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The Honorable Asa Hutchinson
Governor of Arkansas
State Capitol
500 Woodlane Street
Little Rock, Arkansas 72201
Via Electronic Correspondence to
correspondence@governor.arkansas.gov.

Re: Dental Public Health Mismanagement

Dear Governor Hutchinson,

Our firm represents the Arkansas State Dental Association, a voluntary membership organization that represents and supports the dental profession in providing high-quality and ethical oral health care to the public.

Our members' dedication to the highest principles of their profession has earned Arkansas dentists a well-deserved reputation for advancing the profession, protecting individual patient safety, and safeguarding public health. For decades, Arkansas dentists have followed strict protocols to stop the spread of infectious diseases, such as the human immunodeficiency viruses, influenza, and coronaviruses, including SARS-CoV-2—the virus that causes COVID-19. Dental professionals in Arkansas have spent years developing, learning, and implementing the most up-to-date guidelines to protect their patients, their staff, and themselves.

Last week, Secretary of Health Dr. Nate Smith recommended and issued a directive allowing the resumption of elective dentistry. While we applaud the spirit behind Secretary Smith's efforts, the manner in which the state bureaucracy has implemented these efforts has been an unmitigated disaster—one that has already led to needless confusion, frustration, and harm.

The first source of trouble is the Secretary's mandated requirement that dental healthcare providers may resume elective dental services only when they meet certain "guidelines". These guidelines are unfounded, inappropriate, impractical, arbitrary, inconsistent, and vague—they have already led to confusion, frustration, and fear; they are also probably illegal. While the guidelines display a veneer of relevant-seeming public health principles, if viewed through the lens of the popular news media, these slapdash measures—made without formal, disciplined rulemaking or orderly, methodical input from dental health professionals or the public—leave

dentists exposed to regulatory second-guessing, professional liability, and political manipulation. They tend to incite public fear and division and, thus, work directly at odds with the goals they seek to achieve.

Before we address the public-health danger these “guidelines” create, consider the risk to your executive authority caused by this illegal over-reach. Everyone knows that, in America, when one branch of government over-reaches, another cuts it back. Just this week, we have seen the Wisconsin supreme court cut one example of executive-branch power that was premised on its declaration of a public-health emergency. *See Wisconsin Legislature v. Palm, et al.*, 2020 WI 42. Here in Arkansas, Secretary Smith’s directive and guidelines are said to arise from the public-health-emergency powers provided in Ark. Code Ann. § 20-7-109—110 and the Board of Health’s Rules Pertaining to Reportable Disease. First, the Board of Health cannot create more power by regulation than the law that gives it the power to regulate. Arkansas Code Annotated § 20-7-109 gives the Board of Health power “to make all necessary and reasonable rules of a general nature for the protection of the public health and safety.” But the Secretary’s guidelines are not (a) Board of Health rules, they are his own, nor are they (b) necessary, reasonable, or general—they are the definitional opposite of all three. Second, the existing, properly made rule (15 Health Maintenance/Epidemiology 8 “Reportable Disease”) provides only that a reported outbreak of novel coronavirus directs the proper authority to “take whatever steps necessary for the investigation and control of the disease.” Creating the power to control the disease does not create the power for the Secretary to make rules with an enforceable penalty. So, as long as the guidelines have no enforceable penalty, they themselves do not offend these laws or regulations. But, like in Wisconsin, where they purport to become enforceable rules—as here, where the Secretary’s directive requires their implementation before elective dentistry can resume—they become rules that require formal rulemaking procedures. They are, therefore, illegal on their face.

But because they issue with the imprimatur of your executive authority, the mandatory directive and the associated guidelines sow confusion and disorder.

For example—and this is one, small example among many dozen—the May 11 directive requires “a reduced volume of patients [to be] scheduled” for certain obvious and commonsensical reasons, but an email that issued days later from the Arkansas State Board of Dental Examiners, a different executive authority—the state agency that grants professional licenses to dentists and dental hygienists—cites the Secretary’s directive and notes that it (the ASBDE) had received complaints of “over-scheduling by some,” without suggesting what constituted “over-scheduling” or how the validity of such complaints might be assessed. The suggestion is that a dentist’s license to practice dentistry is at risk for some undefined, vague “over-scheduling” is chilling.

For another, the ASBDE has shown dentists a “checklist” to be used by some inspectors (the qualifications of which are unknown) to make a report to the Department of Health Office of Oral Health of “any deficiencies” “if a complaint is received.” This checklist and these inspections carry with them implication that the inspector’s report may form the basis of some sort of enforcement action against a dentist. Yet the directive and guidelines rely on no legal authority other than Ark. Code Ann. § 20-7-109—110 and the Board of Health’s Rules Pertaining to Reportable Disease, neither of which mentions or implies enforcement authority against dentists

who find themselves confronted with a wrong box checked on an inspector's list.

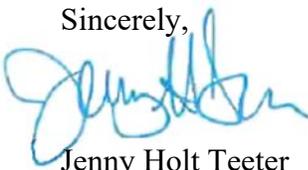
Further, dentists are directed to make "the proper" Personal Protective Equipment available to all staff members (including, presumably, those in administrative positions with no patient contact)—a vague requirement in the face of notorious shortages of PPE. Governor, if your office requires dentists to make PPE available to all staff, we ask your office at least open PPE supplies from the state's reserve. And your office must assist Arkansas's dentists in obtaining PPE from FEMA.

Amplifying the confusion still more, the ASBDE has begun emailing dentists a stream of haphazard, contradictory statements, "reminders," "modifications," "recommendations," and the like, all of which cite the Secretary's directive and guidelines. Thus, the state agency that issues professional licenses to dentists seems to regard the guidelines as legally meaningful. This sort of behavior rightly gives every Arkansas dentist and dental hygienist reason to fear that their professional livelihood may come within the crosshairs of a panicked and arbitrary-acting bureaucracy. It is not the way our government should run. It appears dental healthcare professionals are being singled out and exposed like no other healthcare professions.

To further rub salt in these wounds, please note that dentists in Arkansas's border states Tennessee, Missouri, Oklahoma, Texas, and Louisiana are not required to follow anything like the vague guidelines imposed on Arkansas dentists.

Before they were ordered to do so, many Arkansas dentists voluntarily closed their offices for their patients' and employees' health. And, in like manner, before other Arkansas communities, businesses, and professions had begun to reopen, the dental community has spent enormous time and resources preparing to open their offices for their patients in desperate need of dental care. Dentists should be given the liberty to proceed in the manner they, as highly trained, highly skilled professionals, deem to be in the best interests of their patients and staff. We respectfully request that the Secretary's ill-conceived, badly implemented, and illegal restrictions on dentists be lifted immediately.

Sincerely,



Jenny Holt Teeter

cc: Billy Tarpley, Executive Director, Arkansas State Dental Association
Mary Robin Casteel, Chief Legal Counsel
Nathaniel Smith, M.D., Secretary, Department of Health
The Honorable Tim Griffin, Lieutenant Governor
The Honorable Leslie Rutledge, Attorney General
Arkansas Legislators