



September 9, 2020

The Hon. Nicholas Mattiello, House Speaker
The Hon. Dominick Ruggiero, Senate President
State House
Providence, RI 02903

VIA EMAIL

Dear Speaker Mattiello and President Ruggiero:

We are writing to strongly urge the General Assembly, when it reconvenes, to take up legislation to overturn an Executive Order (EO) issued last week by Governor Raimondo that significantly erodes transparency and accountability in executive agencies. Although the pandemic has necessitated in numerous circumstances the Governor's use of emergency powers given to her by state law, Executive Order 20-72 goes too far. It takes the inappropriately broad leap of expanding by executive order a statute that has already set parameters for the use of emergency powers.

The state's Administrative Procedures Act (APA) authorizes executive agencies to adopt emergency regulations for up to 120 days, with the ability to extend them for an additional sixty days. R.I.G.L. §42-35-2.10. EO 20-72, however, suspends that limitation and instead allows executive agencies to adopt "emergency" rules that can last *indefinitely* (if they are readopted at 60-day intervals) as long as they are "promulgated in relation to the current COVID-19 emergency."

As you may know, the main feature of promulgating a regulation on an emergency basis is that it eliminates any opportunity for public input. It is for this reason that the APA also recognizes that after four (or six) months have passed, any continued need for the regulation should be subject to the statute's normal "notice and comment" process. That customary process allows the public to weigh in on proposed rules and requires the agency promulgating the rule to provide a substantive response to any comments offered. However, under EO 20-72, emergency rules can remain "emergencies" indefinitely, inappropriately freeing state agencies from receiving any public comment or having to

justify their regulatory decisions. Since agency rules carry the force of law, the EO essentially allows open-ended agency rule by fiat.

The importance of the APA's rule-making process – even for rules dealing with the impact of Covid-19 – cannot be underestimated. It ensures that the public has a meaningful opportunity to provide input into the lawmaking activities of state agencies. In adopting this law decades ago, the General Assembly recognized that many critical activities of state government are conducted through agencies of the executive branch, which are given broad authority in implementing the laws enacted by the legislature. In acknowledgment of the important public interest in overseeing the functions and decisions of these agencies, the APA provides a mechanism for residents to offer comments on their policies and procedures and ensures that agencies are not using unbridled and unchecked discretion to effectuate public policy. EO 20-72 destroys that important oversight responsibility.

It is also worth noting just how minimal the standard contained in the EO is for indefinitely extending regulations. The only criterion is that the time extension be “related to the current Covid-19 emergency.” But many rules related to the pandemic could easily be subject to notice and comment after six months without any burden whatsoever to the agency. Nowhere does the EO require the agency to explain the ongoing emergency, beyond the pandemic itself, that justifies continuing to reject public input on the content of a regulation after half a year has passed.

In short, the APA is a substantial grant of quasi-legislative authority to executive branch agencies. By suspending the APA provision that already sets out the circumstances under which “emergency” rules can be adopted, Governor Raimondo has essentially used a legislative grant of emergency power to seize even more executive emergency power. Doing so offends separation of powers principles and sidesteps the transparency that was deliberately built into the Administrative Procedures Act.

The APA has already established that if a state regulation needs to remain in effect for more than six months due to an “emergency,” it deserves being subject to public input at that point. The ongoing nature of this particular public health crisis cannot be used as an excuse to undermine the balance currently struck in the law — a law you substantially revised just four years ago -- and to vitiate public oversight of state agencies exercising vast powers over Rhode Island's residents. While we recognize that agencies may need some administrative flexibility in dealing with the pandemic, there are ways to address that without eliminating the accountability underlying this important state law.

We therefore respectfully urge you to pass legislation upon your return that overrides EO 20-72 and retains a public role in the administrative rule-making process after six months, even in the context of this long-running “emergency.”

Sincerely,

Steven Brown, Executive Director
American Civil Liberties Union of Rhode Island
sbrown@riaclu.org

John Marion, Executive Director
Common Cause Rhode Island
john_marion@commoncauseri.org

Jane W. Koster, President
League of Women Voters of Rhode Island
president@lwwri.org

cc: The Hon. Joseph Shekarchi, House Majority Leader
The Hon. Michael McCaffrey, Senate Majority Leader
The Hon. Robert Craven, House Judiciary Committee Chair
The Hon. Erin Lynch Prata, Senate Judiciary Committee Chair
The Hon. Blake Filippi, House Minority Leader
The Hon. Dennis Algieri, Senate Minority Leader