

IN THE CIRCUIT COURT OF PULASKI COUNTY
AT LITTLE ROCK

DAN SULLIVAN, Arkansas State Representative and Senator-elect
in his official capacity, et al.

PETITIONERS

V. CASE NO. _____

JOSE ROMERO, MD
Secretary of the Arkansas Department of Health,
in his official capacity.

RESPONDENT

PETITION FOR DECLARATORY JUDGMENT

COMES NOW, the Petitioners, Arkansas State Legislators, in their official capacities and private citizens of the State of Arkansas, in their individual capacities, and in support of their Petition for Declaratory Judgment filed pursuant to A.C.A. § 16-111-101 et seq. and Rule 57 of the Arkansas Rules of Civil Procedure, state and allege as follows:

PARTIES

1. Petitioners, who are public officials, business owners and private citizens, all residents of the State of Arkansas, and whose rights, status or other legal relations as legislators or as citizens and residents of the State of Arkansas, have been and are affected by the actions of the Secretary of the Arkansas Department of Health as delegated to him under Emergency Orders of the Governor of the State of Arkansas, are seeking declaratory relief that, and have a claim or interest which, would be affected by the declaration, and no declaration shall prejudice the rights of persons not party to these proceedings.

2. Respondent is the Director of the Arkansas Department of Health with his office in Little Rock, Arkansas, and this action is brought against him for acts performed in the course of the execution of the official acts of his office.

JURISDICTION AND VENUE

3. As a civil action against the Director of the Arkansas State Board of Health brought because of his official acts, venue and jurisdiction are proper pursuant to A.C.A. § 16-60-104.

INTRODUCTION

4. On the 11th day of March, 2020, shortly after the outbreak of coronavirus disease 2019 (COVID-19) was detected in the State of Arkansas, Governor Asa Hutchinson issued the first of four (4) successive executive orders declaring an ongoing state of emergency exists and ordered the Director of the Arkansas State Department of Health to take action to prevent the spread of COVID-19.

5. Using as the basis for his authority to take that action in the form of agency “directives” that place restrictions and affect the day-to-day activities of citizens of the State of Arkansas, the Director of the Department of Health has referenced provisions of the Arkansas State Board of Health Rules and Regulations Pertaining to Reportable Disease adopted by the Board on April 26, 2018, effective as of January 1, 2019.

6. In the ordinary course of their legislative oversight responsibilities to which they are constitutionally and by statute obligated, the 2019 Rules of Regulations of the Department of Health Pertaining to Reportable Disease were reviewed by the Legislative Council of the Arkansas General Assembly on December 21, 2018.

7. Said Rules, however, as required by the Arkansas Administrative Procedures Act of the promulgated rules of any executive agency, were based on the best reasonably available scientific evidence at the time they were adopted in April, 2018.

8. The purpose of the procedural safeguards of the Administrative Procedures Act is to assure that the authority to promulgate and enforce rules delegated to administrative agencies of the executive branch of Arkansas state government conforms to the legislative intent pursuant to

which said authority was delegated to them by the Arkansas General Assembly, a co-equal branch of government and which under Arkansas law performs the integral role of providing legislative oversight in the emergency rulemaking process.

9. The Administrative Procedures Act contains provisions for the promulgation of rules necessary to address an imminent peril to the public health such as the emergence of COVID-19 through the expedited process of emergency rulemaking.

10. The Governor's March 11, 2020 Executive Order EO 20-03 identified COVID-19 as "a new disease, with more to be learned about how it spreads, the severity of the illness it causes, and to what extent it may spread."

11. Between March 13, 2020 and August 21, 2020, the Director of the Department of Health has issued forty-three (43) such directives, all without the procedural safeguard incorporated in the emergency rulemaking provisions of the Administrative Procedures Act.

12. Since COVID-19 is a new disease, in reviewing the 2019 Rules and Regulations of the Department of Health Pertaining to Reportable Disease, the Legislative Council did not have before it the best reasonably scientific evidence regarding COVID-19 and that subsequently lead the Director of the Department of Health to issue his forty-three (43) directives to respond to COVID-19.

13. The emergence of COVID-19, therefore, required of the Director of the Department of Health to present to the Legislative Council of Arkansas General Assembly amended rules containing the best reasonably obtainable scientific evidence for their review so that said body could consider the need for, consequences of, and possible alternatives to those rules.

14. Having not been presented to and reviewed by the Legislative Council of the General Assembly, the forty-three (43) directives of the Director of the Department of Health issued

between March 13, 2020 and August 21, 2020 and any “directives” of the Director of Health issued since August 21, 2020 have not been appropriately promulgated under the emergency rulemaking provisions of the Administrative Procedures Act and are invalid.

SEPARATION OF POWERS

15. The powers of government of the State of Arkansas are divided into three (3) distinct departments pursuant to Article 4, § 1 of the Arkansas Constitution: the legislative, the executive and the judicial, and none are to exercise any power belonging to another except where expressly directed or permitted.

16. The legislative power of Arkansas state government, i.e. lawmaking, is vested in the General Assembly by Article 5, Section 1 of the Arkansas Constitution.

17. While it is a doctrine of universal application that the functions of the legislature must be exercised by it alone and cannot be delegated, it is equally well settled that the Legislature may delegate to executive officers the power to determine certain facts, or the happening of a certain contingency, on which the operation of a statute is, by its terms, made to depend. *Terrell v. Loomis*, 218 Ark. 296, 235 S.W.2d 961 (1951).

18. Discretionary power may be delegated by the legislature to an executive agency as long as reasonable guidelines are provided. This guidance must include appropriate standards by which the administrative body is to exercise this power. A statute that, in effect, reposes an absolute, unregulated, and undefined discretion in an administrative agency bestows arbitrary power and is an unlawful delegation of legislative authority. *See, Hobbs v. Jones*, 2012 Ark. 293, 412 S.W.2d 844, 852 (2012).

19. Statutes passed by the General Assembly are presumed to be constitutional so, if possible, a statute will not be read as an unconstitutional delegation of legislative authority and not to bestow absolute, unregulated and undefined discretion or arbitrary power.

20. A basic rule of statutory construction is to give effect to the intent of the legislature. Where the language of a statute is plain and unambiguous, [the courts] determine legislative intent from the ordinary meaning of the language used. In considering the meaning of a statute, [courts] construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. [The courts] construe the statute so that no word is left void, superfluous or insignificant, and [courts] give meaning and effect to every word in the statute, if possible. *See, Osborn v. Bryant*, 2009 Ark. 358, 324 S.W.3d 687 (2009).

21. For a statute to avoid being unconstitutionally void for vagueness, it must give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden and it must not be so vague and standardless that it leaves judges free to decide, without any legally fixed standards, what is prohibited and what is not on a case by case basis. *See, Thompson v. Arkansas Social Services*, 282 Ark. 369 669 S.W.2d 878, 881 (1984).

22. It is axiomatic that interpretation of a statute will not be done in a manner that defeats its legislative purpose, nor should a statute be interpreted to lead to an absurd result. *See, City of Rockport v. City of Malvern*, 2010 Ark. 449, 374 S.W.3d 660 (2010).

THE EMERGENCY SERVICES ACT

23. The Arkansas Emergency Services Act of 1973, A.C.A. § 12-75-101 et seq., provides that in the event of the occurrence of “a *major emergency* or a *disaster* of unprecedented size and destructiveness” and in order to ensure that the State of Arkansas will be prepared to deal with “enemy attack, natural or human-caused catastrophes, or riots and civil

disturbances,” created the Arkansas Department of Emergency Management and also conferred upon the Governor and upon the executive heads of the political subdivisions of the state certain emergency powers.

24. Arkansas statutes define “disaster” in A.C.A. § 12-75-103 as “any tornado, storm, flood, high water, earthquake, drought, fire, radiological incident, air or surface-borne toxic or other hazardous material contamination, or other catastrophe, whether caused by natural forces, enemy attack, or any other means which:

In the determination of the Governor or the Director of the Arkansas Department of Emergency Management or his or her designee is or threatens to be of sufficient severity and magnitude to warrant state action or to require assistance by the state to supplement the efforts and available resources of local governments and relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby, and with respect to which the chief executive of any political subdivision in which the disaster occurs or threatens to occur certifies the need for state assistance and gives assurance of the local government for alleviating the damage, loss, hardship, or suffering resulting from such disaster; A.C.A. § 12-75-103(2).

25. What situation is to be determined as a “Major emergency” is defined by A.C.A. § 12-75-103(14) as a condition which requires the activation of emergency response at the state or local levels, either in anticipation of a severe disaster such as an imminent enemy attack, potential civil disturbance, forecast major natural or human-caused disaster, or actual onset of conditions requiring the use of such forces which exceed the day-to-day response and activities of such forces and requires the coordinating of a complement of local, state, federal, or volunteer organizations.

THE STATE BOARD OF HEALTH

26. By Act 96 of 1913, codified as A.C.A. § 20-7-102, the Arkansas General Assembly created the Arkansas State Board of Health (“the Board”) as the governing body of the newly-formed Arkansas Department of Health (“ADH” or “the Department”).

27. To head said Department, the legislature provided in A.C.A. § 20-7-102(a)(17) that one (1) member of the Board shall be the Secretary of the Department of Health (“the Secretary” or “the Director”).

28. As of the date of the filing of this Petition, the Secretary of the Arkansas State Board of Health is Jose Romero, M.D, the Respondent.

29. Arkansas law, in A.C.A. § 20-7-109 enumerates the powers conferred on the State Board of Health, and provides that it is allowed “to make all necessary and reasonable rules of a general nature for:

(A) The protection of the public health and safety;

(B) The general amelioration of the sanitary and hygienic conditions within the state;

(C) The suppression and prevention of infectious, contagious, and communicable diseases;

(D) The proper enforcement of quarantine, isolation, and control of such diseases; and

(E) The proper control of chemical exposures that may result in adverse health effects to the public.

A.C.A. § 20-7-109(a)(1).

30. Those same rules are subject to legislative approval by the provision appearing in A.C.A. § 20-7-109(a)(2) requiring that “[a]ll rules promulgated pursuant to this subsection shall be reviewed by the House Committee on Public Health, Welfare, and Labor and the Senate Committee on Public Health, Welfare, and Labor or appropriate subcommittees thereof.”

31. On April 26, 2018, the State Board of Health adopted Rules and Regulations Pertaining to Reportable Disease Control in Arkansas, to be effective January 1, 2019 (“2019

Rules”). Listed among the Notifiable Diseases and Conditions to be found in Section V, Paragraph A of those Rules are the Novel Coronaviruses Middle East Respiratory Syndrome (otherwise known as, and hereinafter referred to as “MERS”) and Severe Acute Respiratory Syndrome (otherwise known as and hereinafter referred to as “SARS”), two of a family of RNA viruses that now includes COVID-19, and states as its purpose, “to provide for the prevention and control of communicable diseases and to protect the public health, welfare and safety of the citizens of Arkansas,” said 2019 Rules are attached hereto as **Exhibit A** and incorporated herein by reference.

32. Section VII of the 2019 Rules sets forth the Responsibility of the Director, and includes that “[w]hen the Director has knowledge, or is informed of the existence of a suspected case or outbreak of a communicable disease . . . [t]he Director shall take whatever steps necessary for the investigation and control of the disease.”

33. Section X of the 2019 Rules provides that “the Director shall impose such quarantine restrictions and regulations upon commerce and travel by railway, common carriers, or any other means, and upon all individuals as in his judgment may be necessary to prevent the introduction of communicable diseases into the State, or from one place to another within the State.”

34. On December 21, 2018, said 2019 Rules and Regulations of the State Board of Health were reviewed by the Legislative Council of the General Assembly pursuant to A.C.A. § 10-3-309(c)(1) that provides that “[a] state agency shall file a proposed rule with the Legislative Council at least thirty (30) days before the expiration of the period for public comment on the rule under the Arkansas Administrative Procedures Act, § 25-15-201 et seq., or other laws or policies pertaining to the rulemaking authority of that state agency.”

35. While COVID-19 is a disease related to SERS and MERS, according to the federal Department of Health and Human Services' Center for Disease Control ("CDC"), there have been no reported cases worldwide of SARS since 2004, and outbreaks of MERS since 2012 were limited largely geographically to the Arabian Peninsula.

36. There have been no reported cases of either SARS or MERS in the State of Arkansas.

37. By listing the respiratory illnesses of SARS and MERS of which there have been no reported cases in the State of Arkansas, the 2019 Rules of the Department of Health were rules of a general nature promulgated pursuant to A.C.A. § 20-7-109(a)(1) that could not possibly have foreseen or anticipated the severity or social and economic consequences of the 2020 outbreak of COVID-19 at the time the rules were adopted, published and reviewed, or when they became effective in January of 2019.

38. The A.P.A. provides that "[a]n agency shall not adopt, amend, or repeal a rule unless the rule is based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule." A.C.A. § 25-15-204(b)(1).

GOVERNOR HUTCHINSON'S DECLARATION OF EMERGENCY

39. On March 11, 2020, Asa Hutchinson, Governor of the State of Arkansas, citing authority granted him under the Arkansas Emergency Services Act of 1973, A.C.A. § 12-75-101 *et seq.*, justified by the detection of COVID-19 within the State of Arkansas, issued Executive Order EO 20-03 to declare that a disaster emergency existed and ordered the Arkansas Department of Health to take action to prevent the spread of COVID-19, said Executive Order EO 20-03 is attached hereto as **Exhibit B** and incorporated herein by reference.

40. At the time Governor Hutchinson issued EO 20-03, the 2019 Rule of the Department of Health had been in effect for over a year and A.C.A. § 20-7-110 was effective law.

41. A.C.A. § 20-7-110(b) states that:

Whenever the health of the citizens of this state is threatened by the prevalence of any epidemic or contagious disease in this or any adjoining state and, in the judgment of the Governor, the public safety demands action on the part of the board, then *the Governor shall call the attention of the board to the facts and order it to take such action as the public safety of the citizens demands to prevent the spread of the epidemic or contagious disease.* [Emphasis added]

42. Executive Order EO 20-03, that acted to call to the attention of the Board to the fact a COVID-19 health emergency, and that should have triggered the contingency enabling the utilization of the emergency rulemaking provisions of the Administrative Procedures Act, instead stated that “[t]he Secretary of Health may issue orders of isolation and/or quarantine as necessary and appropriate to control the disease in the State of Arkansas, and the Secretary of Health, in consultation with the Governor, shall have the sole authority over all instances of quarantine, isolation, and restrictions in commerce and travel throughout the state,” an clear reference to the language contained in Section X of the 2019 Rules of the State Board of Health.

43. In issuing Executive Order EO 20-03, citing A.C.A. § 20-7-110, the Governor also ordered that “[t]he Arkansas Department of Health shall act as the lead agency to work in concert with the Arkansas Division of Emergency Management and other State agencies to utilize state resources and to do “everything reasonably possible” to respond to and recover from the COVID-19 virus.”

44. An exceedingly vague delegation of authority, A.C.A. § 20-7-110(b) cannot be read in conformance with the constitutional provisions of separation of powers, however, to bestow upon the Governor blanket authority “to take such action as the public safety of the citizens demands” and as delegated to the Department of Health to “to do everything reasonably

possible” in Executive Order EO 20-03 without the procedural safeguards envisioned the emergency rulemaking provisions of the A.P.A. since to do so would be a grant to the Director of absolute, unregulated, and undefined authority and an unconstitutional delegation of arbitrary power.

45. In the Governor’s initial Executive Order EO 20-03, issued in response to the COVID-19 outbreak in the State of Arkansas, he noted that “COVID-19 is a new disease and there is more to learn about how it spreads, the severity of illness it causes, and to what extent it may spread.”

46. A “rule” adopted by an administrative agency of the executive branch is an exception to the ordinary constitutional legislative process of the General Assembly, defined in the A.P.A. as “an agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice of an agency and includes, but is not limited to, the amendment or repeal of a prior rule.”

47. Since the emergence of COVID-19 represents to medical community a “new disease” as acknowledged by the Governor in Executive Order EO 20-03, it could not have been anticipated in the 2019 Rules when they were adopted, or, likewise, when they were reviewed by the Legislative Council of the General Assembly and, therefore, said Rules, as they are being used by the Secretary to justify his actions since March 11, 2020, were not based on, nor was the Legislative Council cognizant of, the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning COVID-19 and the need for, consequences of, and alternatives to said Rules.

48. The COVID-19 outbreak, with its heretofore unanticipated drastic health, social and economic consequences, required an amendment to the 2019 Rules that would have apprised the

legislature of said consequences, and facilitated, with the determination by the Department of Health that imminent peril to the public health, safety or welfare required the adoption of such an amendment, by the emergency rulemaking, abbreviated notice and hearing provisions of the A.P.A. set forth in A.C.A. § 25-15-204(c)(1) providing for review by the Executive Subcommittee of the Legislative Council under A.C.A. § 10-3-309(d)(1).

49. Though the Director has not issued a single rule in response to COVID-19, by contrast, for the period beginning March 13, 2020 and ending August 14, 2020, the Director has issued forty-three (43) “directives” relating to the COVID-19 outbreak in the State of Arkansas.

50. There is no statutory definition of “directive,” nor does the Arkansas Department of Health’s Guide to Administrative Law and Procedure, though it includes a thorough discussion of the ordinary statutory process of rulemaking and emergency rulemaking refer to the issuance of directives by the Director.

THE ADMINISTRATIVE PROCEDURES ACT

51. Under ordinary circumstances, and applicable to “all necessary and reasonable rules of a general nature,” as was the case with promulgation of the 2019 Rules and Regulations of the Department of Health, the provisions of the Arkansas Administrative Procedures Act (“the APA”), A.C.A. § 25-15-201 *et seq.* apply and the Department is required to give thirty (30) days’ notice of its intended action, publish a public notice of its intended action, afford all interested parties the opportunity to comment, and submit the proposed action for legislative review.

52. In the case of a health emergency such as COVID-19, to prevent an unfettered exercise power of the Department of Health, administrative safeguards are incorporated into the Administrative Procedures Act’s emergency rulemaking procedures found in A.C.A. § 25-15-204(c)(1) that provide “if an agency finds that imminent peril to the public health, safety, or

welfare, or compliance with a federal law or regulation requires adoption of a rule upon less than thirty (30) days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing, or upon any abbreviated notice and hearing that it may choose, to adopt an emergency rule provided said emergency rule is approved pursuant to A.C.A. § 10-3-309, and which rules may be effective for no longer than one hundred twenty (120) days.

53. A.C.A. § 10-3-309 states as its purpose “to establish a method for continuing legislative review and approval of such rules [of administrative agencies] to correct abuses of rulemaking authority or clarify legislative intent with respect to the rulemaking authority granted the administrative boards, commissions, departments, or agencies,” and provides in § 10-3-309(d)(1) that a state agency shall file a proposed emergency rule with the Executive Subcommittee of the Legislative Council.

“DIRECTIVES” ISSUED BY THE SECRETARY

54. The Director has avoided the emergency rulemaking procedures of the A.P.A. in his exercise of doing everything reasonably possible in response to COVID-19 as delegated to him by the Governor in EO 20-03 and all subsequent executive orders, by the issuance of “directives” under the 2019 Rules as opposed to “rules,” though they clearly consist of agency statements of general application with future effect as they regard COVID-19.

55. There is a distinction to be drawn between an agency “directive” and a rule or regulation in that rules and regulations are “considered to be part of the substantive law of this state, are registered with the Arkansas Secretary of State and open to public inspection while a directive is not adopted by the Board nor registered with the Secretary of State. *See, Orsini v. State*, 340 Ark. 665, 13 S.W.3d 167, 170 (2000).

56. By labeling his actions as “directives” rather than “rules,” the Director of Health has effectively avoided legislative input and oversight or any involvement of the Arkansas legislature whatsoever from rulemaking as it relates to the COVID-19 breakout that should be subject to legislative review pursuant to the A.P.A., and therefore said actions of the Director are beyond the scope of the rulemaking authority delegated to him by the legislature and an unconstitutional violation of separation of powers.

57. The Director has issued forty-three (43) directives of general application affecting the constitutionally derived rights of the Arkansas legislature and affecting the interests of Arkansas business owners and private citizens of the State of Arkansas. Among those are:

- March 20, 2020 for the closure of schools, state government offices, dine-in operations at bars and restaurants and of gyms and indoor entertainment venues;
- March 23, 2020 to close for in-person operations, all barbers, body art establishments, massage therapy clinics/spas and medical spas;
- March 26, 2020 for limitations of private gatherings occurring outside a single household to no more than ten (10) people in a confined space including community, civic, public leisure, commercial or sporting events, etc.
- April 3, 2020 for the indefinite postponement of elective surgical procedures;
- May 8, 2020 for the limitation of the number of people who can enter a business at any time and for the provision of hygienic and surface disinfectant measures.
- July 18, 2020 for the mandate for every person in the State of Arkansas to wear a face covering over the mouth and nose in all indoor environments unless there exists ample space to maintain social distancing of six (6) feet.

58. Having bypassed the emergency rulemaking provisions of the A.P.A., the Director has run afoul of Arkansas law, and, as a result, faces the remedy incorporated in the A.P.A. that each of his “directives” issued since March 13, 2020, that for all legal intents and purposes are rules and, therefore, invalid, since, they were not “adopted and filed in substantial compliance with this section.” A.C.A. § 25-15-204(h).

DURATION OF THE HEALTH EMERGENCY

59. Executive Order EO 20-03 endowed the Director with the power to “do everything reasonably possible to respond to and recover from the COVID-19 virus” but without the oversight provided in the above-mentioned provisions of the emergency rulemaking provisions of the A.P.A. and does nothing to prevent arbitrary and unrestrained use of the Director’s discretion as it relates to his ability to issue health directives in contravention of the doctrine of separation of powers and limited delegation of legislative authority.

60. There are express time limitations to the delegation of emergency authority of the Governor to be found in that “[n]o state of disaster emergency may continue for longer for sixty (60) days unless renewed by the Governor.” A.C.A. § 12-75-107(b)(2).

61. The Governor’s Executive Order EO-20-03 issued due to the imminent threat of an outbreak of COVID-19 on March 11, 2020 and under the authority granted to him in A.C.A. § 12-75-107(b)(2) would expire in 60 days, unless renewed.

62. Within the statutory time frame, by subsequent Executive Order EO 20-25 issued May 5, 2020, with a finding that “COVID-19 continues to spread throughout the United States and Arkansas,” and “having determined that the public health and disaster emergency resulting from COVID-19 should be renewed beyond the sixty (60) days provided in Ark. Code Ann. §

12-75-107(b)(2),” Governor Hutchinson extended his initial state of emergency declaration for an additional forty-five (45) days.

63. Although the Arkansas Emergency Services Act provides for the declaration of a disaster emergency that may continue for a period of no longer than 60 days with one extension, on June 18, 2020, anticipating the expiration of the initial sixty (60) day declaration, and its forty-five (45) days extension on August 17, 2020, in an *ultra vires* act clearly inconsistent with the intent of the Arkansas General Assembly as it appears in A.C.A. § 12-75-107, Governor Hutchinson issued Executive Order EO 20-37 announcing that “the emergency declared pursuant to Executive Order 20-03, and its amendments shall be terminated, and the public health and disaster emergency and declaration of the State of Arkansas as a disaster area resulting from the state-wide impact of COVID-19 shall be declared anew. This emergency shall become effective upon signing of this order, and shall expire in sixty (60) days, unless it is renewed in whole or in part by a subsequent executive order.”

64. On August 14, 2020, by issuing Executive Order EO 20-45, Governor Hutchinson once again renewed Executive Order 20-37 for an additional sixty (60) days, at which time “the emergency shall expire after sixty (60) days unless it is renewed in whole or in part by a subsequent executive order.”

65. There is clearly no provision in Emergency Services Act for a second declaration of emergency nor can there be any reasonable justification under the auspices of the need for immediate action at the exclusion of the procedural safeguards of the A.P.A. consisting of review by the Arkansas General Assembly of the actions taken by the Director of the Department of Health in response to COVID-19.

66. The stated interpretation of the executive authority as it appears in the language of Executive Order EO 20-45 provides for the ability of the Governor to endow the Director with the ability to issue directives into perpetuity.

67. The Governor's Act of declaring a second emergency, and by declaring an emergency anew, is *ultra vires*, or beyond the scope of the authority granted him in under A.C.A. § 12-75-107 and any action of the Director of the Department of Health taken pursuant to the power delegated to him by the Governor after June 18, 2020 is invalid.

68. Clearly, the intent of the legislature was that "[n]o state of disaster emergency may continue for longer than sixty (60) days unless renewed by the Governor.

69. There is no statutory provision allowing for a second emergency declaration.

70. Executive Order EO 20-45 also adopts and incorporated a list of previously issued directives of the Department of Health.

71. Section 25-15-204(c)(3) of the A.P.A. provides that an emergency rule "may be effective for no longer than one hundred twenty (120) days.

72. The A.P.A., in § 25-15-204(c)(4), further requires that "[i]f, after the expiration of the effective period of an emergency rule, an agency wishes to adopt a successive emergency rule that is identical or substantially similar to the expired emergency rule, the agency shall not adopt the successive emergency rule earlier than thirty (30) days after the expiration of the emergency rule."

73. The executive orders have been declared, renewed, declared anew, and renewed again, and the Director has issued his directives related to COVID-19 without regard to the statutory provision that terminates said provisions after one hundred twenty (120) days or the provision requiring successive rules.

74. Every directive issued issued by the Director is invalid ab initio as in violation of the emergency rulemaking provisions of the A.P.A., but, regardless, would be deemed invalid one hundred twenty (120) days after their issuance under any circumstances.

75. The General Assembly is the repository of all powers of sovereignty not reserved by the people or reposed in one of the branches. *Rockefeller v. Hogue*, 244 Ark. 1029, 429 S.W.2d 85, 92 (1968). Likewise, “as is well known, under our system of government the legislature represents the people and as such is the reservoir of all power not relinquished to the Federal Government or prohibited by the State Constitution.” *Hackler v. King*, 233 Ark. 690, 346 S.W.2d 677, 680-81 (1961).

76. There is no repository or reservoir of power reposed in the executive branch such that the Governor could declare a second emergency without said authority being delegated to him by the Arkansas legislature.

77. In executing Executive Order EO 20-37, the Governor again empowered the Director of the Department of Health to impose “such quarantine restrictions and regulations upon commerce and travel . . . and upon all individuals as in his judgment may be necessary to prevent the introduction of communicable diseases into the State, or from one place to another within the State.”

78. The Director has issued five (5) “directives” since June 18, 2020.

79. The authority exercised by the Director of the Department of Health in the form of the forty-three (43) directives issued since March 13, 2020 has been done in violation of the emergency rulemaking provisions of the A.P.A.

80. The five (5) directives issued by the Director since June 18, 2020, issued after the expiration of the Governor’s emergency authority as set forth in the Section 12-75-107 of the

Emergency Services Act are invalid, in addition to being issued in the violation of the A.P.A., but as acts that are *ultra vires*.

REQUEST FOR DECLARATORY JUDGMENT

81. Plaintiffs hereby restate and incorporate by reference the allegations contained in Paragraph 1 through 80 as if set forth in full herein.

82. The Governor has the statutory authority to declare a disaster emergency pursuant to the Arkansas Emergency Services Act of 1973, A.C.A. § 12-75-101, et seq.

83. There did not exist any Rules or Regulations adopted by the Arkansas State Board of Health anticipating the outbreak of COVID-19 in early 2020 when the Governor issued the first of his Executive Orders to address said outbreak.

84. The 2019 Rules of the Arkansas State Board of Health Pertaining to Reportable Diseases, as that document did not contemplate the 2020 outbreak of COVID-19, was not based on the best reasonably obtainable scientific, technical, economic, or other evidence and information available concerning the need for, consequences of, and alternatives to the rule as it related to COVID-19 when it was presented to the Legislative Council on December 21, 2018 and cannot, therefore be used as the basis by which the Director was authorized to issue his forty-three (43) directive since March 13, 2020 and that are essentially emergency rules.

85. The outbreak of COVID-19 in early 2020 necessarily required an amendment to the 2019 Rules of the Department of Health to include the best obtainable scientific evidence if it were be used in reference to COVID-19, and presentation to the Executive Committee of the Legislative Council in accordance with the emergency rulemaking provisions of the A.P.A. found in A.C.A. § 25-15-204(c)(1) and A.C.A. § 10-3-309(d)(1).

86. The “directives” issued by the Director of the Department of Health, as “agency statements of general applicability and future effect that implements, interprets, or prescribes law or policy” are rules as defined by the Administrative Procedures Act in A.C.A. § 25-15-202(9)(A).

87. As rules, by issuing directives without legislative oversight, the Director has unlawfully bypassed the legislative oversight provisions of the Administrative Procedures Act in violation of the doctrines of separation of powers and of the limited delegated authority to the executive branch, and represents an abuse of that authority infringing upon the rights of the Plaintiffs who are elected members of the legislative branch of Arkansas government to exercise their constitutional authority.

88. As being issued not in substantial compliance of the emergency rulemaking provisions of the Administrative Procedures Act, the directives of the Department of Health issued since the issuance of the Governor’s original Executive Order EO 20-03 on March 11, 2020 are invalid pursuant to A.C.A. § 25-15-204(h).

89. The issuance of directives by the Director of the Department of Health outside the scope of the authority specifically delegated to him by the Arkansas General Assembly, violates Article 4, §§ 1 and 2 of the Arkansas Constitution, and represents the exercise of power by the Department of Health of powers belonging solely to the Arkansas General Assembly.

90. Executive Order EO 20-37, issued by the Governor as his proclamation that the emergency declared pursuant to Executive Order 20-03 is terminated and the public health and disaster emergency and declaration of the State of Arkansas as a disaster area is declared anew, is likewise invalid and without legal effect as being in violation of the intent of the legislature as set forth in Section 12-75-107(b)(2) that no disaster emergency may continue for a period in

excess of sixty (60) days unless renewed, in which instance, no longer than one hundred twenty (120) days, which period expired on or about the 11th day of July, 2020.

91. The Governor's Executive Order 20-37, dated the 18th day of June, 2020, represents an *ultra vires* act of the executive, and any actions taken by the Director of the Arkansas Department of Health delegated to him thereby are legally invalid as in violation of the emergency rulemaking provisions of the Administrative Procedures, actions that directly affect the lives and livelihoods of Plaintiffs who are business owners and citizens of the State of Arkansas alike, restricting their freedom of movement and of assembly and of other constitutionally recognized rights inherent to them, the rights to be free from illegal acts of their government being self-evident, said actions, and any further such actions taken after the filing of this Petition, are illegal and should be declared to be invalid *ab initio* under the provisions of the Arkansas Emergency Services Act and the Administrative Procedures Act.

WHEREFORE, Plaintiff pray for an Order of the Court declaring that the acts of the Director of the Arkansas Department of Health, in issuing "directives" pursuant to the arbitrary powers delegated to him beginning with the Governor's Emergency Declaration EO 20-03 issued on March 11, 2020, and all executive orders issued thereafter, but that are actually rules as defined by the Administrative Procedures Act but that have not been promulgated by the emergency rulemaking provisions contained therein, are invalid as issued in contravention of procedural safeguards requiring legislative to assure against the possibility of arbitrary and abusive actions, that Emergency Order EO 20-03, as renewed by EO 20-20, expired on June 19, 2020, and that EO 20-37, issued in violation of the provisions of the Arkansas Emergency Services Act, A.C.A. § 12-75-107(b)(2) as a second emergency declaration is therefore invalid as an *ultra vires* act outside the authority vested in the executive branch by the Emergency Services

Act and is therefore without legal effect, and for such other and further relief the Court deems just and proper.

Respectfully submitted,

STORY LAW FIRM, PLLC

By _____
Travis W. Story (2008274)
Gregory F. Payne (2017008)
3608 Steele Blvd., Suite 105
Fayetteville AR 72703
(479) 443-3700
travis@storylawfirm.com
greg@storylawfirm.com

VERIFICATIONS

STATE OF ARKANSAS)
) ss.
COUNTY OF _____)

I, Dan Sullivan, on my oath, state that the facts and allegations contained in the foregoing Petition for Declaratory Judgment are true and accurate to the best of my knowledge and belief.

Dan Sullivan

Subscribed and sworn before me, a notary public, this _____ day of August, 2020, in the County and State set forth above.

Notary Public

My commission expires:

STATE OF ARKANSAS)
) ss.
COUNTY OF _____)

I, Bob Ballinger, on my oath, state that the facts and allegations contained in the foregoing Petition for Declaratory Judgment are true and accurate to the best of my knowledge and belief.

Bob Ballinger

Subscribed and sworn before me, a notary public, this _____ day of August, 2020, in the County and State set forth above.

Notary Public

My commission expires: