

IN THE CIRCUIT COURT OF PULASKI COUNTY
AT LITTLE ROCK

Representative/Senator-elect DAN SULLIVAN, in his official capacity, Senator BOB BALLINGER, in his official capacity, Senator ALAN CLARK, in his official capacity, Senator TERRY RICE, in his official capacity, Senator GARY STUBBLEFIELD, in his official capacity, Senator KIM HAMMER, in his official capacity, Representative MARY BENTLEY, in her official capacity, Representative STEVEN MEEKS, in his official capacity, Representative JOSH MILLER, in his official capacity, Representative JOHN PAYTON, in his official capacity, Representative MARCUS RICHMOND, in his official capacity, Representative LAURIE RUSHING, in her official capacity, Representative BRANDT SMITH, in his official capacity, Representative RICHARD WOMACK, in his official capacity, Representative HARLAN BREAUX, in his official capacity, Representative BRUCE COZART, in his official capacity, Representative JUSTIN GONZALEZ, in his official capacity, and Representative NELDA SPEAKS, in her official capacity, and each in their individual capacity as voters, citizens and residents of the State of Arkansas,

and

IRIS STEVENS, Jonesboro, Arkansas,
JAMES DAVID HAIGLER, Jonesboro, Arkansas
SCOTT and ANGELA GRAY, Alexander, Arkansas,
MIKE and STEPHANIE DUKE, Benton, Arkansas, and
DAVE ELSWICK, Little Rock, Arkansas,
as voters, citizens and residents of the State of Arkansas,

PETITIONERS

V. CASE NO. CASE NO. 60CV-20-4915

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

ASA HUTCHINSON,
Governor of the State of Arkansas,

in his official capacity,

RESPONDENTS

AMENDED PETITION FOR DECLARATORY JUDGMENT

COME NOW, the Petitioners, Arkansas State Legislators, in their official and individual 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 duly elected public officials and members of the Arkansas General Assembly, acting in their official capacities, whose rights and status as legislators have been infringed by administrative actions of the Director of the Arkansas Department of Health who by issuing directives outside the scope of authority delegated to him under the Arkansas Administrative Procedures Act, in violation of the constitutional doctrine of separation of powers, that significantly interferes with the legislative process and ignores the procedural safeguards of the Arkansas General Assembly in providing legislative oversight over the acts of executive agencies, and whom as legislators individually and collectively have been subjected to institutional injury and who have suffered injury thereby, are seeking declaratory relief that the actions of the Director substantially and unconstitutionally interfere with the legislative process, 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. Petitioners, who are legislators acting in their individual capacities, business owners and other private citizens, all residents of the State of Arkansas, are persons whose rights, status or other legal relations have been injured as citizens and residents of the State of Arkansas, and are adversely 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 by issuing directives that have not been subjected to legislative oversight but which have general applicability to all citizens and residents of the State of Arkansas, including Petitioners, by restricting their freedom of movement and travel, to enjoy and defend life and liberty, freedom to peaceably assemble and to consult for the common good, to protect property, of the free exercise of religion and of other constitutionally recognized rights inherent to them, the rights to be free from illegal acts of the executive branch of their state government being self-evident and whose rights have been violated without due process of law by the issuance of numerous directives applicable to them and all other citizens and residents of the State of Arkansas promulgated by the Arkansas Department of Health to the exclusion from the emergency rulemaking and legislative oversight responsibilities set forth in the Arkansas Administrative Procedures Act of their duly and popularly elected members of the legislature, and whose acts are unconstitutional as applied to them and who have suffered injury thereby, 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.

3. Respondent Dr. Jose Romero 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.

4. Respondent Asa Hutchinson is the Governor of the State of Arkansas 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

4. As a civil action against the Director of the Arkansas State Board of Health and the Governor brought because of official acts, venue and jurisdiction are properly brought in this Court pursuant to A.C.A. § 16-60-104.

INTRODUCTION

5. 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 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.

6. Using as the basis for his authority to take that action in the form of agency “directives” placing restrictions and affecting 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.

7. On December 21, 2018, in the ordinary course of their legislative oversight function to which they are constitutionally entitled and by statute obligated, the Legislative Council of the Arkansas General Assembly reviewed those same 2019 Rules and Regulations of the Department of Health Pertaining to Reportable Disease.

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

9. The Administrative Procedures Act under Arkansas law provides the procedural safeguard of legislative review of agency rulemaking in order to assure that the extraordinary

authority delegated to agencies of the executive branch to promulgate and enforce rules that have force of law 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.

10. The Administrative Procedures Act not only contains procedures for legislative review of rules of general applicability, it also facilitates the promulgation and review 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.

11. Though the 2019 Rules of the Department of Health became effective January 1, 2019, 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."

12. Between March 13, 2020 and August 21, 2020, the Director of the Department of Health has issued forty-three (43) such directives without submitting a single one of those directives to the Legislative Council of the General Assembly for legislative review in accordance to the procedural safeguards incorporated in the emergency rulemaking provisions of the Administrative Procedures Act.

13. Since COVID-19 is a new disease, in reviewing the 2019 Rules and Regulations of the Department of Health Pertaining to Reportable Disease in December, 2018, 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.

14. 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 as they would apply to COVID-19 specifically.

15. 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 or during the pendency of this litigation have not been appropriately promulgated under the emergency rulemaking provisions of the Administrative Procedures Act and are invalid.

16. On June 18, 2020, Governor Hutchinson, after having issued Executive Order 20-03 for a period of sixty (60) days, and renewed by him for an additional forty-five days in Executive Order 20-25 by the limited authority expressly delegated to him in A.C.A. 12-75-107, ordered the emergency declaration of EO 20-03 terminated and the emergency declared anew an additional sixty (60) days in an exercise of unconstitutional authority pursuant to which all acts of the executive branch in furtherance thereof are invalid.

SEPARATION OF POWERS

17. 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.

18. 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.

19. 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).

20. 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).

21. 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.

22. 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).

23. 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).

24. 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 ADMINISTRATIVE PROCEDURES ACT

25. The process by which legislative authority is delegated to the executive branch is found in the Administrative Procedures Act (the “A.P.A.”), A.C.A. § 25-15-201 *et seq.*

26. Under ordinary circumstances, and applicable to “all necessary and reasonable rules of a general nature,” the provisions of the Arkansas Administrative Procedures Act (the “A.P.A.”) apply the first of two different processes for rulemaking and under A.C.A. § 25-15-204(a), 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 rule to the Legislative Council of the General Assembly pursuant to A.C.A. § 10-3-309.

27. The express purpose of A.C.A. § 10-3-309 is that while the extraordinary measure is taken to endow an administrative agency with power that is otherwise exclusively a legislative function in deference to its subject matter expertise, the legislature reserves for itself an oversight function since “[i]t is the purpose of this section to establish a method for continuing legislative review and approval of such rules to correct abuses of rulemaking authority or clarify legislative intent with respect to the rulemaking authority granted the administrative boards, commissions, departments, or agencies. A.C.A. § 10-3-309(a)(2)

28. In the case of a health emergency in which the Department of Health may find that “imminent peril to the public health, safety, or welfare” requires adoption of a rule with less than thirty (30) days’ notice, the A.P.A. provides a second, expedited process for emergency rulemaking under A.C.A. § 25-15-204(c)(1) requiring that the agency justify its finding in writing and submit its findings and proposed emergency rule to the Executive Subcommittee of the Legislative Council under A.C.A. § 10-3-309(d)(1), but which rules may be effective for no longer than one hundred twenty (120) days. A.C.A. § 25-15-204(c)(3).

THE STATE BOARD OF HEALTH

29. By Act 96 of 1913, codified as A.C.A. § 20-7-101, *et seq.*, 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”).

30. 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”).

31. 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.

32. The power conferred on the State Board of Health is limited to those “necessary and reasonable rules of a general nature” for, *inter alia*, “[t]he protection of the public health and safety.” A.C.A. § 20-7-109(a)(1).

33. A “rule” adopted by an administrative agency of the executive branch is the result of an extraordinary process representing an exception to the legislative function generally reserved to the General Assembly and delegated to administrative agencies under the A.P.A. and is defined 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.”

34. Those “reasonable rules of a general nature” are, however, as is any rulemaking authority delegated to an executive agency by the legislature, subject to legislative review and approval by committees of the General Assembly under 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.”

35. On April 26, 2018, consistent with the power conferred by the General Assembly appearing in A.C.A. § 20-7-109, and as “general measures for the control of communicable diseases,” the State Board of Health adopted Rules and Regulations Pertaining to Reportable Disease, to be effective January 1, 2019 (the “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, and states as its purpose, “to provide for the prevention and control or 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.

36. 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.”

37. 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.”

38. On December 21, 2018, the 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) providing 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.”

39. While 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.

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

41. 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).

THE EMERGENCY SERVICES ACT

42. 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.

43. 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).

44. 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.

GOVERNOR HUTCHINSON’S DECLARATION OF EMERGENCY

45. 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.*, rationalized 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.

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

47. A triggering mechanism appears in A.C.A. § 20-7-110(b) requiring of the Governor in instances of a health emergency 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]

48. Executive Order EO 20-03, served as that call to bring the Board's attention the unique facts of the COVID-19 outbreak, and should have initiated the emergency rulemaking provisions of the Administrative Procedures Act set forth in A.C.A. § 25-15-204(c)(1).

49. In Executive Order EO 20-03, though it is a novel coronavirus of a family of RNA viruses related to SARS and MERS, the Governor 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." [Emphasis added]

50. 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.”

51. Bypassing the mandatory legislative oversight provisions of the A.P.A., Executive Order EO 20-03, sought to authorize 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,” a clear reference to the language contained in Section X of the 2019 Rules and Regulations of the State Board of Health.

52. The vague delegation of authority to the Director of the Department of Health appearing in EO 20-03, with its reference to authority purportedly granted to him under A.C.A. § 20-7-110(b), cannot harmonize with provisions of the Arkansas constitution providing for separation of powers, since it sought to bestow upon the executive branch blanket authority “to take such action as the public safety of the citizens demands” and “to do everything reasonably possible” without regard to the procedural safeguards incorporated into 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 a delegation of arbitrary power.

53. Since, as the Governor noted in EO 20-03, the emergence of COVID-19 represents to medical community a “new disease,” 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.

54. 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).

55. Though the Director has not issued a single emergency 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, directives being issued under the premise that they are authorized under the pre-existing, but factually deficient, 2019 Rules regarding reportable diseases.

56. 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.

“DIRECTIVES” ISSUED BY THE SECRETARY

57. The Director has avoided the emergency rulemaking procedures of the A.P.A. in his exercise of authority in response to COVID-19 delegated to him by the Governor in EO 20-03. and all subsequent executive orders, by issuing “directives” under the 2019 Rules that are

essentially “rules” as defined by the A.P.A. since they clearly consist of “an agency statements of general application with future effect that implements, interprets, or prescribes law or policy” as it regards COVID-19. A.C.A. §25-15-202(9)(A).

58. Under Arkansas law, there is a distinction made between an agency “directive” and a “rule” 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).

59. By labeling each of his actions as a “directive” rather than a “rule,” the Director of Health has bypassed the procedural safeguards as are clearly intended by the A.P.A. and has excluded the Arkansas legislature whatsoever from rulemaking as it relates to COVID-19, are *ultra vires* acts beyond the scope of his rulemaking authority as delegated to him by the General Assembly, and an unconstitutional violation of separation of powers.

60. The Director has issued forty-three (43) such directives of general application and future affect that have affected the legislative process and constitutional rights of Arkansas legislators, Arkansas business owners, and private citizens of the State of Arkansas, all of whom have been subjected to criminal penalties for violation of any one of those said directives, of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) or imprisonment not exceeding one (1) month or both, enforceable by any law enforcement officer within the state under A.C.A. § 20-7-101, in the exercise of his “sole authority over all instances of quarantine, isolation and restrictions on commerce and travel throughout Arkansas,” “[b]ased on available scientific evidence” and claimed under A.C.A. § 20-7-109 and 110 and the 2019 Rules. Among those are:

- March 20, 2020 for the closure of K-12 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, subjects “[a]ll public gatherings of any number of people occurring outside a single household to agency directives, and limiting 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 by which the Secretary of Health “requires every person in 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.

61. The Director of the Department of Health, a sole, unelected bureaucrat within the Arkansas Department of Health, has been authorized to impose criminal penalties on citizens of the State of Arkansas, and law enforcement offices within the State of Arkansas have been charged with enforcement of the Director’s directives under A.C.A. § 20-7-101 without due process, though A.C.A. § 20-7-101(a)(1) provides that said criminal penalties apply only to violations or “orders” or “rules” and A.C.A. § 20-7-101(b)(4) states that all “rules” shall have

been reviewed by House and Senate committees on Public Health, Welfare, and Labor or other appropriate subcommittee thereof, provisions the Director seeks to avoid by relabeling rules as directives.

62. Having avoided legislative oversight in contravention of the A.P.A., the Director has violated Arkansas law, and, as a result, faces the consequence that each of his “directives” issued since March 13, 2020 are invalid since they were not “adopted and filed in substantial compliance with this section” as set forth in A.C.A. § 25-15-204(h), and that each will have to be resubmitted to the appropriate legislative committees with his findings of imminent peril to the public health, safety, or welfare in writing to the Legislative Council as required by the emergency rulemaking provisions of the A.P.A.

DURATION OF THE HEALTH EMERGENCY

63. 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 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.

64. There are express time limitations to the delegation of emergency authority of the Governor to be found the Emergency Services Act 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).

65. The Governor's Executive Order EO 20-03 issued due to the threat of the 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.

66. Within sixty (60) days of issuing Executive Order EO 20-03, 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 by issuing Executive Order EO 20-25, said Executive Order EO 20-25 attached hereto as **Exhibit C** and incorporated herein by reference.

67. On June 18, 2020, although the Arkansas Emergency Services Act provides only for the declaration of a disaster emergency for a period of no longer than 60 days and one extension that could arguably be for an additional sixty (60) days, but the Governor opted for only an additional forty-five (45) days, and that would have expired on June 19, 2020, Governor Hutchinson, unauthorized by the language of A.C.A. § 12-75-107 and in an *ultra vires* act clearly inconsistent with the intent of the Arkansas General Assembly, 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," said Executive Order EO 20-37 attached hereto as **Exhibit D** and incorporated herein by reference.

68. Executive Order EO 20-37, and all subsequent Executive Orders issued by the Governor since June 18, 2020, are acts by the Governor representing the use of absolute, unregulated, and undefined discretion not expressly authorized by the legislature to the Governor and illegitimate acts of arbitrary power since his authority to act in an emergency was limited to, at most, 120 days.

69. To be read otherwise, and for the Governor to claim emergency authority for additional periods and to be renewed indefinitely in his sole discretion under A.C.A. 12-75-107, such a delegation would represent a vague, standardless and unconstitutional delegation of authority by the General Assembly.

70. On August 14, 2020, by issuing Executive Order EO 20-45, Governor Hutchinson renewed Executive Order 20-37 for an additional sixty (60) days, which if allowed to expire will result in an emergency declaration period of two hundred twenty-five (225) days duration to the exclusion of the Arkansas General Assembly, 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,” said Executive Order EO 20-45 attached hereto as **Exhibit E** and incorporated herein by reference.

71. There is clearly no provision in Emergency Services Act for a second declaration of emergency, neither can such be inferred from legislative intent, nor can there be any plausible legal justification under the auspices of the need for immediate action to the exclusion of the legislative processes and procedural safeguards mandated by the A.P.A., consisting of review by the Legislative Council of the Arkansas General Assembly, for the actions taken by the Director of the Department of Health in response to COVID-19.

72. The Governor has made public statements suggesting that in a state of emergency, legislative review of his actions and that of the Department of Health would cause unnecessary

delay, yet he has, by Executive Order, formed several committees in the absence of the legislature to perform quasi-legislative functions:

EO 20-11	The Arkansas CARES Act Steering Committee
EO 20-17	The Governor’s Medical Advisory Committee
EO 20-20	The Governor’s Economic Recovery Task Force
EO 20-21	The Governor’s COVID-19 Testing Advisory Group
EO 20-28	The Governor’s COVID-19 Technical Advisory Board
EO 20-32	Task Force to Advance the State of Law Enforcement in Arkansas

73. The stated interpretation to justify the unconstitutional exercise of 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, to the exclusion of the mandated legislative process, representing a clear abuse of rulemaking authority anticipated by A.C.A. § 10-3-309.

74. 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.

75. 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 which, if extended for 60 days provides for a total emergency declaration of one hundred twenty (120) days duration.

76. There is no statutory provision allowing for a second emergency declaration addressing the same disaster occurrence following an initial declaration and one extension.

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

78. 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, a time period that coincides with the statutory time limitation for emergency declarations under A.C.A. § 12-75-107.

79. The A.P.A., in A.C.A. § 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.”

80. 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 rules or “directives” after one hundred twenty (120) days or the provision regarding successive emergency rules found in A.C.A. § 25-15-204(c)(4).

81. Every directive 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.

82. 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).

83. There is no repository or reservoir of power reposed in the executive branch such that the Governor could declare a second emergency for the same occurrence without said authority being delegated to him by the Arkansas General Assembly.

84. 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.”

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

86. 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.

87. 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

88. Plaintiffs hereby restate and incorporate by reference the allegations contained in Paragraph 1 through 87 as if set forth in full herein.

89. 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.*

90. There did not exist any Rules or Regulations adopted by the Arkansas State Board of Health anticipating the outbreak of COVID-19 or its unforeseen and historically unique medical,

social and economic consequences in early 2020 when the Governor issued the first of his Executive Orders to address said outbreak.

91. 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, are not applicable as they were 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 applies to COVID-19 when it was presented to the Legislative Council on December 21, 2018 and cannot, therefore, and it should be declared, could not have legitimately been 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 rules of general applicability to all businesses located in, and residents and citizens of, the State of Arkansas issued without the procedural safeguards of oversight by the General Assembly, fully informed and apprised of those needs, consequences and alternatives.

92. The outbreak of COVID-19 in early 2020 necessarily required, and it should be declared, that 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 of that evidence made to the Executive Committee of the Legislative Council was so required so that it could perform its legislative oversight function and guard against arbitrary and capricious action of the agency 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).

93. 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 for all legal intents and purposes, and they should be declared, “rules” as defined by the Administrative Procedures Act in A.C.A. § 25-15-202(9)(A).

94. By issuing “directives” without legislative oversight, it should be declared, that the Director has unlawfully bypassed the procedural safeguards of 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, interferes with the legislative process, and represents an abuse of that authority adversely affecting the rights of the Plaintiffs who are duly elected members of the legislative branch of Arkansas government, is unconstitutional as it applies to them, as legislators attempting to exercise their constitutional authority and who have suffered injury thereby.

95. As being issued not in substantial compliance with the emergency rulemaking provisions of the Administrative Procedures Act, and it should be declared, that the directives issued by the Director of the Arkansas Department of Health since the issuance of the Governor’s original Executive Order EO 20-03 on March 11, 2020 are invalid *ab initio* pursuant to A.C.A. § 25-15-204(h) as this Court should declare.

96. 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 should be declared to violate Article 4, §§ 1 and 2 of the Arkansas Constitution, and represents the exercise of legislative power by the Department of Health belonging solely to the Arkansas General Assembly not expressly directed or permitted.

97. 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,

should be declared invalid as the source of authority by which the Director of the Department of Health issued directive that are 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.

98. 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 him, and by virtue of said proclamation, by the Director of the Arkansas Department of Health delegated to him thereby should be declared invalid as in violation of the emergency rulemaking provisions of the Administrative Procedures Act, a legislative enactment designed to protect the rights of every individual citizen of the State of Arkansas from the arbitrary and capricious actions of unelected government officials and abuses of their rulemaking authority, actions that directly affect the lives and livelihoods of Plaintiffs who are business owners, residents and citizens of the State of Arkansas alike that are unconstitutional as it applies to them as restricting their freedom of movement and travel, to enjoy and defend life and liberty, freedom to peaceably assembly and to consult for the common good, to protect property, of the free exercise of religion and of other constitutionally recognized rights inherent to them, the rights to be free from illegal acts of their government being self-evident, and who have suffered injury thereby, said actions, and any further such actions taken after the filing of this Petition, are likewise illegal and should be declared to be invalid *ab initio* under the provisions of the Arkansas Emergency Services Act and the Administrative Procedures Act.

SPEEDY HEARING

99. Pursuant to Rule 57 of the Arkansas Rules of Civil Procedure, the Court may Order a speedy hearing of an action for declaratory judgment and may advance it on the calendar.

Plaintiff so requests.

WHEREFORE, Plaintiffs 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 oversight 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 to authorize the Director to act thereby, the Plaintiffs all of whom in their official and individual capacities having then been injured, pray for a speedy hearing on Plaintiffs Petition for Declaratory Judgment pursuant to Rule 57 of the Arkansas Rules of Civil Procedure, and for such other and further relief the Court deems just and proper.

Respectfully submitted,

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