IN THE CIRCUIT COURT OF PULASKI COUNTY
CIVIL DIVISION

REPRESENTATIVE/SENATOR DAN SULLIVAN, IN HIS OFFICIAL CAPACITY, et al.	**PETITIONERS**
v. **CASE NO. 60CV-20-4915**	
JOSE ROMERO, M.D., SECRETARY OF THE DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY	**RESPONDENT**

BRIEF IN SUPPORT OF MOTION TO DISMISS

Comes now Defendant Jose Romero, M.D., in his official capacity as the Secretary of the Department of Health, by and through counsel, Attorney General Leslie Rutledge, Assistant Attorney General Michael Mosley and Assistant Attorney General Brittany Edwards, and for his Brief in Support of Motion to Dismiss, herein states:

I. INTRODUCTION

Petitioners, members of the General Assembly and private persons, bring suit challenging the validity of directives issued by the Secretary of the Arkansas Department of Health ("Secretary") pursuant to Executive Orders of the Governor relating to the COVID-19 pandemic. Petitioners claim that the directives are really rules relating to a new disease, and that as such, the directives were required to

comply with the Arkansas Administrative Procedures Act ("APA"), Ark. Code Ann. § 25-15-201 et seq. Pet. ¶¶ 12, 13, 14. Specifically, because the directives are allegedly rules, Petitioners claim the Secretary was required to present the directives to the General Assembly before enactment and did not do so. Pet. ¶¶ 14, 15. Consequently, Petitioners claim the directives are void because they were allegedly not properly promulgated. Pet. ¶¶ 15.

Although the Governor is not a party to this action, Petitioners also challenge the Governor's Executive Orders relating to COVID-19. Pet. ¶¶ 62-83. Specifically, Petitioners claim that under the Arkansas Emergency Services Act ("Emergency Services Act") the Governor is empowered to declare a state of emergency for a period of 60 days and renew it once, for a maximum total of 120 days. *Id*. They make this claim from what Petitioners assert is the "intent" of the Legislature, not from any plain and unambiguous reading of the actual provisions of the Emergency Services Act. Pet. ¶ 71. Further, Petitioners claim that, because the Governor allegedly could only extend the emergency declaration until June 18, 2020, at the latest, any action taken by the Secretary after that date is also void. Pet. ¶ 70.

Petitioners seek a declaration from the Court that: (1) the 2019 Rules and Regulations Pertaining to Reportable Diseases (2019 Rules), which they concede were properly promulgated by the Department of Health, do not cover COVID-19; (2) that the directives issued by the Secretary regarding COVID-19 are really rules that did not properly go through the APA rule-making process; (3) that by allegedly bypassing the APA, the Secretary's actions violate separation of powers; (4) and that the

Governor's Executive Order EO 20-37 is invalid and violates of the intent of the Emergency Services Act and, as such, cannot form the basis for the authority of the Secretary to issue directives. Pet. ¶¶ 84-94. Finally, Petitioners seek a speedy hearing pursuant to Ark. R. Civ. P. 57.

Petitioners are not entitled to the requested relief and their claims should be dismissed pursuant to Ark. R. Civ. P. 12(b)(6). First, the failure to join the Governor, who is without question a necessary, indispensable, and interested party, dictates dismissal of the Petition by itself. Next, Petitioners are incorrect that the directives at issue are "rules" that must comply with the APA; rather, they are directives issued by the Secretary in accordance with Governor Hutchinson's Executive Orders declaring a state of emergency. The Governor explicitly authorized the Secretary to take action, and as such, these directives are governed directly by the Emergency Services Act. Alternatively, if the 2019 rules apply to COVID-19, they authorize the Secretary to issue directives and, therefore, the Secretary issued these directives in pursuance of carrying out his statutory responsibilities. Finally, in an ironic twist, Petitioners challenge violates well-established separation of powers doctrine, by asking this Court to grant them the authority to re-write a duly enacted statute and confer on them the ability to second-guess executive discretion. Accordingly, Petitioners claim must be dismissed.

II. BACKGROUND

In early 2020, a deadly strain of the novel coronavirus paralyzed the world. This virus, which came to be known as "COVID-19", spread rapidly through the air

and through surface contact. COVID-19 presents many potentially life-threatening complications, especially for vulnerable populations such as the elderly, pregnant women, diabetics, cancer patients, and more. Especially troublesome is that a significant percentage of those infected with COVID-19 present as asymptomatic, but are still capable of spreading the virus. As a result, entire European countries went on lockdown. Panic hit the United States as schools were moved to online home instruction, millions were suddenly out of work, and finding basic household items became difficult or impossible.

The first known cases of COVID-19 in Arkansas occurred in March 2020. In response to COVID-19, and pursuant to the powers bestowed upon him by Ark. Code Ann. § 12-75-107, Governor Asa Hutchinson—like almost every other Governor in America—declared a state of emergency in Arkansas. Governor Hutchinson issued multiple executive orders outlining the dangers COVID-19 presented, and instructed the Secretary of Health, in coordination with the Governor's office, to take measures to stop or limit the spread of the disease. *See e.g.*, Pet. Ex. B-E.

Based on the Governor's executive order, the Secretary began issuing public health directives directly aimed at stopping the spread of COVID-19 and protecting the citizens of Arkansas.[1] Such directives, included restricting visits to nursing homes, closing restaurants and bars for dine-in service, restricting gatherings to 10 people or less, and requiring individuals to wear a mask while in public if they were

[1] Arkansas Department of Health, *COVID-19 Directives, Orders, and Health Guidances,* [online] http://www.healthy.arkansas.gov/programs-services/topics/covid-19-health-guidances [Accessed 22 September, 2020].

unable to maintain appropriate social distancing. *See e.g.*, Pet. Ex. B-E. The directives were explicitly or implicitly adopted in executive orders from the Governor and are directives from the Governor himself. *See e.g.*, Pet. Ex. D-E.

As cases continued to rise, the state of emergency was extended by Governor Hutchinson and currently remains in place. Pet. Ex. E. While some of the Governor's executive orders, and accordingly the Secretary's directives, are still in effect, some restrictions have gradually been lifted. The General Assembly has the power to terminate the Governor's state of emergency and has not done so. Ark. Code Ann. § 12-75-107(c)(1). All of the directives issued by the Secretary will terminate upon the Governor's executive ordering ending the state of emergency. Ark. Code Ann. § 12-75-107(d)(1).

III. STANDARD OF REVIEW

Arkansas requires fact pleading: a complaint must contain "a statement in ordinary and concise language of facts showing . . . that the pleader is entitled to relief." Ark. R. Civ. P. 8(a)(1); *Ark. Dep't of Envtl. Quality v. Brighton Corp.*, 352 Ark. 396, 403, 102 S.W.3d 458, 462 (2003). The complaint may not rely on conclusions. *See Ray & Sons Masonry Contractors v. U.S. Fid. & Guar. Co.*, 353 Ark. 201, 212–13, 114 S.W.3d 189, 196 (2003). On a Rule 12(b)(6) motion, "[o]nly the facts are treated as true, not the plaintiff's theories, speculation, or statutory interpretation." *Davis v. City of Blytheville*, 2011 Ark. App. 651, at 2; *Wallis v. Ford Motor Co.*, 362 Ark. 317, 325, 208 S.W.3d 153, 159 (2005). A plaintiff must show, "beyond mere conclusions and beliefs, that the facts in the complaint sound in a cause of action." *Davis*, 2011

Ark. App. 651, at 3 (citing *Harvey v. Eastman Kodak*, 271 Ark. 783, 610 S.W.2d 582 (1981)). A plaintiff may not file a complaint that is factually insufficient with the hopes of obtaining discovery to ascertain whether a cause of action exists. *Treat v. Kruetzer*, 290 Ark. 532, 534, 720 S.W.2d 716, 717 (1986). Finally, this Court may and should consider the Executive Orders and the Secretary's Directives at issue in assessing the instant motion. Ark. R. Evid. 201(b) & (d). The Orders and Directives are adjudicative facts and the Defendant respectfully requests the Court to take judicial notice of the same. Ark. R. Evid. 201(b) & (d).

IV. ARGUMENT

A. **Petitioners' action must be dismissed for failure to join an indispensable and necessary party.**

As an initial matter, Petitioners' suit must be dismissed pursuant to Ark. R. Civ. P. 19 and the Arkansas Declaratory Judgment Act for failure to name the Governor as a party. Ark. Code Ann. § 16-111-106. Petitioners' entire claim rests on their argument that the Governor unconstitutionally delegated his emergency powers (discussed below) to the Secretary of Health. Pet. ¶¶ 44-94. Additionally, Petitioners challenge Executive Order 20-37 and claim that the Governor could not end the public health emergency then, in the same Order, declare it anew. Pet. ¶¶ 94. Yet, *the Governor is not a party to this suit*.

Arkansas law defines an indispensable party as one without whom complete relief cannot be accorded. Ark. R. Civ. P. 19(a). Here, Petitioners cannot have the Secretary's directives declared unconstitutional without the Court passing on the constitutionality of the Governor's executive orders instructing the Secretary to take

action. Additionally, Arkansas law defines a necessary party as one who has an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may impair or impede his ability to protect that interest. *Id.* Undoubtedly, the Governor has an interest in the parameters of his emergency powers, and a disposition in Petitioners favor would impede his ability to protect that interest. Clearly then, the Governor is both an indispensable and necessary party to this suit. Petitioners complete failure to name him as a party—despite naming him in the body of the petition *and* directly alleging the Governor acted outside the scope of his constitutional office—mandates dismissal pursuant to Ark. R. Civ. P. 19.

Additionally, Petitioners—who only seek declaratory relief—have failed to comply with the requirements of the Arkansas Declaratory Judgment Act by omitting Governor Hutchinson as a party. A portion of the Arkansas Declaratory Judgment Act states:

> "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."

Ark. Code Ann. § 16-111-106. Further, Ark. Code Ann. § 16-111-111 states in part:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

In *Davis v. McKinley*, the Arkansas Court of Appeals found that a trial court could properly refuse to render a declaratory judgment where an interested party had not been named and, thus, the declaratory judgment could not terminate the controversy at issue. 104 Ark. App. 105, 107, 289 S.W.3d 479, 480 (2008); *see also Johnson v.*

Robbins, 223 Ark. 150, 264 S.W.2d 640 (1954) (reversing trial court's failure to dismiss a declaratory judgment action where interested party not named).

Here, Governor Hutchinson is clearly an interested party within the meaning of the Declaratory Judgment Act, as the validity of his executive orders and executive powers are directly in question. A judgment in this action would prejudice the rights and powers of Governor Hutchinson that he possesses by nature of his elected position as head of the state executive branch. Consequently, Petitioners failure to join Governor Hutchinson is grounds for immediate dismissal of this suit under the Arkansas Declaratory Judgment Act in addition to Ark. R. Civ. P. 19.

B. **The Directives Issued by the Secretary of the State Board of Health are Valid Under the Arkansas Emergency Services Act**.

Petitioners argue that directives issued by the Secretary of Health are rules under the APA, and as such, were required to be presented to the Joint Committee of the General Assembly before being issued. Pet. ¶¶ 12, 13, 14. Petitioner's argument is fatally flawed for one very obvious reason: the challenged directives were issued pursuant to the Governor's emergency powers, *not* the State Board of Health's 2019 Rules and Regulations Pertaining to Reportable Diseases ("2019 Rules"). Pet. Ex. A. Petitioners concede this in paragraph 5 of the Petition:

> " . . . 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 that 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 the*** disease."

Petition, ¶ 5.

The Emergency Services Act governs this action. Ark. Code Ann. § 12-75-101-133. Passed by the General Assembly in 1973, the Emergency Services Act confers plenary authority upon the Governor in cases of emergency, which, as defined in the statute, includes airbourne and surface toxins or *any other catastrophe of sufficient severity to warrant state action.* Ark. Code Ann. § 12-75-103(2). Specifically, the Emergency Service Act states:

> (a)(1) A disaster emergency shall be declared by executive order or proclamation of the Governor if he or she finds a disaster has occurred or that the occurrence or the threat of disaster is imminent.
>
> (2) When time is critical because of rapidly occurring disaster emergency events, the Governor may verbally declare for immediate response and recovery purposes until the formalities of a written executive order or proclamation can be completed in the prescribed manner.
>
> (b)(1) The state of disaster emergency shall continue until:
>
> (A) The Governor finds that the threat or danger has passed and terminates the state of disaster emergency by executive order or proclamation; or
>
> (B) The disaster has been dealt with to the extent that emergency conditions no longer exist and the employees engaged in the restoration of utility services have returned to the point of origin.
>
> (2) No state of disaster emergency may continue for longer than sixty (60) days unless renewed by the Governor.

Ark. Code Ann. § 12-75-107. Additionally, the Emergency Services Act states:

> (a) The Governor is responsible for meeting and mitigating, to the maximum extent possible, dangers to the people and property of the state presented or threatened by disasters.
>
> (b)(1) Under this chapter, the Governor may issue executive orders, proclamations, and rules and amend or rescind them.
>
> (2) Executive orders, proclamations, and regulations have the force and

effect of law.

. . .

(d)(1) During the continuance of any state of disaster emergency, the Governor is Commander-in-Chief of all forces available for emergency duty.

(2) To the greatest extent practicable, the Governor shall delegate or assign operational control by prior arrangement embodied in appropriate executive orders or rules, but nothing in this section restricts the Governor's authority to do so by orders issued at the time of the disaster emergency.

(e) In addition to any other powers conferred upon the Governor by law, the Governor may:

(1) Suspend the provisions of any regulatory statutes prescribing the procedures for conduct of state business, or the orders or rules of any state agency, if strict compliance with the provisions of any statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency;

(2) Utilize all available resources of the state government and of each political subdivision of the state as reasonably necessary to cope with the disaster emergency;

(3) Transfer the direction, personnel, or functions of state departments and agencies or units of state departments and agencies for the purpose of performing or facilitating emergency management;

(4) Subject to any applicable requirements for compensation under § 12-75-124, commandeer or utilize any private property if he or she finds this necessary to cope with the disaster emergency;

(5) Direct and compel the evacuation of all or part of the population from any stricken or threatened area within the state if the Governor deems this action necessary for the preservation of life or other disaster mitigation, response, or recovery;

(6) Prescribe routes, modes of transportation, and destinations in connection with evacuation;

(7) Control ingress and egress to and from a disaster area, the movement of persons within the area, and the occupancy of premises therein;

> (8) Suspend or limit the sale, dispensing, or transportation of alcoholic beverages, explosives, and combustibles; and
>
> (9) Make provision for the availability and use of temporary emergency housing.

Ark. Code Ann. § 12-75-114.

COVID-19 is a disease spread both through the air and via surfaces, so it meets the statutory definition of a disaster. *See* Pet. Ex. B ¶ 4. Moreover, even if COVID-19 cannot be classified as an airbourne or surface toxin, COVID-19, with its rapid spread, lack of a cure, number of fatalities, and lasting health effects on even the healthiest of the population, certainly falls into the catch-all category of the statute given its magnitude. Ark. Code Ann. § 12-75-103(2); *See Friends of Danny Devito v.* Wolf, 227 A.3d 872, 889 (Pa. 2020) ("The COVID-19 pandemic is, by all definitions, a natural disaster and a catastrophe of massive proportions. Its presence in and movement through Pennsylvania triggered the Governor's authority under the Emergency Code."). Petitioners have not alleged that COVID-19 is not a public health emergency, but instead concede as such in describing the "heretofore unanticipated drastic health, social and economic consequences" of the virus. Pet. ¶ 53.

In cases of emergency, such as COVID-19, the Emergency Services Act specifically gives the Governor complete authority to issue, amend, and rescind executive orders, proclamations, and rules aimed at mitigating, controlling, or responding to the disaster, and further specifies that any executive orders, proclamations, or regulations passed under this section will have the full force and effect of law. Ark. Code Ann. § 12-75-114(b)(1)-(2). Additionally, Ark. Code Ann. § 20-

7-110(b) authorizes the Governor to order the Secretary of Health to act to prevent the spread of *any epidemic*:

> "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."***

Ark. Code Ann. § 20-7-110(b) (emphasis added).

Pursuant to these statutes, Governor Hutchinson declared a state of emergency in response to COVID-19. Pet. Ex. B. Governor Hutchinson then lawfully issued executive orders aimed at controlling the spread of the virus. *See e.g.*, Pet. Ex. B-E. These executive orders, complying with Ark. Code Ann. § 20-7-110, outlined the facts underlying the emergency and *required* the Secretary of Health to take measures aimed at controlling the disease. *See e.g.*, Pet. Ex. B-E.

The Pennsylvania Supreme Court recently considered its emergency services statute and its Governor's enabling Executive Orders pursuant to that statute in two companion cases, *Friends of Danny Devito v. Wolf*, 227 A.3d 872 (2020) and *Wolf v. Scarnati*,---A.3d.---, 2020 WL 3567269, at *16, (2020). Both Pennsylvania's emergency services statute and the Governor's initial Executive Order contain very similar language as the ones at issue here. *Friends of Danny Devito*, 227 A.3d at 877-879, 885; *Wolf*, 2020 WL 3567269, at *1-2. In explaining the legal effect of the Governor's Executive Orders pursuant to his emergency powers, the Pennsylvania Supreme Court stated:

> The Governor does not argue that the Proclamation is a law in and of itself, but rather that the Proclamation has "the force of law." Governor's Application at 28; *see also* 35 Pa.C.S. § 7301(b) ("[T]he Governor may issue, amend and rescind executive orders, proclamations, and regulations which shall have the force and effect of law."). This may seem like a semantic difference, but it is not. Executive orders that affect individuals outside the executive branch "implement existing constitutional or statutory law." *Markham v. Wolf*, 647 Pa. 642, 190 A.3d 1175, 1183 (2018) (citing *Shapp v. Butera*, 22 Pa.Cmwlth. 229, 348 A.2d 910, 913 (1975)). But an executive order or an administrative regulation promulgated by an executive agency that implements a statute still has the *force of law*. Otherwise, no entity outside the executive branch could be compelled to abide by a regulation issued by an executive branch agency. Such a result would be inconsistent with long-standing precedent. *See, e.g.*, *Bell Tel. Co. of Pa. v. Lewis*, 317 Pa. 387, 177 A. 36 (1935) (overruling a non-delegation challenge to a statute that permitted the Governor to determine when telephone and telegraph lines could be constructed along highways).

Wolf, 2020 WL 3567269, at *16.

In other words, during times of emergency, the Governor can issue Executive Orders with the force of law. These Executive Orders may encompass regulations by agencies, for example, ordering the Secretary to implement measures aimed at controlling the disaster—here a deadly virus—as long as the facts outlined in the Governor's Executive Order ordering such action support a public health emergency. Ark. Code Ann. § 20-7-110; Ark. Code Ann. § 12-75-114(b)(1)-(2). These measures are not rules promulgated by the Department of Health under the APA, but limited measures implemented under the discretion of the Governor pursuant to his statutory authority and responsibility to respond to an emergency and pursuant to authority *granted to him by the General Assembly*. To hold otherwise, as Petitioners urge this Court to do, would render the emergency powers of the Governor practically

void—a result which defies multiple canons of construction. *See City of Cave Springs v. City of Rogers*, 343 Ark. 652, 658-59, 37 S.W.3d 607, 611 (2001) (statutes are presumed constitutional and a statute delegating legislative authority must be upheld if possible); *Ward v. Doss*, 361 Ark. 153, 205 S.W.3d 767 (2005) (statutes must be construed in a way that gives effect to the intent of the legislature and construed in a way that gives meaning and effect to every word in the statute so that no word is left void, superfluous or insignificant); *Roberson v. Phillips Cty. Election Comm'n*, 2014 Ark. 480, 449 S.W.3d 694, 696 (2014) (related statutes must be read together in a harmonious manner, if possible); *Jonesboro Healthcare Ctr., LLC v. Eaton-Moery Envtl. Servs., Inc.*, 2011 Ark. 501 at *8, 385 S.W.3d. 797, 802 (the court will not interpret statutory provision in a manner which reaches an absurd result or clearly contrary to the statute's purpose). As Petitioners note, "It is axiomatic that [an] 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." Pet. ¶ 23 (citing *City of Rockport v. City of Malvern*, 2010 Ark. 449, 374 S.W.3d 660 (2010)). Thus, Respondent's interpretation of the statute is correct as it is the interpretation which harmonizes all relevant statutes and still gives effect to the provisions of the Emergency Services Act granting the Governor wide latitude to control and respond to public emergencies. For these reasons, Petitioners' action must be dismissed.

C. **The Governor's Executive Orders are valid for longer than 120 days.**

Perhaps knowing that their claim will fail in the context of the Governor's emergency powers, Petitioners instead claim that any executive orders issued by the

Governor under the Emergency Services Act are only legally valid for a maximum of 120 days. Pet. ¶¶ 64-71. They cannot claim that any law restricts Emergency Orders to 120 days because no law does; rather, they claim such was the intent of the Legislature. Pet. ¶ 71.

As stated, Petitioners do not cite to any provision of the Emergency Services Act to support their position, nor could they, as *such language does not exist.* Rather, Ark. Code Ann. § 12-75-107 states: "No state of disaster emergency may continue for longer than sixty (60) days unless renewed by the Governor."

It is well-established that statutes must be given their plain and obvious meaning:

> The cardinal rule of statutory construction is to construe the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language. When the language of the statute is plain and unambiguous, and conveys a clear and definite meaning, there is no need to resort to rules of statutory interpretation. In other words, when the language of the statute is not ambiguous, the analysis need not go further and we will not search for legislative intent; rather, the intent is gathered from the plain meaning of the language used. Thus, an unambiguous statute presents no occasion to resort to other means of interpretation as "[i]t is not allowable to interpret what has no need of interpretation.

McMillian v. Live Nation Entertainment, Inc., 2012 Ark. 166, at 4-5, 401 S.W.3d 473, at 476 (internal citations omitted). Here, the enacting statute is clear and unambiguous and, therefore, it must be read to give effect to its plain language and obvious meaning. A state of emergency will last for 60 days *unless renewed by the Governor*. Ark. Code Ann. § 12-75-107. The statute does not say "unless renewed by the Governor an additional time," nor does it say "unless renewed by the Governor

for a maximum of 120 days." Petitioners would have this Court add an entire phrase to the statute seemingly out of thin air; however, it is a basic principle of statutory interpretation that courts cannot read into a statute language not included by the legislature. *Our Community, Our Dollars v. Bullock*, 2014 Ark. 457 at 18, 452 S. W.3d 552, 563.

Petitioners try to circumvent these well-established principles of law by arguing it was the *intent* of the Legislature to limit a state of emergency declared by the Governor to a maximum of 120 days. Pet. ¶ 71. In other words, rather than applying a clear and unambiguous statute as written and passed, Petitioners ask this Court to delve into the individual minds of members of the General Assembly and ascertain the intended meaning of the statute. Not only does Petitioners' argument lack any legal support as the Arkansas Supreme Court has explicitly prohibited such delving into alleged legislative intent when a statute—like this one—is plain and unambiguous, *see McMillian*, *supra*, but Petitioners' argument also lacks any basis in factual support. There is absolutely nothing in the entirety of the Emergency Services Act that even remotely implies a state of emergency may only be extended once. In fact, instead of providing a maximum time limit a state of emergency may be declared, the General Assembly chose to retain the power to terminate the state of emergency by a vote. Ark. Code Ann. § 12-75-107(c)(1). As of the date of this writing, the General Assembly has not chosen to utilize this option.

Similarly, Petitioners argue that the Governor could not end the public health emergency then, in the same Order, declare it anew as was purportedly done in

Executive Order 20-37. Pet. Ex. D. Again, this argument has absolutely no basis in the law. To the contrary, Ark. Code Ann. § 12-75-114(b)(1) unambiguously states: "Under this chapter, the Governor may issue executive orders, proclamations, and rules ***and amend or rescind them***." Moreover, there is no limitation in any statute stating the Governor cannot end the public emergency then state it anew. Indeed, the General Assembly further provided in the Emergency Services Act: "Nothing in this chapter shall be construed to: . . . (4) Limit, modify, or abridge the authority of the Governor to . . . exercise any other powers vested in him or her under the Arkansas Constitution or statutes or common law of this state independent of, or in conjunction with, any provision of this chapter." Ark. Code Ann. § 12-75-104. And, the General Assembly made clear that the Governor's executive orders issued in a disaster " …have the force and effect of law." Ark. Code Ann. § 12-75-114(b)(2). Indeed, the Arkansas Constitution grants the Governor the "supreme executive power" of the State. ARK. CONST. ART. 6, § 2. Finally, Ark. Code Ann. § 12-75-107 and § 114 unmistakably give the Governor the authority to issue additional Executive Orders as needed during the pendency of the state of emergency. Again, Petitioners ask this Court to ignore the unambiguous terms of multiple statutes in favor of an interpretation that directly contradicts them.

Petitioners' argument that the Governor cannot extend an emergency beyond 120 days has no support in Arkansas law. Nor does their argument that the Governor cannot amend or rescind executive orders in whole or in part. Consequently, to the

extent Petitioners claim the Governor's Executive Orders at issue are invalid, that claim should fail. Again, the Court should grant Defendant's motion to dismiss.

D. **Alternatively, the directives of the Secretary of Health are valid under the 2019 rules**.

Realizing their claim will fail under the Emergency Services Act, Petitioners allege that the 2019 Rules govern this action, and the Secretary's directives are invalid under these Rules. Pet. ¶¶ 6-8. Petitioners' argument is two-fold. First, Petitioners argue that COVID-19 is a "new disease" and therefore any powers granted from the General Assembly to the Secretary in the 2019 Rules do not apply to any regulations regarding COVID-19. Pet. ¶ 11-15. Second, Petitioners argue that even if the 2019 Rules apply to COVID-19, the "directives" issued by the Secretary of Health are really new "rules" that must follow the process for rule-making prescribed in the APA. Pet. ¶¶ 6-8; 14-15; 24-27; 53-56. Specifically, Petitioners argue that new rules must be presented to and approved by the appropriate legislative committee before taking effect, and because the Secretary did not present any of these alleged "rules" to the General Assembly, they are de facto invalid. Pet. ¶¶ 56-61.

Petitioners' reliance on the 2019 Rules is at best misguided and at worst a red herring. As explained above, the directives at issue were issued pursuant to the Executive Orders of the Governor in reliance on his emergency powers—emergency powers bestowed upon him by the General Assembly. In fact, of the 43 directives issued by the Secretary of Health between the start of the emergency and Petitioners

filing of this suit, *only six referenced the rules at all, while each and every one referenced the controlling executive order(s).*[2]

However, assuming *arguendo* that the 2019 Rules are relevant, they clearly apply to COVID-19. First, and most obviously, the rules explicitly list "Novel Coronavirus" as a covered disease. Pet. Ex. A § V(A). Petitioners argue—despite admitting COVID-19 is a "novel coronavirus"—that COVID-19 is not encompassed by the 2019 Rules' definition of Novel Coronovirus because in parenthesis next to "Novel Coronavirus" is the phrase "Middle Eastern Respiratory Syndrome or Severe Acute Respiratory Syndrome virus." Pet. ¶¶ 34-39. Thus, Petitioners argue "novel coronavirus" as used in the rules only applies to MERS or SARS and not COVID-19. *Id*. This argument fails for two reasons. First and most obviously, COVID-19 *is* caused by a strain of the severe acute respiratory syndrome coronavirus 2, i.e., SARS-CoV-2.[3] Therefore, even if Petitioners' hyper-technical reading of the statute were correct, the 2019 Rules would apply to COVID-19. Second, assuming *arguendo* Petitioners are correct that "Novel Coronavirus" as used in the 2019 Rules did not include COVID-19, the 2019 Rules—which were approved by the Legislature—include a

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[2] Arkansas Department of Health, *COVID-19 Directives, Orders, and Health Guidances,* [online] http://www.healthy.arkansas.gov/programs-services/topics/covid-19-health-guidances [Accessed 22 September, 2020] (*see* directives issued on March 23, April 16, May 8, May 11, June 15, July 20, and August 26, 2020).

[3] *See* Centers for Disease Control and Prevention. 2020. *Coronavirus Disease 2019 (COVID-19).* [online] https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html [Accessed 18 September 2020] (providing guidance on SARS-CoV-2, also known as COVID-19). The CDC's guidance is an adjudicative fact not subject to reasonable dispute of which this Court may and should take judicial notice pursuant to Ark. R. Evid. 201.

catchall phrase that clearly applies to COVID-19. Pet. Ex. A § VI. Specifically, Section VI of the 2019 Rules ("Other Diseases") states in part:

> All outbreaks of disease on the list ***(or other emerging diseases not specifically mentioned on the list***) should be reported immediately (within 4 hours) via phone to the ADH.
>
> . . .
>
> Other diseases not named in these lists may at anytime be declared notifiable as the necessity and public health demand, ***and these regulations shall apply when so ordered by the Director***.

Pet. Ex. A, § VII (emphasis added). Thus, even if "Novel Coronavirus" defined by the 2019 Rules somehow does not apply to the novel coronavirus COVID-19, at the very least the 2019 Rules apply to COVID-19 through Section VI.

Turning to the cornerstone of Petitioners' claim, the directives issued by the Secretary, in addition to being valid under the Emergency Services Act, are also valid under the 2019 Rules, assuming *arguendo* those rules apply. Petitioners acknowledge that the 2019 Rules were properly promulgated and approved by the General Assembly. Pet. ¶¶ 6-7; 34. In adopting the 2019 Rules, the General Assembly explicitly authorized the Secretary of Health to take appropriate measures to meet a public health emergency. Pet. Ex. A. For example, the 2019 Rules state:

> When the Director has knowledge, or is informed of existence of a suspected case or outbreak of a communicable disease:
>
> (a) The Director *shall take whatever steps necessary* for the investigation and control of the disease.

Pet. Ex. A § VII(a). Moreover, the 2019 Rules state:

> 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 disease into the State, or from one place to another within the State.

Pet. Ex. A § X(a) (emphasis added). Thus, in passing the 2019 Rules, the General Assembly lawfully delegated powers to the Secretary of Health explicitly authorizing him to take action—*including regulations*—in the wake of a public health crisis such as COVID-19. The APA explicitly states that it does not "repeal delegations of authority as provided by law." Ark. Code Ann. § 25-15-202(D). Consequently, the Secretary was merely carrying out his legislatively mandated and authorized administrative duties by issuing public health directives. *See Eldridge v. Board of Corrs*., 298 Ark. 467, 471, 768 S.W.2d 534, 536 (Ark. 1989). As a result, any actions taken or measures implemented by the Secretary pursuant to these 2019 Rules are not subject to the additional rulemaking process of the APA because *such actions and measures have already been approved by the General Assembly*. Petitioners argument to the contrary is incorrect. The Court should dismiss the petition.

E. **Petitioners request for relief violates the separation of powers doctrine**.

Petitioners, seemingly unhappy with how the powers they bestowed on the Governor and the Secretary (in the Emergency Services Act and the 2019 Rules respectively) have been implemented, attempt to recast the Secretary's directives as new "rules", which must follow the procedures set forth in the APA. Pet. ¶¶ 6-8; 14-15; 24-27; 53-61. Notably, such procedures include the adoption of each rule by the appropriate legislative body. *Id*. In effect, Petitioners ask this Court to nullify two lawfully passed statutes so that the General Assembly may micro-manage the state

executive's response to COVID-19. In so doing, it is the Petitioners, not the Respondent who seek to violate longstanding separation of powers doctrine.

The separation of powers doctrine is a "basic principle upon which our government is founded and should not be violated or abridged." *Federal Express Corp. v. Skelton*, 265 Ark. 187, 198, 578 S.W.2d 1, 7 (1979). The separation of powers doctrine relies on the notion that the legislature makes laws and the executive branch enforces those laws. *Hobbs v. Jones*, 2012 Ark. 293, at *9, 412 S.W.3d 844, 851. Additionally, while the legislature may not delegate its power to make law, it may delegate discretionary authority to the executive branch in deciding how best to execute the law. *Id*. at *9-10. The executive, and those officials who are designated by statute to help him discharge his constitutional duties, have broad discretion in determining how to implement the law. Indeed, as the Supreme Court has recognized, the discretion inherent in enforcement and implementation decisions is the touchstone of executive power. *See e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 733 (1986). Importantly, "[O]nce [the legislature] makes its choice enacting legislation, its participation ends. [It] can thereafter control the execution of its enactment only indirectly—by passing new legislation." *Id*. at 733-34; *See also Chaffin v. Ark. Game & Fish Com'm*, 296 Ark. 431, 437, 443, 757 S.W.2d 950, 953, 956-57 (1988) (The legislature does not have the power to manage the operations of [the agency]…."The effect of the [General Assembly's] "advice" is simply a veto of executive actions by the legislature" and violates the separation of powers doctrine).

"One of the most important fields of legislation that may be enacted under the police power is that of regulations in the interest of public health." *Geurin v. City of Little* Rock, 203 Ark. 103, 155 S.W.2d 719, 721 (1941). Here, the General Assembly made basic policy choices related to the regulation of public health and decided that, in times of a public health emergency, the Governor should be able to exercise broad powers to "[meet] and [mitigate], to the maximum extent possible, dangers to the people and property of the state presented or threatened by disasters." Ark. Code. Ann. § 12-75-114. Moreover, the General Assembly also lawfully passed the 2019 Rules charging the Secretary with managing and responding to public health crises, *and* gave him the discretion on how best to accomplish those goals. These delegations are consistent with longstanding law regarding public health challenges. *See Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 27 (1905) (holding that the authority to respond to a public health crisis must be "lodged somewhere" and to vest such authority in officials "appointed, presumably because of their fitness to determine such questions" is not unusual or unreasonable); *Bd. of Trustees of Highland Park Graded Common Sch. Dist. No. 46 v. McMurty*, 184 S.W. 390, 394 (Ky. 1916) (construing public health statutes in a way that enables the executive "to meet the exigencies of the occasion" advances the separation of powers doctrine, not subverts it).

However, to construe the 2019 Rules to require the Secretary to submit every public health restriction or regulation to the General Assembly before enactment, as Petitioners urge this Court to do, essentially grants Petitioners the ability to both

write the law and decide how it should be applied, usurping the executive branch's discretionary authority. Such an encroachment is especially unwarranted where, as here, the General Assembly retains the ability to check executive discretion by amending the 2019 Rules. And, the General Assembly's delegations to the Governor and Secretary authorizing each to take action in the face of a public health emergency without additional review makes sense. The ever-changing demands of a public health crisis such as a pandemic require quick action. As such, they cannot be met completely through the legislative process. By delegating flexible discretion to executive officials, the General Assembly, like the legislatures in other states, sought to avoid "the confusions and delays" as well as "the dangers of partisan opinion" that would arise if they were required to respond during the midst of a public health crisis. *State v. Superior Court for King Cty.*, 174 P.973, 978 (Wash. 1918). To require any action of the Secretary to undergo the rulemaking process, even the emergency rulemaking process, would place the health and well-being of the state citizens are risk, by delaying the time-sensitive judgments of the executive branch.

Interpreting the Secretary's directives as "rules" which need additional approval by the General Assembly renders *both* the General Assembly's delegation of power to the Governor in the Emergency Services Act and the General Assembly's delegation to the Secretary in the 2019 rules of no effect. As explained above, the Court cannot interpret a statute in a way that leaves it devoid of all meaning. *Jonesboro Healthcare Ctr., LLC v. Eaton-Moery Envtl. Servs., Inc.*, 2011 Ark. 501 at *8, 385 S.W.3d, 797, 802 (the court will not interpret statutory provision in a manner

which reaches an absurd result or clearly contrary to the statute's purpose). Moreover, it provides the General Assembly the ability to control the discretion of the executive branch—an ability it does not constitutionally possess. *See Bowsher; Chaffin*, *supra.* The General Assembly simply does not have the power to implement the specifics of a lawfully passed statute delegating broad, but specific powers to the executive branch; rather, that power is specifically reserved to the officials charged with implementing the statute, here, the Governor and Secretary, respectively. *Id*.

The General Assembly charged the Executive Branch with controlling public health emergencies in the state, and provided the Executive Branch with broad powers to do so. While Petitioners may now regret that delegation, that does not justify an abuse of the separation-of-powers doctrine by allowing Petitioners what is in effect a legislative veto. As the Pennsylvania Supreme Court recently opined in a similar case:

> The Senators may be frustrated that, the General Assembly previously having delegated power to the Governor, the rescission of that power requires presentment, perhaps necessitating a two-thirds majority to override a veto. But the potential for such frustration inheres whenever the legislative branch delegates power to the executive branch in any context. ***The General Assembly itself decided to delegate power to the Governor under Section 7301(c). Current members of the General Assembly may regret that decision, but they cannot use an unconstitutional means to give that regret legal effect.***

Wolf v. Scarnati,---A.3d.---, 2020 WL 3567269, at *16, (2020) (emphasis added). Instead, if Petitioners as members of the General Assembly wish to reclaim these delegated powers, they must pass new legislation, or *exercise the power the General Assembly explicitly retained as a check on its delegation* and terminate the Governor's

declaration of emergency. For this additional reason, Petitioners claim must be dismissed.

V. CONCLUSION

Petitioners explicitly seek to challenge the emergency powers of the Governor, but did not join him to this action, therefore Petitioner's claim must be dismissed for failure to join a necessary, indispensable, and interested party. The Governor, pursuant to the powers vested in him by the General Assembly, issued Executive Orders requiring the Secretary of Health to take action to control and mitigate the effects of COVID-19, which meets the statutory definition of a "disaster." These Executive Orders can be extended and amended as long as the state of emergency persists. Moreover, the General Assembly explicitly delegated the Secretary the ability to issue regulations, such as directives, in the face of any public health epidemic, in the 2019 Rules. Petitioners attempt to recast the directives issued by the Secretary under the Governor's emergency powers as "rules" in order to circumvent well-established law prohibiting the legislature from directly or indirectly retaining power over the execution of laws should be rejected. Petitioners lawfully delegated the authority to manage public health crises to the Governor and the Secretary, and cannot undo that delegation without additional legislation. This is especially true when the General Assembly reserved a check on executive emergency management by allowing itself to terminate a state of emergency by majority vote. Consequently, Petitioners suit must be dismissed.

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General

By: *Michael Mosley*
MICHAEL MOSLEY (2002099)
Assistant Attorney General
BRITTANY EDWARDS (2016235)
Assistant Attorney General
OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, AR 72201
Phone: (501) 682-2081
Fax: (501) 682-2591
Email: michael.mosley@arkansasag.gov

Attorneys for Defendant

CERTIFICATE OF SERVICE

I, Michael Mosley, certify that on September 22, 2020, I filed the foregoing document with the Clerk of the Court via the E-flex filing system, which shall send notification of the filing to all parties of record and their counsel.

Michael Mosley
MICHAEL MOSLEY