IN THE CIRCUIT COURT OF PULASKI COUNTY
AT LITTLE ROCK

Representative/Senator-elect DAN SULLIVAN, in his official capacity, et al., PETITIONERS

V. CASE NO. 60CV-20-4915

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

BRIEF IN SUPPORT OF PETITIONERS' RESPONSE TO RESPONDENT'S MOTION TO DISMISS

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, by and through undersigned counsel, and in support of their Response to Respondent's Motion to Dismiss, state and allege as follows:

INTRODUCTION

Respondent's motion to dismiss fails to point out any factual deficiencies of Petitioners' claims. The fundamental allegation of the petition is while executive agencies like the Arkansas Department of Health have been authorized to promulgate and enforce rules, the General Assembly has reserved to itself a method for continuous legislative review and approval, and since March 13, 2020, the Director of the Department of Health has violated that mandatory statutory process. By filing their Petition for Declaratory Judgment pursuant to A.C.A. § 16-111-101 *et seq*., Petitioners have invoked the authority of the Court to "declare rights, status, or other legal relations" under A.C.A. § 16-111-111(a) to establish that Respondent's actions have violated their rights as legislators and private citizens. In invoking that authority, Petitioners are obligated to state, and have stated, the requisite facts to establish a claim for relief that include the following allegations:

> (1) a justiciable controversy, that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy; in other words, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

McCutchen v. City of Fort Smith, Arkansas, 2012 Ark. 452, 425 S.W.3d 671, 680-81 (2012). In no uncertain terms, Petitioners have established the judiciable controversy that the Director of the Arkansas Department of Health has overstepped the authority granted his agency by the emergency rulemaking provisions of the Arkansas Administrative Procedures Act under the pretext of an ongoing and interminable health emergency. In the process, Respondent has not only usurped legislative authority but also violated constitutional rights of the Petitioners and they have suffered injury thereby. Petitioners, therefore, have stated sufficient facts upon which relief can be granted and have demanded relief to which by declaratory judgment they are entitled.

Respondent's Motion is non-specific on which facts Petitioners failed to allege or which elements of a declaratory judgment claim they failed to address, and while he does attest that Petitioners have failed to add Governor Hutchinson as a necessary party, that argument represents a Rule 12(b)(7) defense rather than a Rule 12(b)(6) or Rule 8(a) issue. Respondent, as director of an administrative agency, has specific authority delegated to him under provisions of the Arkansas Administrative Procedures to issue rules that have force of law with the mandatory prerequisite of legislative review whether in the ordinary course of business or, as set out in several specific statutory provisions, in the event of a health care emergency. The Governor, expressly excepted from the statutory definition of "agency" under A.C.A. § 25-15-202(2)(A), enjoys delegated disaster relief authority in myriad circumstances that are simply immaterial here. So, while the Governor is not subject to the provisions of limited delegated authority

appearing in the APA, Respondent, the head of his executive agency, most certainly and specifically is and he is foreclosed under the law from taking advantage of a perceived statutory loophole in issuing indeterminate directives unreviewed by the legislature under the pretext of issuing those directives through executive fiat. Nevertheless, were the Governor a party, the Attorney General's office would provide his defense as it is for Respondent, and therefore, any rights or interests he may claim directly or indirectly will be adequately defended.

RESPONDENT'S DELEGATED AUTHORITY

Under the Administrative Procedures Act, A.C.A. § 25-15-201 *et seq*., ("the APA") by which the Arkansas General Assembly has delegated limited legislative power, as an exception to its sole constitutional authority to make law, to administrative agencies to issue rules that have force of law. In addition, enactment of A.C.A. § 10-3-309 that created the Legislative Council as a committee of the General Assembly, the Arkansas legislature has established mandatory procedures for the promulgation of those rules and provides for continuing legislative review to oversee and prevent abuses of that rulemaking authority. Those statutory provisions likewise provide a method for expedited promulgation and legislative review of agency rules in instances of emergency. Petitioners have alleged that the actions of the Director of the Arkansas Department of Health, in issuing forty-three (43) "directives" since March 13, 2020, represents a blatant attempt to circumvent the mandatory emergency rulemaking process of the APA, thereby thwarting legislative review and assuming absolute and unchallenged authority the Director has not been, and under the constitutional doctrine of separation of powers cannot be, granted.

AUTHORITY OF THE DEPARTMENT OF HEALTH

Respondent is one of sixteen (16) individuals appointed by the Governor to the State Board of Health and designated as the Secretary (a.k.a. "the Director") of the Department of

Health pursuant to A.C.A. § 20-7-102 and A.C.A. § 25-43-803. That body, as an administrative agency, is obligated by the APA to adopt certain rules providing a description of the organization while describing the general course and method of its operations. A.C.A. § 25-15-203(a)(1). On April 26, 2018, the Board of Health promulgated one such rule as its Rules and Regulations of the State Board of Health Pertaining to Reportable Disease made effective on January 1, 2019 ("the 2019 Rules"), said rules attached as an exhibit to Petitioner's petition. The stated purpose of those rules is "to provide for the prevention and control of communicable diseases and to protect the public health, welfare and safety of the citizens of Arkansas."[1] Section VII of said rules provides that "[w]hen the Director has knowledge, or is informed of the existence of a suspected case or outbreak of a communicable disease . . . the Director shall take whatever steps necessary for the investigation and control of the disease."[2] Respondent's existing obligation set forth in the 2019 Rules to act in the interest of public health is reflected in Governor Hutchinson's directive from his March 11, 2020 Executive Order EO 20-03 declaring an emergency by which he charged the Department of Health "to do everything reasonably possible to respond to and recover from the COVID-19 virus." EO 20-03 is, therefore, redundant except as it fulfills the Governor's statutory authority that when in his judgment safety of the public demands due to epidemic or contagious disease, that he "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." A.C.A. § 20-7-110(b). In other words, the Governor, by his proclamation. ordered the Department of Health to take action it was already obligated to take under the 2019 Rules. However, as the Governor declared in said

[1] DOH 2019 Rules, p. 4.
[2] DOH 2019 Rules, p. 10.

proclamation, COVID-19 is a "new disease," related to, yet unanticipated in scope, to those contained in the 2019 Rules and would necessitate further amendment and legislative review under the APA as circumstances dictated. Section 20-7-110, however, merely establishes that the State Board of Health has "general supervision and control of all matters pertaining to the health of the citizens of the State of Arkansas, not the "sole authority over all instances of quarantine, isolation and restrictions on commerce and travel throughout Arkansas" he boldly claims in his directives. Respondent's "power . . . to make all necessary and reasonable rules" for, *inter alia*, "the suppression and prevention of infectious, contagious, and communicable diseases" is found in A.C.A. § 20-7-109. In order for Respondent to "take whatever steps necessary," or "to take such action as the public safety of the citizens demands," requires that for Respondent to exercise his power to issue necessary and reasonable rules, those rules "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 subcommittee thereof" a specific and mandatary enactment of the Arkansas General Assembly calling for legislative review. A.C.A. § 20-7-109(b).

The Director's obligations from the 2019 Rules, EO 20-03 and A.C.A. § 20-7-109-110 also reflect language found in the APA by which the legislature has granted emergency rulemaking authority applicable to the current COVID-19 crisis that if the agency "finds that imminent peril to the public health, safety or welfare . . . requires adoption of a rule in less than thirty (30) days' notice" it may proceed "without prior notice or hearing." A.C.A. § 25-15-204(c)(1). Those emergency rules, however, may not be effective for more than one hundred twenty (120) days. A.C.A. § 25-15-204(c)(3). Moreover, at the end of that 120-day period, if the agency wishes to adopt a successive rule the same or similar to the one that has expired, the

agency must wait thirty (30) days after expiration of the emergency rule to adopt the successive rule. A.C.A. § 25-15-204(c)(4). Those specific, statutory provisions may seem inconvenient the Respondent in claiming sole authority unlimited in time and scope, but are essential procedural safeguards to protect the public from abuses of that emergency rulemaking authority and to clarify legislative intent. A.C.A. § 10-3-309(a)(2).

The Governor, therefore, has not empowered Respondent to take preliminary steps in a public health emergency he was not previously authorized by the legislature to take, and making reference to that token grant of authority in an emergency proclamation does further endow Respondent with power to take action outside the scope of authority previously granted to him under the APA unless properly promulgated after legislative review. The Governor's proclamation certainly does not relieve the Director of his obligation to "file an emergency rule with the Secretary of State for adoption until said emergency rule has been approved under § 10-3-309," that provides for review of a proposed emergency rule by the Executive Subcommittee of the Legislative Council. A.C.A. § 10-3-309(d)(1).

EMERGENCY RULEMAKING UNDER THE APA

The APA defines an "agency" as a board, commission, department or other authority of the government of the State of Arkansas," but specifically excludes the office of Governor. A.C.A. § 25-15-202(2)(A). It also defines a "rule" as "an agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy . . . ." A.C.A. § 25-15-202(9)(A). The APA further requires that an agency rule be "based on the best reasonably obtainable scientific, technical, economic, or other evidence . . . ." A.C.A. § 25-15-204(b)(1). The term "directive," however, is not defined and, as issued by Respondent, likewise not subjected to review by any government actors outside the executive branch. The only

plausible rationalization for Respondent's using the term "directive" is to steer clear of the emergency rulemaking provisions of the APA by issuing what he calls directives though they clearly consist of agency statements of general applicability and future effect. His insistence that he issued his directives in consultation with the Governor or that he claims sole authority over all instances of quarantine and isolation is unavailing, since his directives that have the force and effect of rules have been issued without the procedural safeguards incorporated into the APA or enacted a part of A.C.A. § 29-7-109. Likewise, Respondent, in reference to his authority to issue his directives, borrows but truncates terminology from the APA definition of rules in suggesting they are "based on available scientific evidence,"[3] falling short of the best reasonably obtainable scientific, technical, economic, or other evidence requirements of the APA but invoking the characteristics of a rule.

Though the Governor himself is specifically excepted from compliance with the APA, Respondent is not, and given the fact that the APA addresses and specifically provides for expedited procedures for emergency rulemaking without unnecessary delay, there is no plausible legal or logistical argument to justify his actions other than an unbridled and unrepentant assumption of absolute power. It is incumbent upon Respondent, as head of his executive agency, to comply with the mandates of the APA whether he claims authority under the Governor's executive orders or the pre-existing rules and regulations of his department, and it his actions, not the Governor's, that are at issue. The APA sets forth a procedure under which the validity or applicability of agency rule are determined, and if it is alleged that a rule or its threatened application results in injury to a person, business or property, the filing of an action for declaratory judgment is appropriate and that the agency "shall be made defendant in that

[3] Respondent has previously asked the Court to take judicial notice of his directives.

action." A.C.A. § 25-15-207. Respondent cannot avoid express statutory prohibitions or accountability for his actions under the law by simply renaming written agency statements as directives rather than rules.

THE GOVERNOR'S EXECUTIVE ORDERS

Respondent further suggests that Petitioners "cannot have the Secretary's directives declared unconstitutional without the Court passing in the constitutionality of the Governor's executive orders to take action."[4] The Court can, however, interpret through a plain reading of the provisions of both the Emergency Services Act, A.C.A. § 12-75-101, *et seq*., ("the ESA") and the Administrative Procedures Act and, in harmonizing the two statutory provisions, determine, that the Governor's emergency orders from which Respondent claims authority, have expired under the terms of the ESA, without imposing upon the Governor's constitutional powers or statutory obligations. One presumes that the Governor would not instruct the director of one of his executive agencies to break or ignore the law and, in fact, when executive officers are constitutionally obligated to perform such duties as may be prescribed by law. AR Const. Art. 6, § 22. The Governor's executive orders, therefore, can reasonably be interpreted as neither expressly or impliedly authorizing Respondent to disregard the legislative review provisions of the APA and represent, in fact, merely a recitation of existing law and not as independent delegated legislative enactments. Nevertheless, as is standard when a court reviews a 12(b)(6) motion, the facts alleged by Petitioners in their petition are to be taken as true:

> Arkansas has adopted a clear standard to require fact pleading: "a pleading which sets forth a claim for relief ... shall contain (1) a statement in ordinary and concise language of facts showing that the pleader is entitled to relief ..." ARCP Rule 8(a)(1). Rule 12(b)(6) provides for the dismissal of a complaint for "failure to state facts upon which relief can be granted." This court has stated that these two rules must be read together in testing the sufficiency of the complaint; facts, not mere conclusions, must be alleged. *Rabalaias v.*

[4] Respondent's MTD, p. 7.

> *Barnett,* 284 Ark. 527, 683 S.W.2d 919 (1985). In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and pleadings are to be liberally construed. *Id.*; ARCP Rule 8(f).

Brown v. Tucker, 330 Ark. 435, 438, 954 S.W.2d 262, 264 (1997).

Petitioners are, therefore, entitled to relief due to facts clearly alleged in the complaint that Respondent has issued "directives" of general applicability to the residents of Arkansas that for all intents and purposes are "rules" as defined by the APA, promulgated without benefit of the mandatory processes for procedural safeguards reserved to the General Assembly and also incorporated in the APA. Respondent has assumed both sole legislative and executive authority in violation of the APA and the doctrine of separation of powers under Article 4, §§ 1 and 2 of the Arkansas Constitution causing injury to Petitioners in both their official and individual capacities.

THE GOVERNOR IS NOT A NECESSARY PARTY

Under alternative arguments, Respondent suggests that he acted either pursuant to authority under the Governor's executive orders or, if not, under the pre-existing 2019 Rules and Regulations of the Department of Health. In either event, the Governor is not a necessary party since the Court can terminate the uncertainty or controversy between the named parties as it relates to the rights of legislative members of the Arkansas General Assembly and Arkansas residents in evaluating Respondent's actions and his obligations under the APA and render a declaratory judgment by which complete relief can be accorded to Petitioners without the Governor being a party or affecting his interests. The Governor's statutory authority applies much more broadly to those disasters enumerated in the ESA than during the occurrence of a health emergency subject to specific provisions of the APA. Despite Respondent's allegations that Petitioners' claims would nullify the Governor's emergency powers, in the event of an

emergency enumerated in the ESA,[5] *i.e.*, disasters including tornado, storm, flood, high water, earthquake, drought, fire, radiological incident, air or surface-borne toxic or other hazardous material contamination, or other catastrophe, the Governor's powers would neither be affected or impaired and are not hereby addressed or material. It is only to public health emergencies, in instances of imminent peril to public health, safety, or welfare, that are subject to more specific statutory provisions found in the APA, and only to the extent that the agency is directed to act and obligated to comply with the expedited procedures for emergency rulemaking under the APA. In addition, whether the party is the Governor or the Director or the Department of Health, the Attorney General's office, that would presumably defend this action in any regard, has been copied on all pleadings.

ARKANSAS D.O.H. DIRECTIVES

Respondent argues that his 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").[6] That is an interesting argument given that of the two, at least the 2019 Rules were subjected to legislative review as set forth in the APA, whereas the Director's forty-three (43) "directives" related to the COVID-19 outbreak are made from whole cloth and issued while the Arkansas General Assembly is isolated and quarantined from its constitutional duties. Nevertheless, no language appearing either in the relevant statutes nor the Governor's executive orders empowers Respondent with the sole authority free from legislative review he seeks to assume.

[5] Respondent's MTD, p. 13.
[6] Respondent's MTD, p. 8.

Each "directive," a term used freely by Respondent but undefined in either the ESA or the APA and that Respondent equates to "regulations,"[7] issued by the Secretary of Health since March 13, 2020, begins with a similar introductory paragraph in which he declares that he has "has sole authority over all instances of quarantine, isolation, and restrictions on commerce and travel throughout Arkansas, as necessary and appropriate to control disease in the State of Arkansas as authorized by Ark. Code Ann. §20-7-109—110." Clearly, directives are not promulgated regulations, do not carry the authority of regulations and the distinction between a regulation and a directive is an important one. *Orsini v. State*, 340 Ark. 665, 13 S.W.3d 167, 171 (2000). The difference being that "regulations adopted pursuant to legislative authority are considered to be part of the substantive law of this state" while a directive "has not been adopted by the Board and is not registered with the Secretary of State . . . and is thus not a regulation." *Id*. Moreover, each "directive" includes language from the rulemaking provisions of the APA stating that it is "[b]ased on available scientific evidence," paraphrasing the APA, § 25-15-204((b)(1), that "an 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 . . . ."

The term "sole authority" claimed by Respondent is borrowed from the preamble of the Governor's March 11, 2020 Executive Order EO 20-03 in which he observed that:

> Whereas, [t]he Secretary of Health may issue orders of isolation and/or quarantine as necessary and appropriate to control this disease in the State of Arkansas, and the Secretary of Health, in consultation with the Governor, shall have sole authority over all instances of quarantine, isolation, and restrictions on commerce and travel throughout the State.

[7] Respondent's MTD, p. 26. "Moreover, the General Assembly explicitly delegated to the Secretary the ability to issue regulations, such as directives, in the face of any public health epidemic, in the 2019 Rules."

Preambles, or introductory statements to legislative enactments are helpful only to the extent that they represent expressions of legislative intent. *See*, *Prewitt v. Warfield*, 203 Ark. 137, 156 S.W.2d 238, 239 (1941).

Governor Hutchinson, to his credit, though he uses the suspect language in the introductory statements or preamble to his March 11 proclamation, does not subsequently proclaim or otherwise declare that the Director is endowed with "sole authority," instead simply designating the Arkansas Department of Health as the lead agency to respond to the emergency and for it "to do everything reasonably possible to respond to and recover from the COVID-19 virus." Respondent can fully and successfully perform the responsibilities of his office pursuant to the Governor's directive and do everything reasonably possible to respond to COVID-19 while also acting within the statutory constraints of the emergency rulemaking provisions of the APA. The Director's failure to do so under a false assumption of plenary authority do not arise from the Governor's emergency orders and, therefore, the Governor is not an essential party to this action.

SOURCE OF DIRECTOR'S AUTHORITY

The Emergency Services Act describes several disaster scenarios to which the Governor is obligated to urgently respond such as tornadoes, storms, floods, drought and fire. A.C.A. § 12-75-103(2). The ESA does not, however, specifically address health emergencies except to generally provide "for the common defense and protect the public peace, health, and safety and preserve the lives and property of the state" collateral to one of those enumerated disasters. A.C.A. § 12-75-102(a). Without an express grant of statutory authority, Respondent attempts to sidestep his legal obligations by equating the outbreak of COVID-10 with air or surface borne "toxins" under the "catch-all" statutory definition of "other catastrophe" found in A.C.A. 12-75-

103(2).[8] The statutory definition of "disaster" in that section, however, does appear to include "air or surface-born toxic or other hazardous material contamination." *Id*. Toxic material, however, not airborne toxins representing a category of hazardous materials into which Respondent seeks to shoehorn COVID-19 is included in the separate statutory section of the Arkansas Hazardous and Toxic Materials Emergency Notification Act of A.C.A. § 12-79-101 *et seq*. defining hazardous and toxic materials as substances that when released into the environment may pose a risk to health and safety when transported in commerce, i.e., hazardous chemicals or petroleum products, simply not applicable here. So, while Respondent engages in dubious speculation and semantic gymnastics to qualify COVID-19 as an airborne toxin and therefore a "disaster" subject to the general authority delegated to the Governor in the ESA, it most certainly qualifies in more specific terms as both an "epidemic or contagious disease" under the provisions of A.C.A. § 20-7-110, and an "imminent peril to public health" as anticipated by the emergency rulemaking provisions of the APA.

It is a maxim of statutory interpretation that "a general statute must yield to a specific statute involving a particular subject matter." *Lambert v. LQ Management, LLC*., 2013 Ark. 114, 426 S.W.3d 437, 440 (2013). The APA is very specific as to the mandatory procedures required to address emergency rulemaking during health emergencies. Therefore, "catch-all" language appearing in the ESA applying generally to numerous disaster scenarios and providing necessary protection to the public must yield to more specific legislative enactments establishing specific obligations of the State Board of Health that apply when the health of citizens is affected, and in the APA mandatory when a state agency determines that a situation has arisen causing imminent peril to public health and safety.

[8] Respondent's MTD, p. 9.

The Governor, in issuing EO 20-03 and subsequent executive orders regarding COVID-19, has done nothing other than exercise the authority delegated to him under A.C.A. 20-7-110 and call to the attention of the State Board of Health that, in his judgment, public safety demands action due to the emergence of COVID-19. A.C.A. § 20-7-110(b). The Board is also tasked with direction and control of sanitary and quarantine measures throughout the state. A.C.A. § 20-7-110(a)(3). What that statutory sections does not do is grant to the Director the power to issue arbitrary, undefined and interminable directives in taking such action as he deems the interest of public safety dictates in his unlimited discretion. Whatever powers he is granted is set forth in A.C.A. § 20-7-109, and that is "to make all necessary and reasonable rules of a general nature for . . . [t]he suppression and prevention of infectious, contagious and communicable diseases" as well as the authority for "[t]he proper enforcement of quarantine, isolation, and control of such diseases." A.C.A. § 20-7-109(a)(1). Not only does the specific statute regarding limited legislative authority delegated to the State Board of Health not use or define the term "directive," it specifically uses the word "rule," defined in § 25-15-202 of the APA as "an agency statement of general applicability and future effect that implements, interprets or prescribes law or policy . . . ." A.C.A. § 25-15-202(9)(A). Use of the word "rule" is significant here since A.C.A. § 20-7-109(a)(2) mandates the very procedural safeguards for legislative review repeated in the APA in that "[a]ll rules promulgated 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." Moreover, A.C.A. § 20-7-101 includes criminal sanctions for "violations of the provisions of this act or any of the orders or rules made and promulgated in pursuance hereof" consisting of fines up to $500 and incarceration up to one (1) month. A.C.A. § 20-7-101(a)(1). Improperly promulgated directives

are thereby unenforceable, not being orders or rules and not having been reviewed by the appropriate legislative committees. Nothing in a plain reading of the text of A.C.A. § 20-7-110(b), when read in harmony with the ESA and the APA, eliminates the legislative review process even when public safety demands during the occurrence of a public health emergency. Moreover, as stated in the APA, a rule in not valid, *i.e.*, void and unenforceable, unless adopted and filed in substantial compliance with its emergency rulemaking provisions. A.C.A. §25-15-204(h).

The U.S. Supreme Court cogently reminded us even under the dire economic circumstances caused by the Great Depression that "[e]mergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). Likewise, the emergence of COVID-19 does nothing to deter or detract from the limitation on legislative authority already existing under Arkansas law.

The APA process of legislative oversight for rulemaking by the Department of Health in the presence of infectious, contagious or communicable diseases is entirely consistent with the philosophy expressed in A.C.A. § 10-3-309 in which the General Assembly has expressed that it is "aware of the significant number of laws which have been enacted" by administrative agencies of the state, and whereby it states that its purpose is to "establish a method for continuing legislative review and approval of such rules to correct abuses of rulemaking authority . . . ." A.C.A. § 10-3-309(a). That is not an amorphous expression of legislative intent, but a statutory

provision expressing legislative purpose that in no way inhibits the Governor or any of his executive agencies in their efforts to react to emergency situations. Moreover, once the Governor executes his executive function of demanding action of the State Board of Health under A.C.A. § 20-7-110(b) to act to prevent the spread of contagious diseases like COVID-19, it is incumbent upon the Director, not the Governor, to follow the rulemaking procedures under the Administrative Procedures Act, that, in case of emergency, provides that when "an agency finds that imminent peril to the public health, safety or welfare . . . requires adoption of a rule upon less than thirty (30) days' notice" in addition to the procedural safeguards of A.C.A. § 10-3-309. A.C.A. § 25-15-204(c)(1). It avails Respondent not at all to invoke a Nuremberg-style defense that he is just following the Governor's orders. He is authorized neither by the plain language of the Emergency Services Act nor from the express language of the Governor's executive orders to bypass the procedural safeguards of legislative review found in the APA, an integral reservation of authority reserved unto themselves by the General Assembly to prevent abuse of their delegated responsibilities, and as stated concisely, and presciently it seems, to clarify legislative intent. A.C.A. § 10-3-309(a)(2).

Respondent would have this Court believe that the only legislative check on executive power in emergency rulemaking, or "directive" generation to borrow Respondent's verbiage, is to "terminate a state of emergency by majority vote,"[9] a reference to the concurrent resolution provision of A.C.A. § 12-75-107(c)(1). That is one way, to be certain. However, pursuant to Article 16, § 6 of the Arkansas Constitution, such a resolution must be presented to the Governor for his approval, representing a certain exercise in frustration to be sure. The alternative Respondent suggests, is the requirement of "additional legislation," in an attempt to suggest the

[9] Respondent's MTD, p. 26.

executive branch of Arkansas state government in general can exercise emergency authority interminably, under existing legislation and that the Director specifically can issue regulations, a.k.a. directives, under any circumstances involving a public health epidemic. However, the ESA provides a sunset provision for the Governor's executive orders of sixty (60) days plus an extension for a total of one hundred twenty (120) days. Likewise, under A.C.A. § 25-15-204(c)(3), the natural life of an emergency rule that would apply when an agency takes action pursuant to an emergency declaration is that same one hundred twenty (120) days. Such is a reasonable interpretation from the ordinary meaning of the language used in reading the APA and the ESA in harmony. *See*, *Hobbs v. Jones*, 2012 Ark. 293, 412 S.W.3d 844, 851 (2012). Respondent counters, however, with a claim that the Governor, and by inference, Respondent, has "wide latitude",[10] unrestricted,[11] and perpetually renewable,[12] under the "supreme executive power" of Article 6, § 2 of the Arkansas Constitution that gives the Governor "the authority to issue additional Executive Orders as needed during the pendency of the state of emergency,"[13] the sole discretion for the declaration of which rests with the Governor. A.C.A. 12-75-103(2)(A). Respondent proposed interpretation of the emergency declaration provisions of the ESA suggest that emergency powers have been delegated to the Governor, and by virtue of that authority, to Respondent, without any reasonable guidelines other than the good graces of the Governor in determining that an emergency has ended. However, the Arkansas Supreme Court held that "discretionary power may be delegated by the legislature to a state agency as long as reasonable guidelines are provided." *Hobbs*, *supra*, at 852. Respondent believes in this instance

[10] Respondent's MTD, p. 14.
[11] Respondent's MTD, p. 15.
[12] Respondent's MTD, p. 16.
[13] Respondent's MTD, p. 17.

that his authority is supreme and unrestricted. "A statute" however, "that, in effect, reposes an absolute, unregulated, and undefined discretion in an administrative agency bestows arbitrary powers and is an unlawful delegation of legislative powers." *Id*. To read the ESA as a delegation of unlimited authority would invite this Court to invalidate as an unconstitutional delegation of legislative authority certain statutory provisions of the ESA as such an endowment of absolute and unregulated discretion in the Director of the Department of Health rather than as reasonably proscribed by the APA. Given that every statute carries presumption of constitutionality, the Court is obligated to respectfully decline that invitation.

CONCLUSION

In short, Petitioners' action provides no more a challenge to the Governor's emergency authority than does a plain reading of the Administrative Procedures Act and the Emergency Services Act. On the contrary, by proclamation, the Governor simply ordered the Department of Health to do everything reasonably possible, and presumably legal, to combat COVID-19. Considering that the executive branch, under the doctrine of separation of powers, has no inherent legislative authority whatsoever that has not been delegated to it gratuitously under the Administrative Procedures Act, it is counterintuitive to expect that that authority is to be executed over a period that, as of this writing, is into its seventh month, without proper legislative review that is part of the essential fabric of that legislation. Respondent, however, attempt to circumvent procedural safeguards by referring to his legislative enactments as "directives" rather rules, more than a mere issue of semantics since properly promulgated rules are subjected to legislative review while Respondent's so-called directive are issued at whim, indeterminate in scope and time, and enforceable at gunpoint under penalty of punitive fines and periods of incarceration, all while undefined by law and issued without review by the legislature

as an essential measure to protect the public from enactments that may be oppressive, vague or inherently unreasonable. The only disaster occurring in this instance is the impact Respondent's actions have had on the constitutional authority of the Arkansas General Assembly and the rule of law.

WHEREFORE, for the reasons stated herein, Petitioners pray for an Order of this Court denying the relief requested in Respondent's Rule 12(b)(6) Motion to Dismiss, and for such other and further relief the Court deems just and proper.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petitioners' Response to Respondent's Motion to Dismiss has been provided to counsel for Respondent this 1st day of October, 2020 via the Court's electronic e-flex filing system.

/s/ Gregory F. Payne
Gregory F. Payne