

52. Rutkow, *supra* note 31, at 1602.

Once a state had a clearly defined purpose for declaring and planning for implementation, declaration states were then prepared to engage outside stakeholders into the planning process. Governors and key state officials held a series of discussions with external stakeholders and decision-makers to solicit their feedback on the potential declaration.[53] These stakeholder groups included additional impacted state agencies, local law enforcement, county leadership, public health officials, judges and judiciary members, and legislators. Because exercising a governor's emergency authority might be thought of as outside the regular policy development process, governors and key state officials found it helpful to explain why an emergency policy was necessary and to solicit feedback during this process. Another important consideration was whether the state has fully utilized or exhausted alternative, more intermediate steps—such as opioid task forces/commissions, legislation, etc.—before declaring. Discussing with external stakeholders and soliciting feedback and input early on in the declaration process helped states garner buy-in, mitigate pushback, and improve chances for sustainability.

Finally, state officials deliberated on how the use of such a declaration will be perceived by the public. Although several declaration states have warned not to use this tool simply for rhetorical purposes, states have taken time to assess whether the use of the declaration can help broaden efforts to raise the profile and awareness of the epidemic. Using the pre-declaration process to identify the state's goal, plan toward implementation, and solicit input from external partners can help ensure that a state is poised to make the declaration and transition smoothly into implementation.

B. Evaluation and Application of Statutory Powers to Address the Epidemic

Parallel to the initial information gathering and gap analysis phase, state leaders assessed the emergency legal framework. States need to understand the parameters of their statutory power, anticipate challenges, and be prepared to respond to potential public objection. Evaluating the scope of the executive authority and determining how success should be measured are key in the pre-declaration process.[54]

One of the first actions taken by declaration states was tasking legal counsel from either the governor's office, attorneys general offices, or state

53. *See id.*

54. *See* Hodge et al., *supra* note 44, at 14–15; *see also* Gregory Sunshine, *The Case for Streamlining Emergency Declaration Authorities and Adapting Legal Requirements to Ever-Changing Public Health Threats*, 67 Emory L.J. 397, 413 (2018).

agencies to review existing executive emergency and disaster power statutes and constitutional provisions. Legal staff members were asked to provide analysis on the applicability of existing statutes for potential use in the opioid epidemic and identify potential legal challenges. As mentioned previously, all states are authorized to issue a declaration of "emergency" or "disaster" to facilitate response efforts.[55] Additionally, twenty-four states have the legislative authority to issue public health emergencies.[56] Upon review, legal counsel determined whether it was within the governor's power to declare an emergency or disaster declaration for the opioid epidemic, and followed the designated protocol to make this official declaration.

In evaluating the use of emergency or disaster powers in the opioid epidemic, senior state officials asked their respective legal counsels to weigh in on applicability under their statutory scheme. Among other factors, they assessed whether:

- Authority to use an emergency or disaster declaration rests with the governor, a state agency, and/or the legislature;
- There is a high statutory threshold to meet in order to properly declare a disaster within the state constitutional and/or statutory framework;
- Existing case law or attorney general opinions provided definitive guidance on the use of emergency or disaster declarations;
- Statutory or regulatory provisions set timeframe periods and renewal limitations; and
- Potential challenges may be brought over the declaration for the possible infringement of civil liberties, government overreach, or other breaches.

Ongoing conversations with gubernatorial staff and legal counsel are crucial. In Arizona, the governor's legal counsel and the attorney general's office determined whether an emergency was the appropriate mechanism for

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55. Rutkow, *supra* note 31, at 1601.

56. LEGAL DATA SET, *in Effect of Variations in State Emergency Preparedness Laws on the Public Health Workforce's Willingness to Response in Emergencies*, J. HOPKINS BLOOMBERG SCH. PUB. HEALTH: CTR. FOR L. & PUBLIC'S HEALTH, https://www.jhsph.edu/research/centers-and-institutes/center-for-law-and-the-publics-health/research/StateEmergencyPreparednessLaws.html [https://perma.cc/9KSL-SQJ8] (last visited May 13, 2019) (follow "Legal Data Set" hyperlink under "Additional Project Materials").

relief.[57] In addition, other declaration states noted that the CDC classification of the opioid crisis as an epidemic, helped provide a compelling basis for a state public health emergency or emergency disaster declaration.[58]

Though legal precedence is limited, courts generally uphold a governor's emergency authorities against challenges. General challenges that have arisen in the courts include a governor's emergency proclamation to enter into contracts with out-of-state private prisons due to overcrowding,[59] a governor's executive order to provide a maximum speed limit during a fuel shortage,[60] and a governor's state of emergency restricting "red zones" due to volcanic activity.[61] When questions around the governor's emergency declaration powers have arisen, state officials have also requested and used attorney general opinions as guidance.[62]

Currently, only one known lawsuit has challenged a governor's use of emergency powers in response to the opioid epidemic. In March 2014, former Massachusetts Governor Deval Patrick declared a public health emergency

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57. DOUGLAS A. DUCEY, ARIZ. GOVERNOR, DECLARATION OF EMERGENCY AND NOTIFICATION OF ENHANCED SURVEILLANCE ADVISORY: OPIOID OVERDOSE EPIDEMIC (June 5, 2017), https://azgovernor.gov/sites/default/files/related-docs/opioid_declaration.pdf [https://perma.cc/WP34-KL3T].

58. *Opioid Overdose: Understanding the Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 19, 2018), https://www.cdc.gov/drugoverdose/epidemic/index.html [https://perma.cc/RMT5-MBBL].

59. Cal. Corr. Peace Officers Ass'n v. Schwarzenegger, 77 Cal. Rptr. 3d. 844 (Ct. App. 2008). The California Court of Appeal held that Governor Schwarzenegger did not exceed his authority when, after invoking the Emergency Services Act, CAL. GOV'T CODE § 8550 et seq. (West 2013), to issue a "Prison Overcrowding State of Emergency Proclamation," he directed the California Department of Corrections and Rehabilitation to negotiate contracts for the transfer and housing of prisoners in facilities outside of California. *Cal. Corr. Peace Officers Ass'n* at 809–10.

60. Boyd v. Virginia, 215 S.E.2d 915 (Va. 1975). The court determined that the Governor acted within the limits of the authority delegated to him by state statute as the safety and welfare of the people of the state required the exercise of emergency measures pursuant to VA. CODE ANN. § 44-146.17(7) (West 1973). *Boyd* at 917.

61. Cougar Bus. Owners Ass'n v. Washington, 647 P.2d 481 (Wash. 1982). The court affirmed the dismissal, holding that the governor's actions were authorized by statute and were entirely discretionary. *Id.* at 488.

62. For example, see Emergency Expenditures, Ariz. Op. Att'y Gen. No. I01-021 (RO1-037) (Nov. 28, 2001), https://www.azag.gov/sites/default/files/2018-06/I01-021.pdf [https://perma.cc/NH4V-WSZQ]. The Director of the Arizona Division of Emergency Management requested an attorney general opinion on whether, pursuant to A.R.S. section 35-192, expenditures for an emergency may be authorized only in the fiscal year in which the emergency is declared. *Id.* Attorney General Napolitano issued an opinion that pursuant to A.R.S. section 35-192, expenditures may be authorized for an emergency in a fiscal year after that emergency is declared, provided that expenditures authorized for the subsequent fiscal year do not exceed $4 million and otherwise comply with applicable statutes and rules. *Id.*

for the opioid epidemic.[63] The declaration specifically called for the prohibition of the "prescribing and dispensing" of extended release hydrocodone, among other provisions.[64] In response to the declaration, Zogenix—a pharmaceutical manufacturer of one such drug, known as Zohydro—filed suit against the state challenging the state's regulatory restrictions.

In *Zogenix, Inc. v. Patrick*, a federal district court enjoined Massachusetts from enacting a statewide ban on Zohydro, an FDA-approved opioid analgesic drug.[65] Following this decision, the state issued emergency rules to require doctors, dentists, and other prescribers to examine a patient's substance use history and current medications before submitting a "letter of medical necessity" to a patient's pharmacist explaining the diagnoses and treatment plan for the use of hydrocodone-only extended release medication.[66] The rules also mandated that pharmacists could not dispense the drug if they do not receive the medical need letter, and that pharmacists must go over the drug's precautions and warnings with the patient.[67] Zogenix legally challenged the rules in court.[68] The court allowed Zogenix's motion to preliminarily enjoin the "letter of medical necessity" regulation but denied Zogenix's motion with respect to the pharmacist-only regulation.[69]

Legal counsels are integral to the declaration process. Declaration states advise that the governor's office engage attorneys early in the declaration process and maintain collaborative conversations with legal staff throughout implementation. In navigating specific parameters of emergency power provisions, legal counsel can also assist in evaluating how success measures may be determined or how a declaration can be legally sustained through

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63. Press Release, Mass. Dep't of Pub. Health, Public Health Advisory: Massachusetts Health Officials Issue Advisory to Public and Health Care Providers on Opiate Overdose (Mar. 28, 2014), https://www.mass.gov/files/documents/2016/07/pv/140328-opiate-advisory.pdf [https://perma.cc/2T26-Q928].

64. *Id.* at 5.

65. Susan Kelly & Natalie Grover, *U.S. Court Reverses Massachusetts Ban on Zogenix Pain Drug*, REUTERS (Apr. 15, 2014, 1:15 PM), https://www.reuters.com/article/us-massachusetts-zogenix/u-s-court-reverses-massachusetts-ban-on-zogenix-pain-drug-idUSBREA3E1T520140415 [https://perma.cc/3ZN2-7CBS]. The U.S. District Court for Massachusetts granted a preliminary injunction against the ban citing federal preemption, holding that by imposing its own conclusion about the safety and efficacy of Zohydro, the state was obstructing the U.S. Food and Drug Administration's constitutionally mandated charge. Zogenix, Inc. v. Patrick, No. 14-11689-RWZ, 2014 WL 1454696, at *1 (D. Mass. April 15, 2014).

66. 247 MASS. CODE REGS. 8.05, 9.04 (2019).

67. *Id.*

68. Zogenix, Inc. v. Patrick, No. 14-11689-RWZ, 2014 WL 3339610, at *2 (D. Mass. July 8, 2014).

69. *Id.* at *5.

renewal. They will also assist with ensuring that the appropriate statutes are utilized and precise language is incorporated within the declaration.

IV. IMPLEMENTING THE EMERGENCY PHASE: OPERATIONAL IMPACT AND STRATEGIES UNDERTAKEN

As states' chief executives, governors are positioned to bring together state agencies, local entities, and external partners to pursue and achieve solutions that promote public health and safety. The decision to use emergency powers is only the beginning. Declaration states note that transitioning state operations, fulfilling new policy and regulatory strategies, and defining success are crucial to ensuring positive outcomes from the declaration. The following sections provide an overview of each state's declaration, as well as how declaration states implemented and operationalized the emergency phase.

A. Issuance of Emergency Powers in Declaration States

Following the rigorous pre-declaration process, declaration states began executing their respective emergencies. Eight states have declared emergencies in varying sizes and scopes.[70] Multiple tribal governments have also issued formal emergency declarations.[71] The following represent highlights of each declaration in chronological order.

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70. It should also be noted that on March 28, 2018, Governor Kate Brown declared addiction and substance abuse a public health crisis in Oregon. The legislature also signed bills declaring an emergency related to alcohol and substance abuse addiction. The legislation included language addressing measures to combat the opioid epidemic and required the Alcohol and Drug Policy Commission to develop strategic plans for addiction prevention, treatment, and recovery. The executive order may be accessed here: Or. Exec. Order No. 18-01 (March 27, 2018), https://www.oregon.gov/gov/Documents/executive_orders/eo_18-01.pdf [https://perma.cc/F489-RGGW]. The accompanying bills may be accessed here: H.B. 4134, 79th Legis. Assemb., Reg. Sess. (Or. 2018), https://olis.leg.state.or.us/liz/2018R1/Measures/Overview/HB4134 [https://perma.cc/54MV-PL3N]; H.B. 4137, 79th Legis. Assemb., Reg. Sess. (Or. 2018), https://olis.leg.state.or.us/liz/2018R1/Measures/Overview/HB4137 [https://perma.cc/KX9K-QQTF].

71. *See* JAMES HODGE, JR., NETWORK FOR PUB. HEALTH LAW, OPIOID-RELATED HEALTH EMERGENCY DECLARATIONS 25 (2018), https://www.networkforphl.org/_asset/gdsc0n/Western-Region-Primer---Opioids-6-1-18.pdf [https://perma.cc/PA7Z-HZAW] (noting that Red Lake Nation, Leech Lake Band of Chippewa Indians, White Earth Nation, Mashpee Wampanoag Tribe, and the Bad River Band of Lake Superior Chippewas have all declared public health emergencies in response to the opioid epidemic).

1. Massachusetts

Governor Deval Patrick issued a Declaration of Emergency Detrimental to the Public Health on March 27, 2014, in response the number of opiate-related overdoses and amount of opiate addiction seen across the state.[72] In addition, the state noted the increase of synthetic and other powerful opiate medications with potential for abuse and overdose were being diverted for non-medical use.[73] The declaration provided for the prohibition of prescribing and dispensing of certain drugs, expanded access to naloxone for individuals in a position to assist a person experiencing an opiate-related overdose, and expanded access to naloxone for first responders.[74]

The public health emergency continues under Governor Baker's Administration as an ongoing initiative. In the continued fight to combat the epidemic, Governor Baker formed a task force which has developed sixty-five recommendations, including creating new pathways to treatment, increasing access to medication assisted treatment, utilizing data to identify hot spots and deploy appropriate resources, acknowledging addiction as a chronic medical condition, and reducing the stigma of substance use disorder.[75] As of May 2019, the declaration remains in effect.

2. Virginia

The Virginia Department of Health, with support from former Governor McAuliffe, issued a Declaration of Public Health Emergency in response to the opioid epidemic on November 21, 2016.[76] The declaration was intended to support the development of the Governor's Executive Leadership Team on Opioid Abuse and Addiction, support a standing order for naloxone, spur a federal declaration, and draw public attention to the disease of addiction before families gathered for the Thanksgiving holiday, which was seen as an opportunity for family members to support loved ones in need.[77] In preparing for the declaration, the Virginia Department of Health coordinated with the

72. Press Release, Mass. Dep't of Pub. Health, *supra* note 63.

73. *Id.* at 5.

74. *Id.* at 1–4.

75. Press Release, Charlie Baker, Mass. Governor, Baker-Polito Administration Announces More Reforms To Combat the Opioid and Heroin Epidemic (Nov. 14, 2017), https://www.mass.gov/news/baker-polito-administration-announces-more-reforms-to-combat-the-opioid-and-heroin-epidemic [https://perma.cc/58ZC-ZPZB].

76. Marissa J. Levine, Va. State Health Comm'r, Declaration of Public Health Emergency (Nov. 21, 2016), http://www.vdh.virginia.gov/commissioner/opioid-addiction-in-virginia/declaration-of-public-health-emergency/ [https://perma.cc/4EUB-NK67].

77. *Id.*

governor's office and other agencies, and notified other regional health departments. The public health emergency remains in effect as of June 2018 under the administration of his successor, Governor Ralph Northam.

3. Alaska

Governor Bill Walker declared a public health crisis through a Declaration of Disaster Emergency on February 14, 2017.[78] The declaration initiated a statewide overdose response program and authorized a statewide medical standing order for the distribution and administration of naloxone rescue kits.[79] The declaration was expanded on February 16, 2017, by Administrative Order 283, which provided for an incident command structure with participation of cabinet level officials from nine departments of state government and their senior staff under the governor's leadership to implement a coordinated response.[80] In addition to involving a number of state agencies in the response effort, the Incident Command System (ICS) also included local, tribal, federal, and non-governmental partners. The declaration also coincided with the launch of Governor Walker's public health and safety initiative, *Safer Alaska*.[81] The disaster declaration remained in effect until February 14, 2018, after which the naloxone standing order authority was established in Alaska statute and signed into law by the governor. The incident command structure remains operational as of May 2019.[82]

4. Maryland

Governor Larry Hogan issued an Executive Order on March 1, 2017, to declare an emergency in response to the heroin, opioid, and fentanyl overdose

78. Michelle Theriault Boots, *Alaska Governor Declares Opioid Abuse Public Health Disaster*, ANCHORAGE DAILY NEWS (Dec. 2, 2017), https://www.adn.com/alaska-news/2017/02/15/alaska-governor-declares-opioid-abuse-public-health-disaster/ [https://perma.cc/8CWU-CLU4].

79. *Id.*

80. *See* Alaska Admin. Order No. 283 (Feb. 16, 2017), https://gov.alaska.gov/admin-orders/administrative-order-no-283/ [https://perma.cc/9FK8-K63J].

81. *See* Press Release, Alaska Dep't of Labor & Workforce Dev., Alaska Awarded $1.2 Million To Expand Workforce Opportunities for Individuals Affected by the Opioid Crisis (July 12, 2018), http://labor.alaska.gov/news/2018/news18-30.htm [https://perma.cc/7GUU-S84N].

82. James Brooks, *Gov. Walker Signs Bill Extending Drug-Abuse Emergency Through 2021*, JUNEAU EMPIRE (Mar. 22, 2017), https://www.juneauempire.com/news/gov-walker-signs-bill-extending-drug-abuse-emergency-through-2021/ [https://perma.cc/Q6JX-H6XS].

crisis.[83] Informed by the state's overdose fatality data, prescribing data, and seizure data, the declaration was intended to implement efforts to reduce the number of fatalities and non-fatal overdoses throughout the state and establish state and local coordination structures to identify and respond to gaps in prevention, enforcement, treatment, and recovery services.[84]

Upon declaring, the governor appointed an individual to direct the statewide approach and to lead the state's Opioid Operational Command Center (OOCC) to drive opioid response priorities as outlined in the declaration.[85] Operated out of the Maryland Emergency Management Agency, the OOCC coordinates the efforts of twenty state agencies, federal partners, and state-level associations.[86] The OOCC also oversees twenty-four local jurisdiction Opioid Intervention Teams led by health officers and emergency managers and tasked by Governor Hogan with coordinating the local response to the opioid crisis.[87]

The declaration signaled that the opioid crisis was a top priority in the state and empowered departments to take bold steps to save lives. In addition to the declaration, Governor Hogan also announced a supplemental budget of $50 million in new funding (over five years) to fight the heroin and opioid epidemic.[88] The declaration elapsed in December 2018, but the opioid command center remains operational through executive order.[89]

5. Florida

Governor Rick Scott issued an Executive Order on May 3, 2017, directing a public health emergency across the state following the CDC declaring a

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83. Md. Exec. Order No. 01.01.2017.02 (Mar. 1, 2017), https://governor.maryland.gov/wp-content/uploads/2017/03/0391_001.pdf [https://perma.cc/Q724-F36H].

84. *Id.* at 2–3.

85. *Id.* at 2.

86. *See* OPIOID OPERATIONAL COMMAND CTR., MARYLAND INTER-AGENCY HEROIN AND OPIOID COORDINATION PLAN 7, app. C (2019), https://beforeitstoolate.maryland.gov/wp-content/uploads/sites/34/2018/10/Coordination-Plan-_-Midyear-10.4.pdf [https://perma.cc/L5HT-K7WR].

87. *Id.* at 10.

88. *See* Press Release, Office of Governor Larry Hogan, Governor Larry Hogan To Submit Supplemental Budget (Mar. 24, 2017), https://governor.maryland.gov/2017/03/24/governor-larry-hogan-to-submit-supplemental-budget/ [https://perma.cc/E254-VKJM].

89. Md. Exec. Order No. 01.01.2018.30 (Dec. 12, 2018), https://governor.maryland.gov/wp-content/uploads/2018/12/Executive-Order-01012018.30.pdf [https://perma.cc/6GU6-PPY6].

national opioid epidemic.[90] The declaration allowed the state to accelerate the dispersal of more than $27 million in federal funding from HHS's Opioid State Targeted Response Grant awarded to the state in April 2017.[91] These funds were meant to provide prevention, treatment, and recovery support services.[92] Without the declaration, it would have taken months longer for the state to distribute these funds to local communities. The declaration also allowed Florida's department of children and families, department of health, and department of law enforcement to suspend any statute, rule, ordinance, or order to procure necessary supplies, services, and temporary premises, which helped accelerate the dispersion process.[93] In addition to declaring a public health emergency, the Florida surgeon general issued a standing order for naloxone to ensure first responders have immediate access to the drug to respond to opioid overdoses.[94] The declaration remained in effect until October 27, 2017.

6. Arizona

Governor Doug Ducey issued the Opioid Overdose Epidemic Declaration of Emergency on June 5, 2017, to address the growing number of opioid deaths in the state.[95] The declaration gave the state the ability to coordinate public health efforts between state, local, and private-sector partners.[96] It also allowed the state to utilize all of its public health resources, including accessing a state-based public health emergency fund and leveraging monies to distribute naloxone throughout local communities.[97]

The declaration also called for heightened surveillance, which required enhanced data reporting of overdose deaths from doctors and hospitals. The Arizona Department of Health Services was also authorized to develop rules

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90. Fla. Exec. Order No. 17-146 (May 3, 2017), https://www.flgov.com/wp-content/uploads/2017/05/17146.pdf [https://perma.cc/YRU3-4YLV].

91. Press Release, Fla. Dep't of Health, Gov. Scott Directs Statewide Public Health Emergency for Opioid Epidemic (May 3, 2017), http://www.floridahealth.gov/newsroom/2017/05/050317-health-emergency-opioid-epidemic.html [https://perma.cc/33GW-ALRS].

92. *Id.*

93. *See* Fla. Exec. Order No. 17-146, *supra* note 90.

94. *Id.*

95. DUCEY, *supra* note 57.

96. *Id.*

97. Press Release, Office of the Governor Doug Ducey, Governor Ducey Declares Statewide Health Emergency in Opioid Epidemic (June 5, 2017), https://azgovernor.gov/governor/news/2017/06/governor-ducey-declares-statewide-health-emergency-opioid-epidemic [https://perma.cc/557D-UQE5].

related to opioid prescribing and treatment, guidelines for health care providers on responsible hiring practices, and training for local law enforcement agencies on proper naloxone use. The governor's declaration also served as a catalyst for the development and implementation of the state's Opioid Action Plan.[98] On January 26, 2018, Arizona passed the Arizona Opioid Epidemic Act, which included a number of provisions recommended in the Action Plan.[99] With the Opioid Action Plan enshrined in state law, Governor Ducey ended the formal emergency public health declaration on May 29, 2018.[100]

7. South Carolina

Governor Henry McMaster signed an Executive Order proclaiming a statewide public health emergency on December 18, 2017.[101] The order established the Opioid Emergency Response Team to "ensure coordination and collaboration among government agencies, private entities and associations, and state and local law enforcement authorities."[102] The order specified the members of the team, which included state law enforcement, the attorney general, the adjutant general, federal representatives, and other local law enforcement and health officials.[103] The order directed the team to meet monthly for the first six months of the declaration, and on an as-needed basis thereafter.[104] Pursuant to the order, the governor also authorized the adjutant general to enter into mutual assistance and support agreements with law enforcement agencies as needed to support drug interdiction, counterdrug activities, and demand reduction activities.[105] In addition to the declaration of

98. ARIZ. DEP'T OF HEALTH SERVS., OPIOID ACTION PLAN 2 (2017), http://www.azdhs.gov/documents/prevention/womens-childrens-health/injury-prevention/opioid-prevention/opioid-action-plan.pdf [https://perma.cc/5UYG-3E3X].

99. *See* S.B. 1001, 53rd Leg., 1st Spec. Sess. (Ariz. 2018); *see also* OFFICE OF THE GOVERNOR DOUG DUCEY, ARIZONA OPIOID EPIDEMIC ACT POLICY PRIMER 3, https://azgovernor.gov/sites/default/files/related-docs/arizona_opioid_epidemic_act_policy_primer.pdf [https://perma.cc/99ZD-WBVC].

100. Press Release, Office of the Governor Doug Ducey, In New Front Against Opioid Epidemic, Formal Statewide Health Emergency Declaration Comes to a Close; Fight Against Crisis Just Beginning (May 29, 2018), https://azgovernor.gov/governor/news/2018/05/new-front-against-opioid-epidemic-formal-statewide-health-emergency [https://perma.cc/FR3D-C5AU].

101. S.C. Exec. Order No. 2017-42 (Dec. 18, 2017), https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2017-12-18-FILED-Executive-Order-No-2017-42.pdf [https://perma.cc/LR5T-E8P4].

102. *Id.* at 3.

103. *Id.* at 4.

104. *Id.*

105. *Id.* at 3.

a public health emergency, Governor McMaster also issued an executive order directing the state Department of Health and Human Services to limit initial opioid prescriptions for acute and post-operative pain to a maximum of five days for state Medicaid recipients.[106] The declaration remains in effect as of May 2019.

8. Pennsylvania

Governor Tom Wolf signed a Proclamation of Disaster Emergency for the opioid epidemic on January 10, 2018.[107] The statewide disaster declaration was issued to enhance a coordinated state and local response effort, increase access to treatment, increase data collection, and improve tools for law enforcement and families. For example, the declaration amended the current state standing order to allow dispensing by first responders, authorizing emergency medical services providers to leave behind a dose of naloxone to individuals at-risk of overdose or their family members and loved ones.[108]

In the pre-declaration phase, the governor's office asked each state agency to identify hurdles in opioid response activities.[109] Similar to other state efforts, Pennsylvania utilizes a command system structure for its response, led by the Pennsylvania Emergency Management Agency (PEMA), which also houses the state's command center to track progress and enhance coordination of health and public safety agencies.[110] "Among the declaration's specifics [were] thirteen key initiatives that [represent] the culmination of a collaboration between all state agencies, with focus on the departments of Health, Drug and Alcohol Programs, [PEMA], the Pennsylvania Commission on Crime and Delinquency, and . . . State Police."[111] The emergency declaration allows for the waiver of certain regulations that inhibit the state's overall response.[112] The declaration was

106. S.C. Exec. Order No. 2017-43 (Dec. 18, 2017), https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2017-12-18-FILED-Executive-Order-No-2017-43.pdf [https://perma.cc/6873-VJ3G].

107. Press Release, Governor Tom Wolf, Governor Wolf Declares Heroin and Opioid Epidemic a Statewide Disaster of Emergency (Jan. 10, 2018), https://www.governor.pa.gov/governor-wolf-declares-heroin-and-opioid-epidemic-a-statewide-disaster-emergency/ [https://perma.cc/GP8F-UUFN].

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

renewed consecutively on April 4, June 28, and September 24 for additional 90-day periods.[113]

B. Transitioning to "The New Normal": Short and Long-Term Impacts on State Operations

Emergency declarations greatly affect state operations. Most declaration states have utilized the emergency or disaster declaration to strengthen their operational command reporting structure and sharpen their overall opioid overdose epidemic response. Declaration states have also noted that planning for sustainability should occur in both the pre-declaration phase as well as throughout the implementation phase to ensure an effective long-term response. Planning for short- and long-term impacts on state operations is crucial during the emergency declaration period and must reflect the state's enduring goals and strategies for fighting the epidemic.

1. Short-Term Impacts: Translating Emergency Response Frameworks

Several states have created opioid emergency response frameworks through the establishment of ICS or a similar derivative. ICS is a fundamental element of incident management and reflects the Federal Emergency Management Agency's National Incident Management System (NIMS).[114] NIMS is a systematic approach to guide agencies at all levels of government, nongovernmental organizations, and the private sector to work together seamlessly and manage incidents involving all threats and hazards—regardless of cause, size, location, or complexity—to reduce morbidity and

113. Press Release, Governor Tom Wolf, Governor Wolf Announces Progress, Renewal of Opioid Disaster Declaration (Apr. 4, 2018), https://www.governor.pa.gov/governor-wolf-announces-progress-renewal-opioid-disaster-declaration/ [https://perma.cc/ZZ82-NZRG]; Press Release, Governor Tom Wolf, Governor Wolf Announces Renewal of Opioid Disaster Declaration, Passage of Legislation To Aid in Crisis (June 28, 2018), https://www.governor.pa.gov/governor-wolf-announces-renewal-of-opioid-disaster-declaration-passage-of-legislation-to-aid-in-crisis/ [https://perma.cc/KBN4-4KUE]; Tom Wolf, Pa. Governor, Amendment to Proclamation of Disaster Emergency (Sept. 24, 2018), https://www.governor.pa.gov/wp-content/uploads/2018/09/20180924-Opioid-Disaster-Emergency-Extension-Sept-24.pdf [https://perma.cc/9JWX-DUT3].

114. *National Incident Management System*, FED. EMERGENCY MGMT. AGENCY, https://www.fema.gov/national-incident-management-system [https://perma.cc/TV8A-NQCM] (last updated May 7, 2019, 11:16 AM).

mortality rates.[115] In so doing, state use of ICS in the opioid context provides standardization through consistent terminology and established organizational structures.[116]

ICS command structures organize state, local, and other partners together into one hub for opioid coordination and communication. For some declaration states, emergency responses required utilizing and staffing hubs such as their emergency operations centers (either virtually or in-person). In using an ICS framework, an Incident Commander is tapped to lead the state's response on behalf of the governor, with all communications flowing up and through this individual. For some declaration states, an experienced emergency management agency and personnel either led the overall effort or were integral to the process.

Although public health may not always be the lead agency in a traditional ICS framework, it should be prioritized as a lead partner in an opioid emergency response effort. For example, "the [Arizona Department of Health Service] ADHS team immediately sprang into action and activated the Health Emergency Operations Center (HEOC) within hours of the Governor's emergency declaration. More than seventy-five agency staff across ADHS responded to the Governor's calls to action."[117] As part of the declared state of emergency, ADHS was given the responsibility to:

> Provid[e] consultation to the Governor on identifying and recommending necessary elements for Enhanced Surveillance Advisory;
>
> Initiat[e] emergency rule making . . . for opioid prescribing and treatment within health care institutions;
>
> Develop[] guidelines to educate []providers on responsible prescribing practices;
>
> . . . [P]rovid[e] training to local law enforcement agencies on proper protocols for carrying, handling, and administering naloxone in overdose situations; and
>
> Provid[e] a report on findings and recommendations . . . to the Governor.[118]

Underneath the Incident Commander, declaration states utilized the command structure to divide their opioid response into relevant sections (e.g., planning, operations, finance, etc.). For staff focused on planning, work plans

115. *Id.*
116. *Id.*
117. ARIZ. DEP'T OF HEALTH SERVS., *supra* note 50, at 3 (2017).
118. *Id.* at 3.

were designed and metrics were established. Likewise, operations staff incorporated programmatic efforts from a diversity of policy areas, including public health, public safety, and local efforts. Finance staff analyzed existing state resource allocation and identified possible additional funding streams from state and federal coffers.

By using an ICS framework, declaration states were able to quickly scale up coordination and response activities of state agencies during the mobilization period and following the issuance of the declaration. ICS requires interagency coordination amongst key agencies (e.g., public health, public safety) and assists in operational alignment. This structure facilitates data sharing between public health and public safety agencies and personnel. As the response becomes more comprehensive, it allows for gradual expansion from a core number of agencies to additional departments (e.g., commerce, National Guard, veteran's affairs, education). As such, the state can draw upon internal expertise and experience of handling other types of disasters or emergencies (public health, natural disasters), and apply appropriate lessons learned to the opioid epidemic response.

Declaration states emphasized training on the ICS throughout the emergency (e.g., regular meetings and briefings) and the importance of ensuring public health serves in a leading management role. In orienting their entire state apparatus into an ICS framework, states also required a change in the responsibilities of key personnel. For example, certain states changed personnel responsibilities to allow for deputy incident commanders to focus full-time on the declaration response. Alaska operated its ICS with existing staff that included both personnel experienced in ICS and emergency management of health events and staff with little to no experience in emergency response. In accelerating coordination between Alaskan departments, key personnel within the coordination command structure held daily meetings with their respective command section chiefs and biweekly meetings with the incident commander. Not only were pace and tempo accelerated, state situational reports on relevant declaration policy issues were provided in meetings with the governor.

Clearer lines of coordination, communication, authorities, and decision-making provided declaration states with several benefits, including:

- Accelerated coordination between public health and law enforcement;
- Strengthening opioid intergovernmental response and coordination efforts between states and locals;

- Increasing information sharing and reporting practices. ICS situational reports to incident commanders (and, by extension, weekly briefings to governors, as requested by Alaska Governor Walker) included progress towards key metrics such as county actions, naloxone kit delivery, treatment access, policy changes in related fields, media updates, and epigraphs of overdose deaths with trend lines;
- Bringing together subject matter experts in policy sections allowed for a more coherent whole of government policy response; and
- Greater flexibility and recalibration needed in light of the scale of the response required.[119]

Declaration states noted a few challenges with using ICS for the opioid epidemic. First, some declaration states acknowledged that the use of this framework could be a hard sell to those not familiar with it. For example, ICS has its own command structure, vocabulary, and operational language, which requires training and buy-in from new staff. As a result, acclimating agency staff early in the process and jointly identifying targeted goals are critical. Furthermore, the ICS structure needs flexibility, but must be implemented with fidelity. The opioid epidemic is different than a hurricane or wildfire—emergencies more typically associated with an activated ICS—and therefore certain aspects will need to be tailored to the response.

While states reported significant benefits from the use of declarations, it remains an open question as to the impact of ramp down efforts in declaration states. With declarations tied to statutory timelines, some states are faced with ending the "emergency" phase of their response. Historically, states and localities have used emergency or disaster declarations for shorter-term responses. Using emergency declarations in response to a chronic condition may require continued state-level innovation to sustain the impact over time.

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119. *See generally* NAT'L GOVERNORS ASS'N, GOVERNORS' RECOMMENDATIONS FOR FEDERAL ACTION TO END THE NATION'S OPIOID CRISIS (2018) https://docs.house.gov/meetings/IF/IF14/20180321/108049/HHRG-115-IF14-20180321-SD036.pdf [https://perma.cc/4FA6-Q6MG]; U.S. Dep't. of Health & Human Servs., *Emergency Management and the Incident Command System*, PUB. HEALTH EMERGENCY (last updated Feb. 14, 2012), https://www.phe.gov/preparedness/planning/mscc/handbook/chapter1/Pages/emergencymanagement.aspx [https://perma.cc/DG7J-XD3Z].

2. Long-Term Impacts: Transitioning to a Sustainable Structure

In thinking through how their declaration efforts and gains made can be sustained over the long-term, states have identified pace and tempo, new monies, and institutionalized partnerships as key factors in transitioning from an emergency into normal operations. Traditional disaster recovery responses require states to go through a transition process in returning to a more sustainable, day-to-day rhythm of state operations. While still in the emergency phase, states typically plan for operations after an emergency ends. In the opioid context, declaration states have emphasized that they do not want to ramp down completely but rather strive to sustain their responses for staff long-term. In internal messaging, states have identified that their "new normal" as a heightened state of urgency.

Funding is always a factor when considering sustainability. Certain declaration states have identified ways to repurpose existing money and/or secure new and additional resources. As the emergency phase ends, states have turned their attention to ensuring that programmatic advancements in emergency goal areas (e.g., naloxone deployment, data sharing, criminal justice, surveillance methods, lab capacity) are achieved. In Maryland, the Opioid Operational Command Center, Department of Health, and Governor's Office of Crime Control & Prevention announced more than $22 million in new state money including $2.1 million from the Twenty First Century Cures Act.[120] Such money was used for prevention, enforcement, and treatment efforts.[121] In Arizona, officials were able to access their emergency public health fund, which contained $500,000 and required authorization for use.[122] In addition, as part of the Arizona Opioid Epidemic Act passed on January

120. Press Release, Office of Governor Larry Hogan, Hogan-Rutherford Administration Announces Over $22 Million To Fight Heroin and Opioid Epidemic (June 7, 2017), http://governor.maryland.gov/2017/07/07/hogan-rutherford-administration-announces-over-22-million-to-fight-heroin-and-opioid-epidemic/ [https://perma.cc/5UA5-WESW].

121. *Id.* Funding allocations included:

> $4 million total distributed to local Opioid Intervention Teams . . . for each jurisdiction to determine how best to fight the . . . epidemic; . . . $1.25 million to add to existing efforts to disrupt and dismantle drug trafficking organizations; . . . $3.2 million to expand treatment beds statewide, as well as a tracking system; . . . and $2.7 million to improve access to naloxone statewide.

Id.

122. Ken Alltucker, *Arizona Declares Opioid Crisis a Public-Health Emergency*, AZ CENT. (June 5, 2017, 12:21 PM), https://www.azcentral.com/story/money/business/health/2017/06/05/arizona-declares-opioid-crisis-public-health-emergency/371208001/ [https://perma.cc/Y96A-3BMM].

25, 2018, $10 million was allocated to help uninsured and underinsured Arizonans access addiction treatment, which also included over $800,000 for prevention efforts.[123] Certain declaration states have noted that the tool was also used as a signal to state legislatures to enact more money for the crisis.

Institutionalized partnerships are also key for sustainability purposes. During the emergency period, declaration states sought to formalize inter-agency partnerships through actions such as data usage agreements, regular meetings, other collaborative efforts. Governors' offices can play key roles in ensuring that the transition into the non-emergency phase ensures that agency stakeholders continue to share data in a timely manner. Declaration states have also formalized task forces and other bodies to maintain oversight over continued activities and segue into a more sustainable response. For example, Alaska formed the Office of Substance Misuse and Addiction Prevention[124] and Maryland established the Opioid Operational Command Center to oversee state and local coordinating bodies and develop a comprehensive statewide plan.[125] As a result of the declaration in Arizona, the state has required opioid overdose and death data reporting by administrative rule and passed significant legislation in an emergency session of the legislature called by Governor Ducey.[126] The South Carolina proclamation established the Opioid Emergency Response Team, which was tasked with drafting a statewide plan, identifying funding streams, and making recommendations for future response efforts.[127]

Legal experts have noted that emergency or disaster declarations are intended to be used for specified periods, not longer terms. Although declarations may be renewed, planning for sustainability—whether through institutionalized partnerships, changes in administrative rules/procedures, or new legislation—should be considered throughout the declared state of emergency. Planning for sustainability supports ongoing operations and may mitigate the possibility for legal challenges.

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123. SENATE RESEARCH, FACT SHEET FOR S.B. 1001/H.B. 2001, at 1 (Ariz. 2018), https://www.azleg.gov/legtext/53leg/1S/summary/S.100_ASENACTED.pdf [https://perma.cc/Z3GT-HT8G] (noting appropriations of $10 million in General Fund moneys to the Substance Abuse Disorder Services funding and $400,600 each to the Department of Health Services and the Attorney General for opioid education and prevention efforts).

124. *Office of Substance Misuse and Addiction Prevention*, ALASKA DEP'T OF HEALTH & SOC. SERVS., http://dhss.alaska.gov/osmap/Pages/default.aspx [https://perma.cc/P2BQ-7AKX] (last visited May 13, 2019).

125. *Maryland Opioid Operational Command Center*, BEFORE IT'S TOO LATE, https://beforeitstoolate.maryland.gov/about-the-opioid-operational-command-center/ [https://perma.cc/G2ZA-87V7] (last visited May 13, 2019).

126. Press Release, Office of the Governor Doug Ducey, *supra* note 97.

127. S.C. Exec. Order No. 2017-42, *supra* note 101.

C. Delivering on New Policy and Regulatory Strategies

Once an emergency is declared and response efforts are in place, it is time to execute. A primary goal of opioid emergency declarations is to reduce the number of overdoses and overdose fatalities. These declarations allow governors to create a sustainable, systematic effort that strengthens coordination and collaboration to overcome certain statutory, legislative, or regulatory barriers. In addition to acknowledging the existence of an emergency, each declaration outlines a number of strategies to implement or pursue, and immediate next steps to respond to the crisis. States should then implement these identified strategies, determine metrics for assessing outcomes, and define what success means to the state for an impactful, sustained response.

1. Types of Strategies Pursued

The exercise of emergency declaration powers allows for states to identify and address potential points of vulnerability for a select period of time covered under the declaration. These strategies include increasing access to naloxone, data sharing, reducing regulatory barriers, treatment, funding, prescribing practices, and other response activities.

Naloxone Distribution. Some declaration state responses within the emergency allowed for better identification of naloxone needs, heat mapping, and subsequent targeting and distribution of naloxone. States ensured that data, was shared with local governmental units. The emergency response also allowed for more naloxone kits to be ordered, assembled, and distributed to local partners. Arizona's declaration, for example, empowered "public health efforts between state, local and private-sector partners and allow[ed] the state to utilize all of its public health resources, including distributing naloxone throughout the community to help prevent drug overdose deaths."[128] Declarations in Alaska, Florida, and Massachusetts allowed for first responders to carry naloxone.[129] In Arizona, the declaration also allowed for additional trainings for and increased access to naloxone for first responders.[130]

Standing Orders for Naloxone. In states that lacked standing orders for naloxone or possessed standing orders that required amending, this

128. Press Release, Office of the Governor Doug Ducey, *supra* note 97.

129. *See* Boots, *supra* note 78; Press Release, Fla. Dep't of Health, *supra* note 91; Press Release, Mass. Dep't of Pub. Health, *supra* note 63.

130. DUCEY, *supra* note 57.

emergency lever allowed for the political space to make enable this change without legislation. For example, declarations in Alaska and Florida enabled statewide standing orders for the distribution of naloxone. In Pennsylvania, the declaration "enables Emergency Medical Services providers to leave behind naloxone by amending the current standing order."[131] It also "allow[ed] pharmacists to partner with other organizations to increase access to naloxone."[132] This allowed for expanded access to the overdose medication to first-responders, community leaders, and the public as a whole. Arizona and Virginia also used their emergency powers for standing order to allow the public to obtain naloxone.

Data Sharing. State emergency or disaster responses also allowed for further insight into data patterns and enhanced data sharing frameworks within their state. For example, certain states increased their insight into provider behavior, enhanced their ability to provide bio-samples of collected drugs, and strengthened evaluation processes of past overdose cases to see if there were missed opportunities to have them access treatment. After experiencing issues with sharing data across agencies, Massachusetts created agency memoranda of understanding (MOU) and data use agreements to sustain agency exchange of data. Other states leveraged the emergency declaration to target the drafting of MOUs with state agencies, including fusion centers, to institutionalize relationships. Maryland's declaration established improved channels for sharing data between state and local partners,[133] and legislation was introduced to resolve information-sharing gaps.[134] In South Carolina, the declaration authorized the adjutant general to enter into mutual assistance and support agreements with law enforcement agencies as needed to support drug interdiction, counterdrug activities, and demand reduction activities.[135] Although declaration states still face challenges with having public safety and public health share data and information, the emergency process builds relationships to help address issues long-term.

Data Timeliness and Surveillance. An emergency declaration can also allow for better data timeliness. For example, Arizona's declaration sought

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131. Press Release, Governor Tom Wolf, *supra* note 107 (capitalization throughout the original omitted).

132. *Id.* (capitalization throughout the original omitted).

133. *See* HEROIN & OPIOID EMERGENCY TASK FORCE, INTERIM REPORT 13 (2015), https://governor.maryland.gov/ltgovernor/wp-content/uploads/sites/2/2015/08/Draft-Heroin-Interim-Report-FINAL.pdf [https://perma.cc/4KUX-FJUR].

134. H.B. 359, 2018 Leg., Reg. Sess. (Md. 2018); *see* MD. CODE ANN., HEALTH-GEN. § 13-3602 (LexisNexis 2019).

135. S.C. Exec. Order No. 2017-42, *supra* note 101, at 3.

to secure enhanced surveillance for real-time inpatient hospitalization records, real-time emergency department data, and quicker analysis and production of death certificates.[136] Declaration states have also reported efforts to strengthen state laboratory blood draw efforts and a strengthened capacity for administering and sharing toxicology test results. In Arizona, surveillance data were critical in setting up hot spotting capacity and geographic detail regarding the occurrence and frequency of fatal and non-fatal overdoses, as well as naloxone deployment in different parts of each respective state. In some states, such surveillance methods allowed for spike alerts to be sent to public health and safety partners, thus allowing for a reallocation of existing resources. Declarations in Arizona, Massachusetts, and Pennsylvania also provided for enhanced prescription drug monitoring programs (PDMP) surveillance.[137]

Addressing Regulatory Barriers. State declarations have allowed for the promulgation of emergency rules that can last for set periods, subject to renewal. Identifying and temporarily removing regulatory barriers are key to initial state responses. Pennsylvania waived "regulations to allow pharmacists to partner with other organizations, including prisons and treatment programs to make naloxone available to at-risk individuals upon discharge from these facilities."[138] The Arizona declaration required ADHS to develop rules related to opioid prescribing and treatment, guidelines for health care providers on responsible prescribing practices, and training for local law enforcement agencies on proper naloxone use.[139]

Medication Assisted Treatment. States have used the emergency process to examine ways to strengthen access to medication-assisted treatment (MAT) and other community services. The Pennsylvania declaration identified accelerating and expanding access to treatment as a key priority.[140] The declaration called for waiving the face-to-face physician requirement for narcotic treatment program admissions, expanding access to MAT by removing the regulatory provision to permit dosing at satellite facilities, ending annual licensing requirements for high-performing drug and alcohol treatment facilities, removing prior authorization for MAT in the Medicaid program, and eliminating certain fees and licensing requirements.[141] Florida

136. *See* Press Release, Office of the Governor Doug Ducey, *supra* note 97.

137. *See* DUCEY, *supra* note 57; Press Release, Mass. Dep't of Pub. Health, *supra* note 63; Press Release, Governor Tom Wolf, *supra* note 107.

138. Press Release, Governor Tom Wolf, *supra* note 107.

139. DUCEY, *supra* note 57.

140. Press Release, Governor Tom Wolf, *supra* note 107.

141. *Id.*

also emphasized providing prevention, treatment, and recovery services as a priority.[142] Additionally, through its declaration and Opioid Action Plan, the Arizona Opioid Action Plan called for expanding and improved access to treatment, including access to naloxone and injectable naltrexone for individuals leaving state and county correctional institutions and increase access to MAT therapy for individuals with opioid-use disorder while incarcerated.[143] Florida and Maryland also called for increased funding for treatment.

Opioid Prescribing Restrictions. Certain states sought to increase capacity for state law enforcement to monitor pill mills and other illicit prescribing behavior. The Arizona and Massachusetts declarations address opioid prescribing practices through the development of prescribing guidelines, regulations, or requirements for PDMP use.[144] South Carolina included a five-day opioid prescription limit for Medicaid recipients.[145] Similar prescription limits were also included in Arizona's Opioid Action Plan and Opioid Epidemic Act.[146]

Funding. Emergency declarations do not automatically appropriate additional state-level funding. It also does not allow automatic access to federal funds. Depending on the state's statutory scheme, the issuance of disaster and public health emergencies can authorize access to a state's emergency funds. Such declaration can also galvanize state efforts to secure available federal grants and funding. In Maryland, the Opioid Operational Command Center, Department of Health, and Governor's Office of Crime Control & Prevention announced more than $22 million in new state money including $2.1 million from the Twenty First Century Cures Act.[147] Such money was used for prevention, enforcement, and treatment efforts.[148] In Arizona, officials were able to access their emergency public health fund,

142. Press Release, Fla. Dep't of Health, *supra* note 91.
143. ARIZ. DEP'T OF HEALTH SERVS., *supra* note 98.
144. *See* DUCEY, *supra* note 57; Press Release, Mass. Dep't of Pub. Health, *supra* note 63.
145. S.C. Exec. Order No. 2017-43, *supra* note 106, at 2.
146. *See* ARIZ. DEP'T OF HEALTH SERVS., *supra* note 98; DUCEY, *supra* note 57.
147. Press Release, Office of Governor Larry Hogan, *supra* note 120.
148. *Id.* Funding allocations included:

> $4 million total distributed to local Opioid Intervention Teams . . . for each jurisdiction to determine how best to fight the . . . epidemic; . . . $1.25 million to add to existing efforts to disrupt and dismantle drug trafficking organizations; . . . $3.2 million to expand treatment beds statewide, as well as a tracking system; . . . and $2.7 million to improve access to naloxone statewide.

Id.

which contained $500,000 and required authorization for use.[149] Certain declaration states have noted that the tool was also used as a signal to state legislatures to enact more money for the crisis.

Other Strategies. Emergency declarations often facilitate coordination with other jurisdictions—including the federal government and other state governments—allowing the affected state to draw on human, financial, or other resources. Declarations in Arizona, Maryland, South Carolina, and Pennsylvania call for interagency and/or federal coordination. In addition, South Carolina's declaration recommended implementing training for state and local law enforcement authorities regarding referrals to treatment for individuals with opioid use disorders, strengthening PDMPs, and drafting an opioid state plan by June 2018.[150] Finally, decreasing stigma and raising awareness of the opioid crisis were also targets for declaration states, notably in Virginia and Maryland.[151]

2. Determining Metrics and Defining Success

For most declaration states, the discussion around what success looks like at the conclusion of the emergency can be difficult. Effective long-term, sustained, and comprehensive outcomes take time; thirty to sixty-day statutory emergency periods are not always long enough to see immediate results. Because of this, most states' opioid emergencies have extended well beyond the initial periods due to declaration renewals. Declaration states grappled with defining what success would look like at the end of the emergency period and therefore developed a series of metrics around the parameters of their intended declaration objectives. Through the declaration process, a lead agency and individual in each state was tapped to lead the effort and carry out the declaration's parameters and mandate. For several states, their command structure management process drove the establishment of work plans and a series of performance and process metrics and during the run-up to the declaration.

Success among declaration states is focused in three main areas:

1. States have identified the reduction in overdoses and drug-related injuries and fatalities as a primary indicator of success. This can include reductions in human immunodeficiency virus (HIV) and hepatitis c virus (HCV) infections, as well as reduced rates of incarceration and child protective service-related calls.

149. Alltucker, *supra* note 122.
150. S.C. Exec. Order No. 2017-42, *supra* note 101, at 5.
151. Levine, *supra* note 76; Md. Exec. Order No. 01.01.2017.02, *supra* note 83.

2. While fatalities from overdoses may not decline precipitously in declaration states within the original framework of the comprehensive action plan, implementation and tracking of this plan is another indicator of success. Such a plan might allow the state to institute evidence-based policies to mitigate the epidemic's worst effects as well as strengthen relationships between local, state, and federal officials.
3. Many states have developed a robust set of performance and process-based metrics for agencies to measure and define progress. Declaration states have developed sets of outcome-based metrics and scores of performance-based metrics to demonstrate increased competency in areas such as coordination, program delivery, and resources deployed.

When developing specified metrics to track, declaration states sought to tailor these metrics to specific goals, including:

- Reduced deaths from drug overdose;
- Fewer HIV and HCV infections related to injection drug use;
- Less unintentional injuries and self-harm related to drugs and alcohol;
- Lower rates of drug misuse and addiction, including underage use;
- Reduced drug- and alcohol-related incarceration and re-incarceration of persons with addictions;
- Lower rates of crime and referrals to child protective services;
- Increased partnerships;
- Less interpersonal violence, self-harm, and child neglect; and
- Prevention of excessive prescriptions for controlled substances while improving wellness and function.

To achieve these goals, specific performance metrics include:

- Number of naloxone kits built;
- Number of kits provided to police, tribal nations, medical departments, and public health centers;

- Number of task force meetings;
- Number of drug disposal deactivation bags distributed;
- Number of drug disposal deactivation bags distributed to emergency response, police, fire;
- Number of meetings held to provide substance abuse information at town hall meetings, schools, etc.;
- Site visits; and
- Number of opioid prescriptions.

Other signs of success have included the sharing, implementation, and expansion of evidence-based programs in the areas of prevention, enforcement, and treatment. Declaration states have also emphasized building relationships and institutionalizing structures at the state and local level to facilitate ongoing cross-sector coordination as other metrics of success. Overall, the sustained reduction in the number of deaths associated with opioids and related non-fatal overdoses seems to be the hallmark definition of success, and declaration states continue to address this challenge in the post-declaration phase.

V. LESSONS LEARNED FROM EXISTING DECLARATIONS AND RECOMMENDATIONS FOR STATE CONSIDERATION

While the application of state emergency declarations to the opioid epidemic is fairly novel, states have identified immediate lessons learned, considerations for states deliberating whether to declare, and recommendations for governor's offices in contemplating future emergency actions.

A. Lessons Learned from Previous and Ongoing Emergency Declarations

For states that have declared an emergency, lessons learned can be separated by two phases of time—the pre-emergency phase and emergency period.

1. Pre-Emergency Phase

For the pre-emergency phase, declaration states have cited two major lessons learned: the importance to thoughtfully think through a plan for the emergency declaration and contemplate the end of the emergency from its conception. First, states have highlighted the need for other states to use as much time as they can to secure the right legal determination, select the proper personnel to lead the effort, and brief necessary stakeholders.[152] Declaration states have encouraged others to take time to shape their declaration in an appropriate way to pass statutory and constitutional muster. These states have noted that there are other implementation bodies to consider and examine whether they've been used effectively in other efforts (e.g., commissions, Task Forces, committees, working groups).[153] Additionally, legal reviews by state attorney generals and governors' general counsel take time. Legal support may derive from various state actors, with a general agreement on the interpretation of state law (e.g., constitutional, statutory, previous case law) for this novel application.[154] While declaration states have all found that the use of emergency powers is legal and appropriate, certain states took longer to reach that determination and also debated whether they should expect legal challenges to emerge from outside parties.[155]

States have cited the need to build a cohesive legal approach in the pre-emergency phase, as consensus can drive a coordinated state response during the emergency phase.[156] Central to the emergency phase is ensuring that the right personnel are charged with leading the state's response. Declaration states have generally used an ICS (or derivative framework) to structure their state's response, which requires that the right full-time manager who understands emergency response frameworks is named by the governor to lead the effort. The manager needs to plan for the opioid disaster or emergency response as they would for a recovery-like response, which takes a longer time to execute compared with a disaster response framework.

For states contemplating whether to issue a declaration, discussions with key stakeholders should occur prior to a formal emergency is established. Most declaring states took time to brief external stakeholders on the basis of the order, why the governor has decided to order an emergency, and what the governor needs to reach success. Examples of external stakeholders include

152. *See* MURPHY ET AL., *supra* note 14, at 3.
153. *See id.* at 9.
154. *See* Rutkow, *supra* note 31, at 1603.
155. *See, e.g.*, *supra* text accompanying notes 54–69.
156. *See* MURPHY ET AL., *supra* note 14, at 8.

local public health and emergency units, local public safety and first responder officials, regional federal government officials, private advocacy groups, etc.[157] Transparency with the decision, the decision-making process, and the governor's goals for the emergency response can help strengthen buy-in and coordination throughout the emergency period. Declaration states face the challenge of having to communicate successes throughout the emergency phase, which requires that the pre-emergency phase outreach deftly handle political calculations and public relations with key stakeholders.

Secondly, the pre-emergency phase should include robust discussions and debate on when the emergency should conclude. In certain declaration states, an absence of discussions during the pre-emergency phase on how the emergency should conclude created challenges later when it became more politically difficult to end the emergency.[158] If state leaders do not feel ready to define an exit strategy, the emergency may linger longer than other emergency periods in its history.

One lesson learned for states is to consider whether they require an exit strategy from the emergency phase before it is declared and define success metrics that can be communicated to the public as those are achieved. States need to ask what a wind-down of the emergency will look like, as meaningful and sustained reductions in fatalities may not be achievable in such a short timetable. However, states like Maryland were able to establish a robust series of performance measures to strengthen the state's multi-agency response, which is helpful in communicating successes to the public and for analyzing progress towards ending the emergency.[159] States may want to consider articulating that, while the epidemic remains a significant challenge, it no longer requires the use of these specific legal powers and an ICS. In this scenario, the state can consolidate its policy, programmatic, and operational gains while communicating to the public about the "new normal" and baseline that the state is operating from.

2. Emergency Phase

Lessons learned from the emergency phase include ensuring a robust role for the governor, preparing a communications plan for the public that sets realistic expectations, and creating a flexible body to manage the epidemic

157. *See id.* at 32.

158. *See supra* Part IV(a) (noting that many declaration state emergencies have not ended and remain in effect).

159. *See generally* HEROIN & OPIOID EMERGENCY TASK FORCE, FINAL REPORT (2015), https://governor.maryland.gov/ltgovernor/wp-content/uploads/sites/2/2015/12/Heroin-Opioid-Emergency-Task-Force-Final-Report.pdf [https://perma.cc/YT3L-LSK8].

that can evolve and be sustained for the longer-term. First, declaration states have highlighted the need for the governor to play a visible and active role in executing the declaration and implementing the emergency. For example, state emergency leaders emphasized that government agency cabinet officials, senior officials, and staff responded better to governors that stayed active throughout the declaration process through weekly or monthly briefings, press releases, press conferences, public events, etc.[160] If state officials perceive the governor as invested in this emergency effort, more attention will be paid to the day-to-day execution across agencies that do not normally interact with the opioid epidemic.

Second, declaration states have prioritized the need for preparing a communications plan for the public that sets realistic expectations. Communications plans include the development of core messages, press releases, and public service announcements, as well as coordinating rapid response efforts and convening state and local public information officers for workshops and meetings. In states like Alaska and Maryland, governors' communications directors have been responsible for each state's overall communications plan.[161] These states were able to coordinate communications efforts throughout state government and further their messaging impact. In other states, governors' communications offices provided press personnel to support the development and execution of a communications plan in places such as joint information centers.[162] Joint information centers are used in other emergency efforts and have been used as critical convening apparatuses for the opioid epidemic.

As the communication plan is developed, a set of core messages must be developed that emphasizes realistic expectations to the public on what is achievable through an emergency period. For example, declaration states have highlighted to the public that the epidemic won't be solved quickly, and

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160. *See, e.g.*, Mary Lockman, *Governor's Opioid Disaster Declaration Eases Access to Naloxone*, FRONTIERSMAN (Feb. 16, 2017), https://www.frontiersman.com/news/governor-s-opioid-disaster-declaration-eases-access-to-naloxone/article_8e457974-f4ca-11e6-b30e-b78c2939ba25.html [https://perma.cc/7MYD-Q4S5] (noting Alaska Governor Walker's active involvement in video-streamed addresses, administrative orders, and Q&A sessions with reporters).

161. *See generally* MURPHY ET AL., *supra* note 14, at 27; NAT'L GOVERNORS ASS'N, GOVERNORS' OFFICE STAFF DIRECTORIES 2018 (2018), https://www.nga.org/wp-content/uploads/2018/06/StaffDirectory.pdf [https://perma.cc/H3KD-S39H] (listing Alaska and Maryland's communication directors).

162. *See, e.g.*, *The Maryland Opioid Operational Command Center Fact Sheet*, MD. DEP'T EDUC. http://www.marylandpublicschools.org/Documents/heroinprevention/OOCCSummarySheet.pdf [https://perma.cc/6STT-QXSD] (last visited May 26, 2019).

it may get worse before it gets better.[163] The public should understand that overdoses will not plummet simply as a result of the emergency being declared. Instead, ensuring that the public is better informed that the epidemic may worsen but this disaster-like event requires that the state lead a more-focused intergovernmental effort. Such messaging also highlights that the emergency mechanism will not solve anything itself, as it is a system for decision-making that allows the effort to be sustained at a high level to meet the scale and scope of the challenge. Emergency phase messaging also requires that the state answer why the declaration is necessary, how public health and public safety objectives will be achieved, and how this is an effective use of taxpayer dollars. Declaring states have attempted to answer these questions by articulating that the emergency phase will attempt to achieve healthier outcomes for individuals and safer communities through treating the epidemic as a disease at a fair cost to the taxpayer.

Third, declaration states have recommended that the emergency phase should result in the creation of a flexible body to manage the epidemic that can evolve and be sustained for the longer-term. In using interim bodies such as ICS (or their equivalents), states operationalize a response that can be recalibrated and changed to improve collaboration, communication, and community engagement throughout the emergency period. As noted earlier, ICS may be (temporarily) managed through a command center.[164] However, these structures need eventual long-term replacements. In certain declaration states, the eventual wind-down of their emergency periods may result in government units that oversee substance misuse and addiction prevention or entirely new offices taking over the coordination effort for the long-term. As the emergency periods progress, temporary bodies staffed with reassigned personnel may suffer from meeting fatigue, which longer-term and sustainable bodies may be better suited to address.

B. Outcome Considerations from Declaring

In analyzing their emergency periods, declaration states cited a series of desired outcomes and faced a series of unintended consequences or challenges that arose from their efforts. States considering the use of emergency declarations should consider the "7-P's" of potential accrued benefits such as:[165]

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163. *See, e.g.*, Press Release, Office of the Governor Doug Ducey, *supra* note 97.

164. *See supra* Part IV(b)(1).

165. The "7-P's" concept was first conceived by Dr. Jay Butler, Chief Medical Officer and Director of Alaska's Division of Public Health.

Personnel. States that issue declarations have reassigned and/or appointed new personnel to better address the epidemic. These personnel can support existing institutions, like the state department of health, or new bodies, such as an ICS or other entities as designated by the governor's office.

Pay-fors. Pay-fors provide governors and states with additional options to supplement existing opioid funding. State emergency orders can allow the governor to redirect previously allocated funding or use certain reserve funding. For example, Maryland Governor Hogan used the emergency phase to announce more than $22 million in funding to address the epidemic in fiscal year 2018.[166] Similarly, Florida Governor Scott capitalized on the emergency declaration to allow for accelerated distribution of $27 million in HHS Opioid State Targeted Response Grant funding for naloxone purchases and other anti-overdose activities.[167] Arizona Governor Ducey's emergency declaration authorized ADHS to access a public health emergency fund to pay for items such as training and naloxone.[168] Emergency declarations have also led to state officials to redouble efforts to seek additional pay-fors through federal government grants.

Procurement. State emergency declarations have allowed for accelerated procurement practices for certain supplies. For example, in Alaska and Florida, state emergency declarations authorized standing orders for the procurement and deployment of naloxone.[169] Additionally, Pennsylvania's declaration authorized an emergency purchase for a hotline contract through their current vendor and an emergency contract to expand its advanced body scanner pilot program within a community corrections center.[170] While standing orders can be achieved through other means, certain declaration states used the benefits of emergency declarations to overcome existing statutory or other hurdles to accelerate procurement and deployment of life-saving supplies.

Practice. Executive orders have been used to force changes in practice among public or private actors. In declaration states, emergency declarations directed new focus on the opioid epidemic from agencies that may not regularly engage in public health response efforts, such as departments of veterans' affairs or education. Further, in South Carolina and Arizona, the

166. Press Release, Office of Governor Larry Hogan, *supra* note 120.

167. Dan Sweeney, *Gov. Scott Calls for $50 Million and New Legislation to Fight Opioid Abuse*, SUN SENTINEL (Sept. 25, 2017, 5:25 PM), http://www.sun-sentinel.com/news/politics/florida-politics-blog/fl-reg-scott-opioid-crisis-announcement-20170925-story.html [https://perma.cc/BEH5-HL2G?type=image].

168. Alltucker, *supra* note 122.

169. *See* Fla. Exec. Order No. 17-146, *supra* note 90; Boots, *supra* note 78.

170. Press Release, Governor Tom Wolf, *supra* note 107.

public health emergency authorized state regulatory bodies to re-evaluate existing prescribing practices.[171] Such evaluations resulted in these respective states pursuing prescribing limits for prescription opioids.

Policy. Declaration states have used their emergency orders to address larger policy issues. As noted previously, naloxone training and deployment, treatment, prevention and recovery efforts, alternatives to incarceration, and access to data are just a handful of examples of areas that states have sought to address.

Perception. By declaring an emergency, states can reset their respective statewide conversations around the opioid epidemic and provide a more accurate public perception of the challenges. Such declarations have allowed for further conversations to destigmatize addiction and raise the importance of this issue in the eyes of the public, state legislatures, and the judiciary. Through an emergency phase, the public can better understand the true scale and scope of the epidemic.

Partnerships. Declaration states have sought to strengthen partnerships with other local or state entities, private entities, and/or the federal government through their emergencies. In Maryland, the emergency order helped create a new culture of partnerships between public health and public safety.[172] Such change helped to facilitate more formalized data sharing discussions between different sectors. Similarly, while Alaska had relationships with federal partners and tribal nations before the emergency, the emergency period strengthened these relationships and encouraged greater intergovernmental collaboration. In Arizona, numerous state agencies participated in Governor Ducey's cross-agency efforts to address the epidemic and engaged with entities such as its regional High Intensity Drug Trafficking Area (HIDTA) Task Force and local non-profits on strategies moving forward.[173] Additionally, Maryland's ICS contained staff from twelve state agencies dedicated to bringing state and federal entities, local government bodies, community and faith-based organizations, private-sector partners, and individuals with lived experience into decision-making structures and operations.[174]

Declaration states have faced a series of unintended consequences or challenges in implementing their efforts. In certain states, the emergency

171. S.C. Exec. Order No. 2017-43, *supra* note 106, at 2; Press Release, Office of the Governor Doug Ducey, *supra* note 97.

172. *See, e.g.*, Press Release, Office of Governor Larry Hogan, *supra* note 120.

173. *Participating Agencies*, ARIZ. HIGH INTENSITY DRUG TRAFFICKING AREA, https://www.azhidta.org/default.aspx/MenuItemID/137/MenuGroup/Public+Website+About.htm [https://perma.cc/AR79-5V9D] (last visited May 14, 2019).

174. *Maryland Opioid Operational Command Center*, *supra* note 125.

declaration can "kick start" certain policy changes and act as a stopgap measure while the legislature is out of session, agencies review existing regulations, and/or appropriations bodies evaluate further funding. While the immediate policy change can be felt through an emergency action, temporary actions may require further follow-up with other stakeholders to ensure that the action can be codified and sustained past the emergency phase. However, by acting quickly, certain actors may perceive that the problem is now solved, which requires steadfast follow-up by state emergency response leaders. While data sharing may strengthen during the initial phases of the emergency, if outside entities are unclear whether and when the data sharing will become formalized and institutionalized, data and information sharing can become haphazard and inconsistent.

Declaration states have highlighted the need for increased funding, as many state executive branch agencies are limited to existing resources. In undertaking an emergency, states are better adept at understanding the scale and scope of their epidemic—which may require additional funding from other entities to address. Emergency declarations do not automatically appropriate additional state-level funding. Additional funding to meet the demands of the emergency phases require cooperation and support by state legislatures and federal partners. Depending on the state's statutory scheme, the issuance of disaster and public health emergencies can authorize access to a state's emergency funds. Such declaration can also galvanize state efforts to secure available federal grants and funding.

Finally, declaration states have struggled in planning for and communicating what a post-emergency phase will look like while in the midst of executing existing emergency operations. Certain states are unable to transition to a post-emergency phase until the public better understands what the next phase will look like and why the emergency was needed initially.

C. Considerations for Governors

Governors are leading statewide initiatives to strengthen treatment, prevention, recovery, and public safety responses to the opioid epidemic. Public health emergencies and disaster declarations can provide states with new tools to improve outcomes for states, communities, and individuals affected by the opioid epidemic. As such, crafting and executing emergency declarations for use in the opioid epidemic can potentially assist states when they have utilized other policymaking vehicles but face continued policy barriers while overdose fatalities continue to rise.

Weigh the Options. Before making a declaration, governors should ensure that this lever is weighed against other intermediate options (e.g., commissions, committees, working groups, Task Forces). Governors' offices must analyze and evaluate how the state will use this legal lever most appropriately to fit their state's unique public health and public safety needs. Further, governors' offices may need to examine how the use of this lever fits within the state's comprehensive goals to address the epidemic.

Define the Objectives. If a governor determines that an emergency is the right lever, state officials must balance the need to craft discrete outcomes within the confines of the declaration against allowing for sufficient flexibility to meet the evolving challenges and community needs within the epidemic. Should the governor issue the declaration, he or she should be prepared to explain the rationale to external stakeholders and the public and articulate how it will help overall health and safety.

Develop Sustainable Practices. Once implementation begins, states ought to ensure that the declaration leads to data-driven, evidence-based practices and/or innovative strategies. Such practices and strategies require support from a well-defined organizational structure that, once the emergency concludes, can transition and be sustained over the long-term.

Employ Consistent Messaging. Throughout the emergency phase, governors' offices must execute a communications plan that prioritizes and engages with key stakeholders and the public and prepare them for the eventual winding down of the emergency phase.

By leveraging the emergency tools and authorities they have, governors are uniquely positioned to lead state efforts to create healthier communities, increase public safety, improve outcomes for those with substance use disorders, and build more effective inter- and intra-governmental responses to the opioid epidemic.