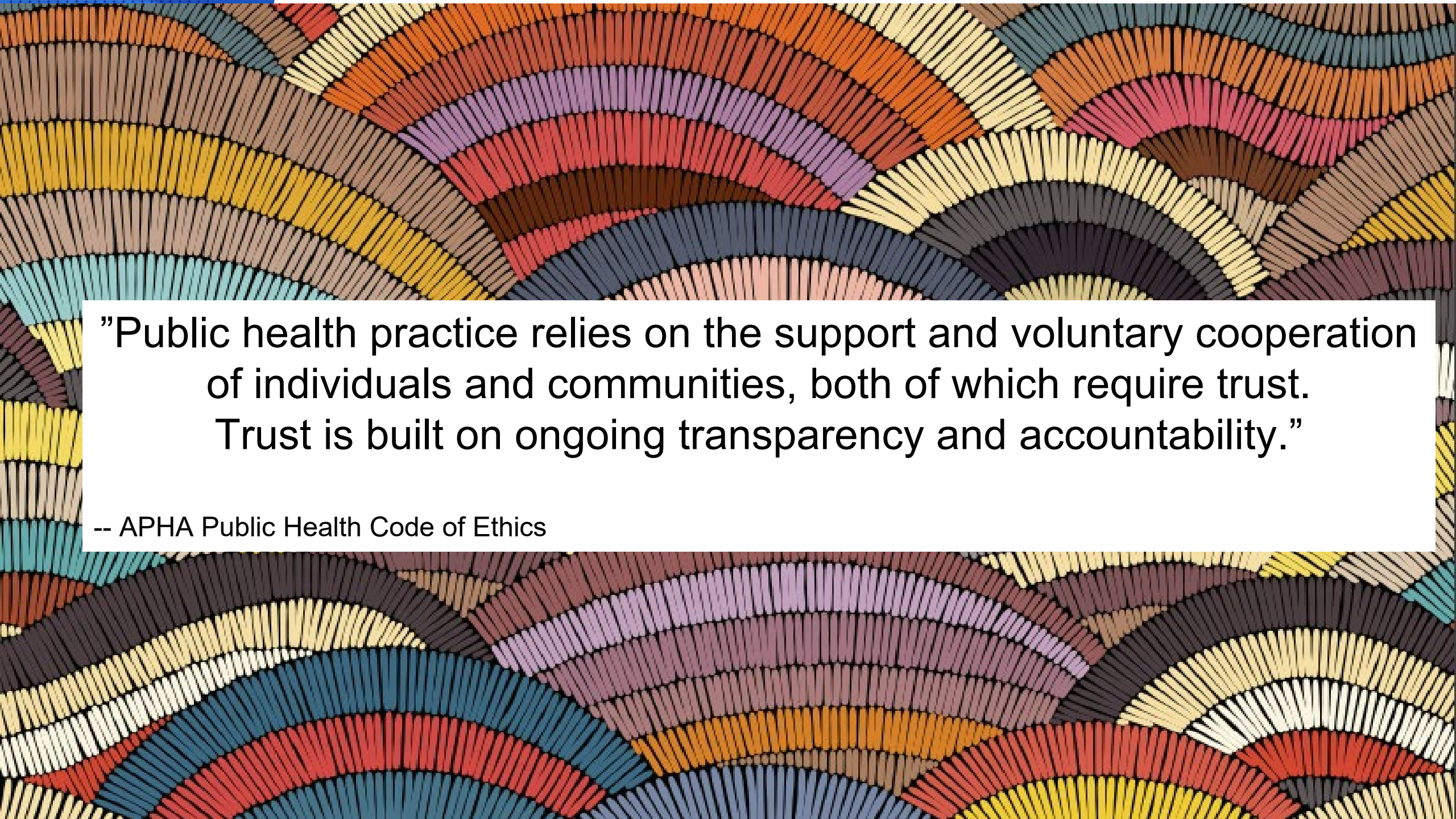




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# Resecuring Public Health Powers: Model Public Health Emergency Authorities Act

Robert Gatter, SLU Law



“Public health practice relies on the support and voluntary cooperation of individuals and communities, both of which require trust. Trust is built on ongoing transparency and accountability.”

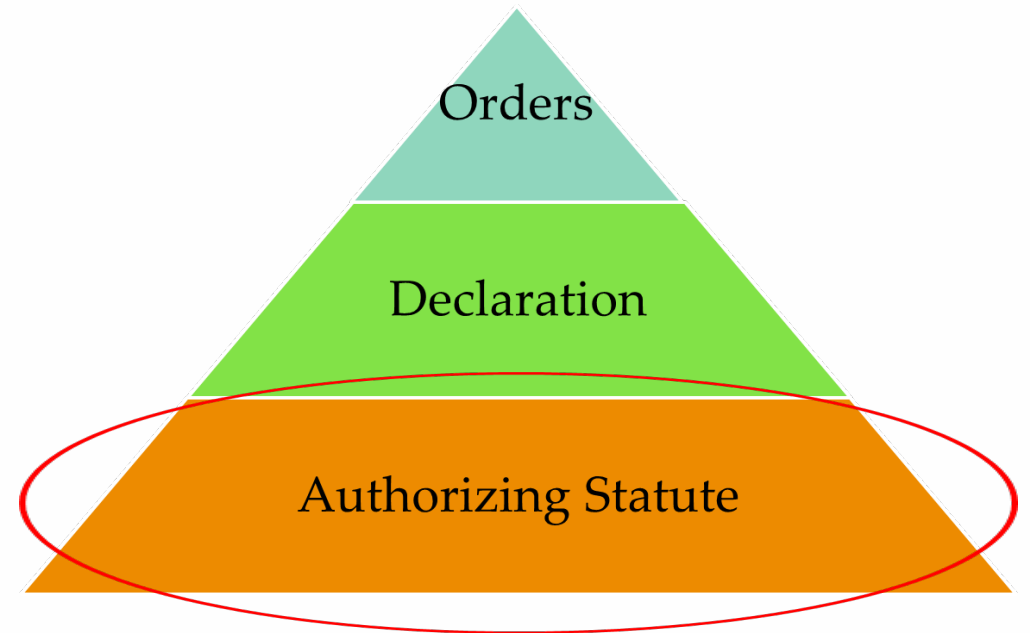
-- APHA Public Health Code of Ethics



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## Key COVID-19 Lesson

When segments of the population become frustrated with public health emergency orders, they undercut the statutory authority of executive branch officials to issue orders at all.



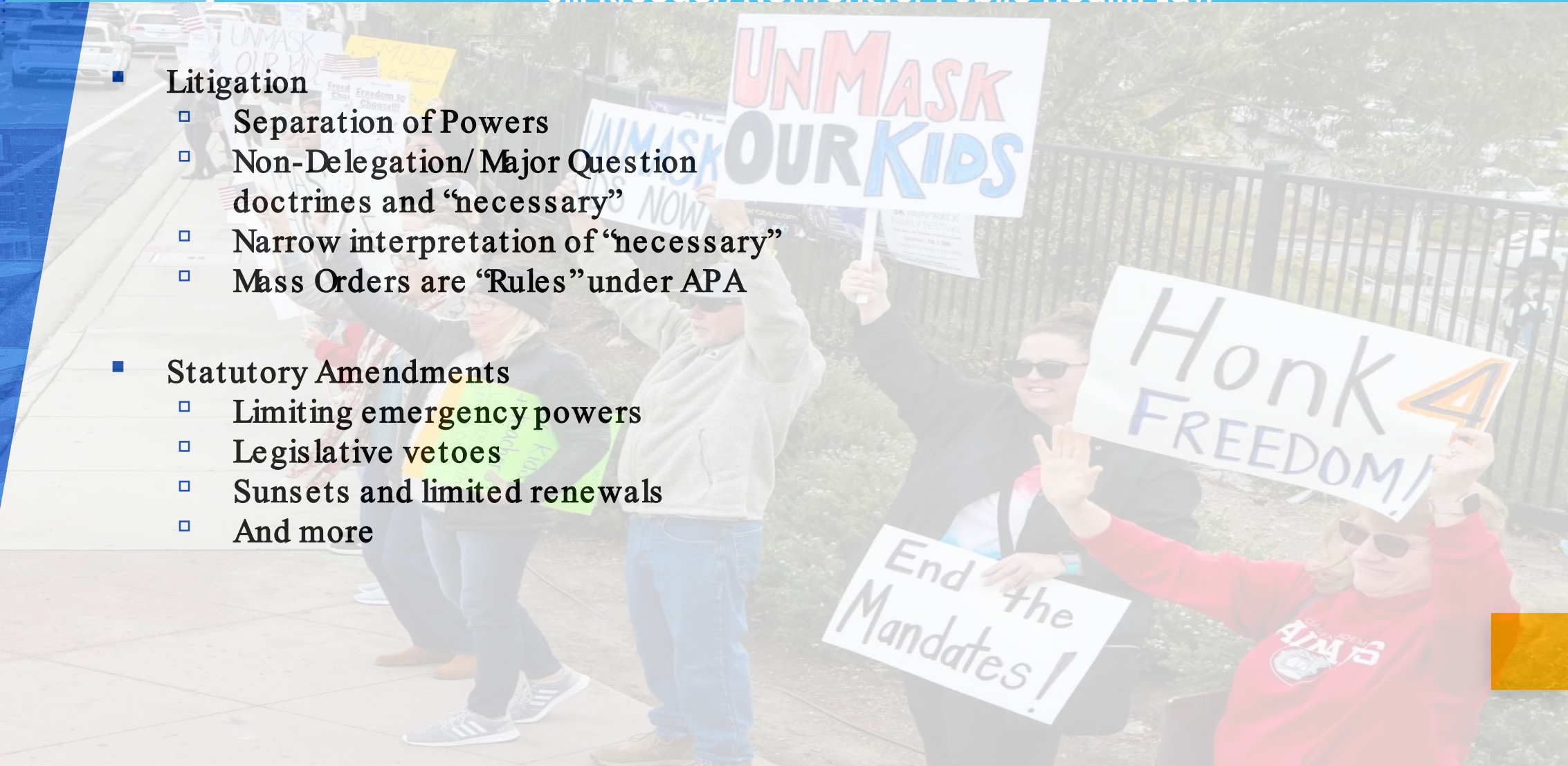


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# “Burn It All Down Fervor”

- Jill Krueger. Network for Public Health Law

- **Litigation**
  - Separation of Powers
  - Non-Delegation/ Major Question doctrines and “necessary”
  - Narrow interpretation of “necessary”
  - Mass Orders are “Rules” under APA
  
- **Statutory Amendments**
  - Limiting emergency powers
  - Legislative vetoes
  - Sunsets and limited renewals
  - And more





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# Model Public-Health-Emergency Authority Act

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# Model PHEA Act: Basic Structure

## Model Public-Health-Emergency Authority Act

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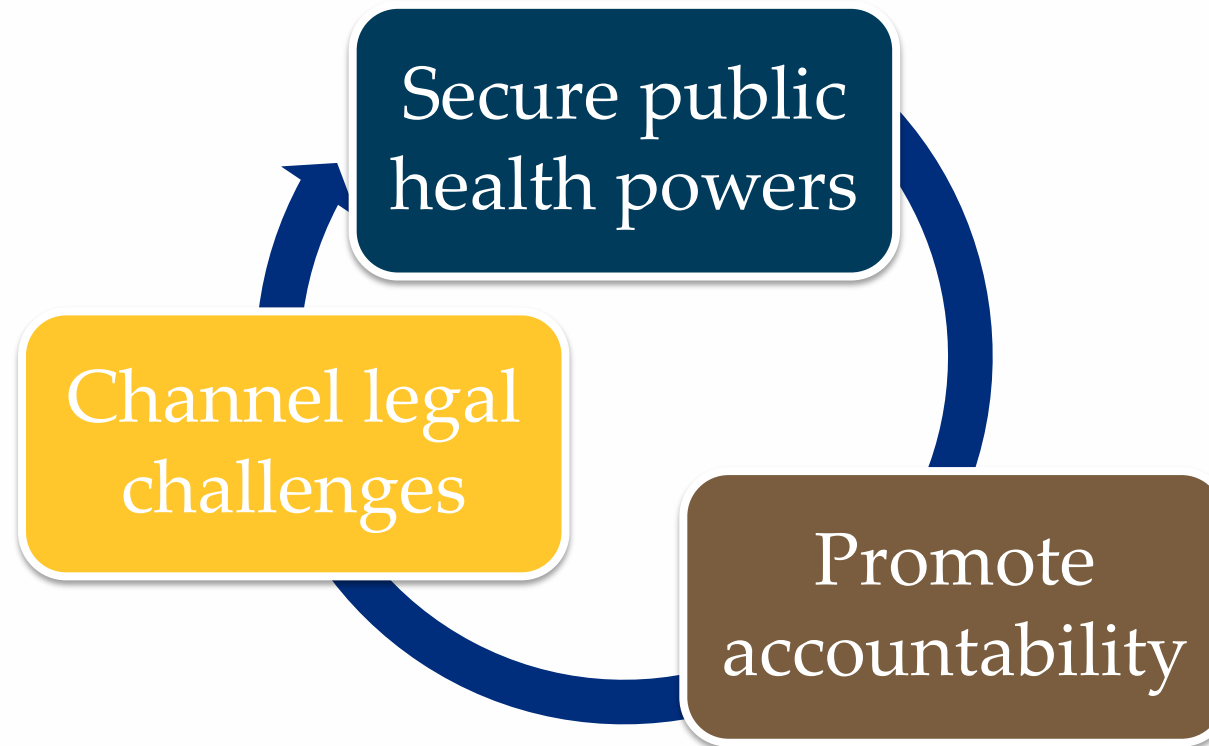


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- Governor empowered to declare a public health emergency.
- Declaration empowers Governor to issue public health emergency orders.
- Model PHEA Act separate from other state emergency powers statutes, and PHEA controls *public health* emergencies.



## Drafting Goals for the Model PHEA Act







## Model Public-Health-Emergency Authority Act

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Click “clean copy”



# Securing Public Health Powers: The Non-Delegation/Major Questions Problem

## Risk & Benefit of

- Broadly worded statute: actions “reasonable and necessary” to protect public health.
- Specifically worded statutes: quarantine/isolation.

PHEA strategy: *retain the broadly worded power, add specific categories of powers, and provide substantive principles and procedural guardrails for public health emergency orders.*



## Securing Public Health Powers: The Non-Delegation/Major Questions Problem

- 20 specific purposes for which a Governor may issue a public health emergency order
- Separate general power to “issue any order to eliminate or reduce an of the risks of harm posed by the public health emergency or to eliminate, reduce, contain, or mitigate any of the effects of the public health emergency.”
- Order must be designed rationally to achieve one or more of those goals.
- Before issuing an order, the Governor accounts for 6 factors.
- Procedural requirement: Governor must create and share publicly an administrative record for each order.



## Securing Public Health Powers: Rule v Order Problem

- State Administrative Procedure Acts – “rule” and rule-making procedures; “orders.”
- Public health emergency orders are “rules” requiring rule-making.
- Time delays and rule-making procedures during an emergency.
- Model PHEA Act: public health emergency orders are not subject to rule-making.



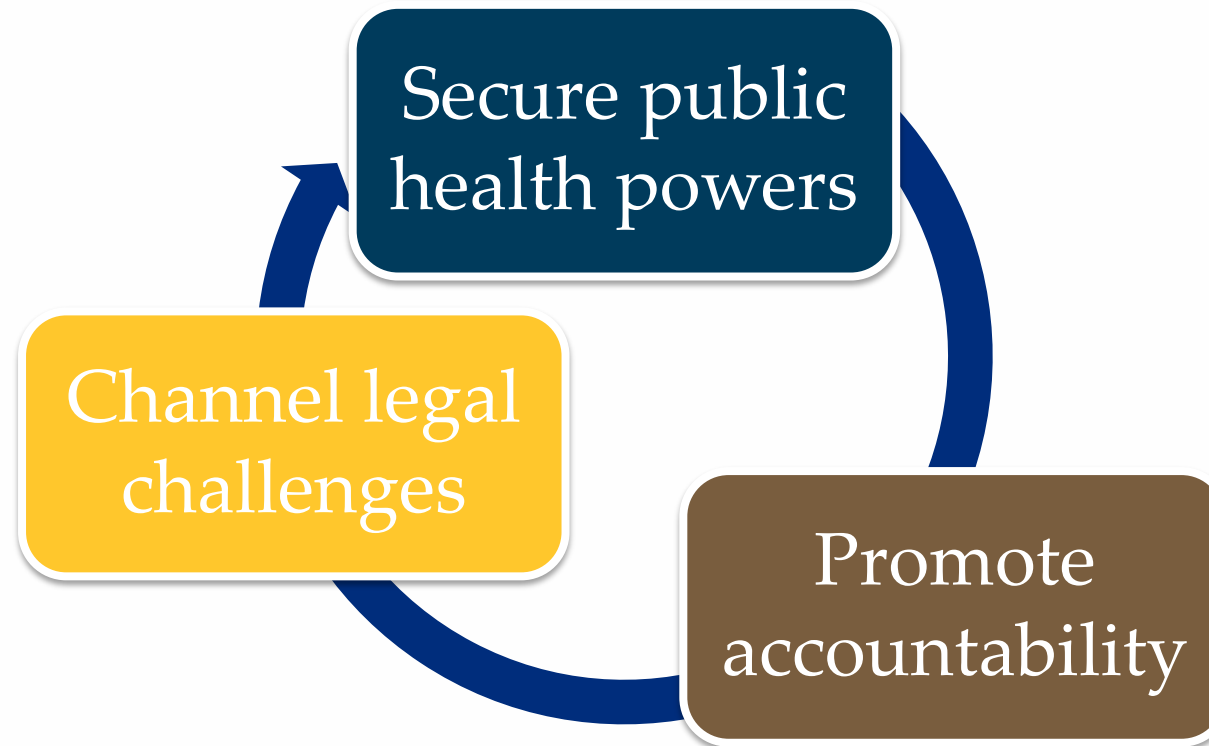
## Securing Public Health Powers: Renewing Declarations and Orders

- Declarations expire after 90 days unless renewed.
- No limitation on number of times Governor authorized to renew declaration.
- Orders expire when declaration expires unless renewed.
- No limitation on number of times Governor may renew orders.
- Renewals are subject to same substantive standards and procedural guardrails as initial declarations and orders.

Draft Model PHEA Act, Sections 4(d) and 6(g/h).



## Drafting Goals for the Model PHEA Act





## Promote Accountability to Evidence

- A declaration of a public health emergency—at time of both initial declaration and each renewal—must be rationally based on evidence then-available to Governor about nature of emergency and its risks. (Sec. 4(h)).
- Each public health emergency order—at time of both initial order and each renewal—must be designed rationally to reduce/mitigate some or all of risks or effects of emergency. (Sec. 6(d/e).)



## Promote Accountability to Political Process

- A Governor's authority to renew a declaration of public health emergency is conditioned on the Legislature's having an opportunity to be in session during at least the first 5 days of the term of the renewed declaration. (Sec. 4(c)).
- Trigger the political process to hold both Governor and legislators to account.
- Address problem of part-time legislatures that lack power to call themselves into session.
- *Why not authorize state legislatures to terminate a public health emergency declaration by joint resolution? Wolf v. Scarnati, 233 A.3d 679, 696-97 (PA 2020) (statute authorizing General Assembly, by concurrent resolution, to terminate public health emergency declared by the Governor is unconstitutional because it violates the presentment requirement for legislative action to have the force of law).*



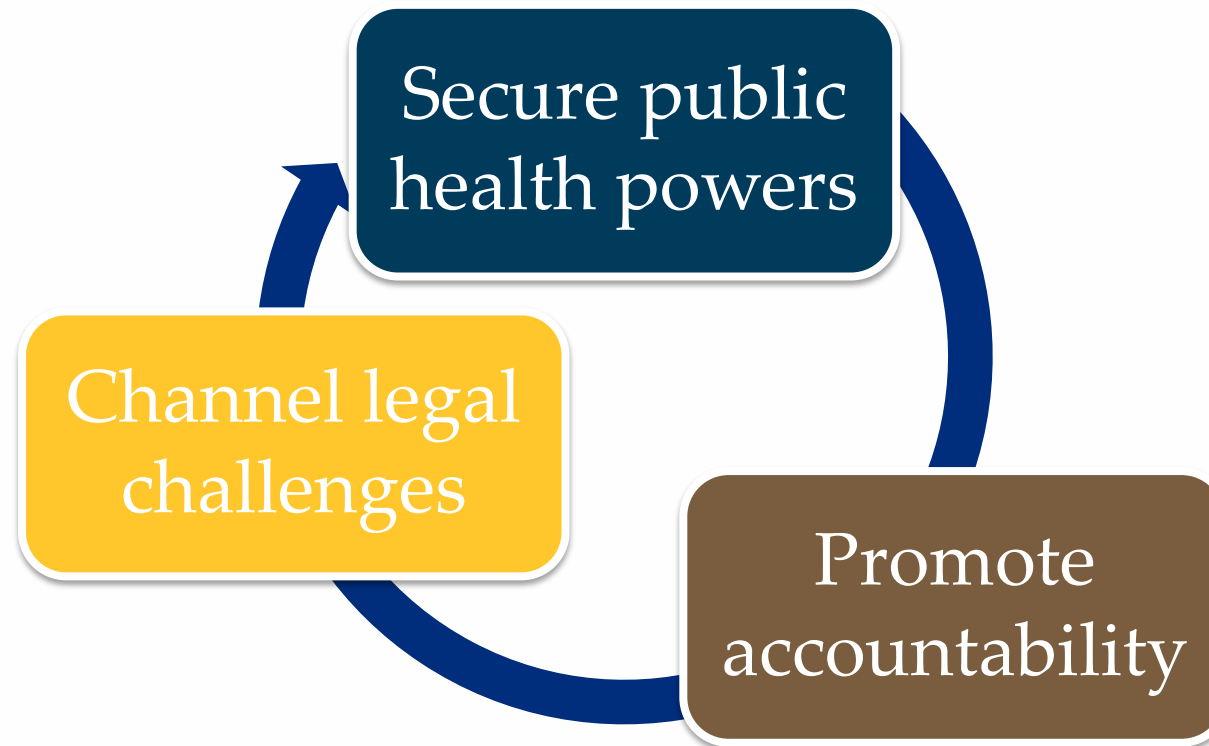


## Promote Accountability to Those Subject to Orders

- Any person with standing seek judicial review of a public health emergency declaration or order.
- Court may grant relief where Governor:
  - misinterpreted the law
  - committed a procedural error
  - acted in an arbitrary or capricious manner
  - determinations of fact not supported by substantial evidence in the record.

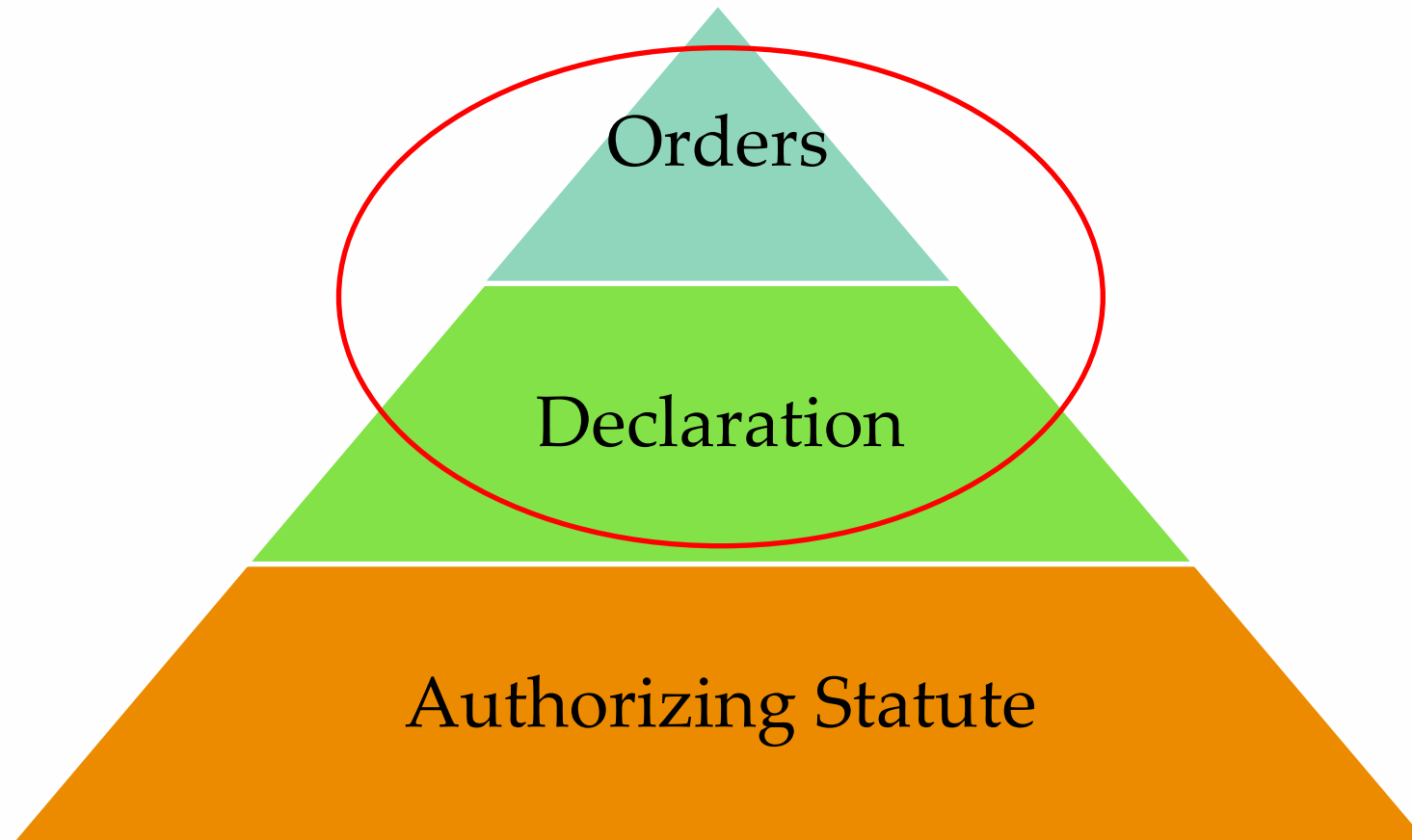


## Drafting Goals for the Model PHEA Act





## Channel Legal Challenges





## Channel Legal Challenges

- Right to pursue judicial review of declarations or orders.
- Assures opportunity for political process to operate at time of renewal.
- “Safety valve” to reduce likelihood of amending, repealing, or challenging constitutionality of authorizing statutes.



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# Value of “Resecuring” Public Health Powers





## Pandemic's Erosion of Powers and the Void It's Created

### American Legislative Exchange Council (ALEC)

- Orders subject to strict scrutiny standard
- Orders expire after 7 days if legislature in session; otherwise, orders expire after 30 days unless ratified by legislature.
- Authorizes legislative veto or orders.
- Prohibits Governor from reissuing expired or terminated orders during same emergency.

<https://alec.org/model-policy/emergency-power-limitation-act/>



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## Model Public-Health-Emergency Authority Act

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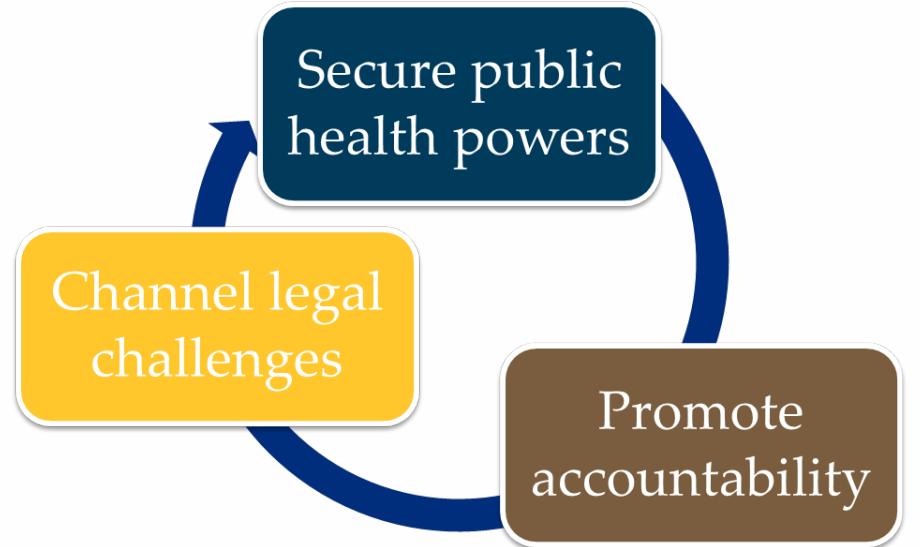
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