IN THE SUPREME COURT OF ARKANSAS

REPRESENTATIVE/SENATOR-ELECT DAN SULLIVAN, in his official capacity, et al., APPELLANTS

v. No. CV-20-721

JOSE ROMERO, M.D. SECRETARY OF THE DEPARTMENT OF HEALTH, in his official capacity, and ASA HUTCHINSON, GOVERNOR OF THE STATE OF ARKANSAS, in his official capacity, APPELLEES

ON APPEAL FROM THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS

THE HONORABLE WENDELL GRIFFEN, CIRCUIT JUDGE

APPELLANT'S BRIEF

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II.

TABLE OF CONTENTS

I. COVER…… 1

II. TABLE OF CONTENTS……. 2

III. POINTS ON APPEAL…… 5

IV. TABLE OF AUTHORITIES…….. 6

A. Cases……..…… 6

B. Constitutional Provisions…….. 7

C. Statutes…….. 7

D. Rules…….. 8

V. JURISDICTIONAL STATEMENT…… 9

VI. STATEMENT OF THE CASE…….. 13

VII. ARGUMENT…….. 15

A. STANDARD OF REVIEW……..…… 15

B. THE TRIAL COURT ERRED IN HOLDING THAT THE ESA GRANTS THE GOVERNOR UNLIMITED AUTHORITY IN A HEALTH EMERGENCY…….. 15

1. The Governor Overstepped the Bounds of His Authority under the Emergency Services Act…….. 16

2. The Authority to Respond to a Health Emergency is Not Found in the Emergency Services Act……..…… 17

3. The Governor Has Exercised Police Power He Does Not Possess…… 19

4. The ADH Issued "Directives" are Emergency Rules Subject to Legislative Review……. 21

5. Directives are Unenforceable…….. 22

C. THE TRIAL COURT ERRED IN FINDING THAT THE ESA CONTAINED NO TIME LIMITATIONS ON THE GOVERNOR'S AUTHORITY TO ISSUE EXECUTIVE ORDERS…… 23

1. The Legislature has Imposed Reasonable Restrictions on all Administrative Rulemaking as Required Under the Doctrine of Separation of Powers……..……..... 23

2. The ESA Contains Reasonable Guidelines……. 24

3. To Find No Reasonable Guideline on Executive Power Renders a Statute Unconstitutional…….. 27

4. Legislative Intent Was to Limit the Governor's Authority……..…… 28

D. THE TRIAL COURT ERRED IN FINDING THAT THE EXISTING 2019 RULES OF THE ADH PERTAINING TO REPORTABLE DISEASES APPLIED TO COVID-19…… 30

1. The 2019 ADH Rules Did not Anticipate the Outbreak of COVID-19…….. 30

2. The Trial Court Disagreed with Both Parties to Find the 2019 Rules Applicable…….. 32

3. Actions Taken in Response to COVID-19 Were Not Pre-authorized by the Legislature……..…… 33

4. The 2019 Rules Were Not Based on the Best Available Scientific Evidence for COVID-19…….…… 34

5. The Secretary has Exceeded His Statutory Authority

Over Necessary Quarantine and Isolation Measures…….. 35

CONCLUSION…… 38

VIII. REQUEST FOR RELIEF…….. 43

IX. CERTIFICATE OF SERVICE……. 45

X. CERTIFICATE OF COMPLIANCE WITH ADMINISTRATIVE ORDER NO. 19, ADMINISTRATIVE ORDER 21 SEC. 9, AND WITH WORD-COUNT LIMITATIONS…..…… 46

III.

POINTS ON APPEAL

1. THE TRIAL COURT ERRED IN HOLDING THAT THE EMERGENCY SERVICES ACT GRANTS THE GOVERNOR UNLIMITED AUTHORITY IN A HEALTH EMERGENCY

- A.C.A. § 20-7-110

- *Lambert v. LQ Management, LLC*, 2013 Ark. 114, 426 S.W.3d 437 (2013)

2. THE TRIAL COURT ERRED IN FINDING THAT THE EMERGENCY SERVICES ACT CONTAINED NO TIME LIMITATIONS ON THE GOVERNOR'S AUTHORITY TO ISSUE EXECUTIVE ORDERS

- A.C.A. § 12-75-107(b)(2)

- *Bakalekos v. Furlow*, 2011 Ark. 505, 410 S.W.3d 564, 571 (2011)

3. THE TRIAL COURT ERRED IN FINDING THAT THE EXISTING 2019 RULES OF THE ARKANSAS DEPARTMENT OF HEALTH RULES PERTAINING TO REPORTABLE DISEASES APPLIED TO COVID-19

- A.C.A. § 25-15-204(b)(1)

- *Arkansas State Board of Election Commissioners v. Pulaski County Election Commission*, 2014 Ark. 236, 437 S.W.3d 80, 89 (2014)

IV.

TABLE OF AUTHORITIES

A. CASES:

Arkansas Department of Human Services, v. Ledgerwood, 2019 Ark. 121, 571 S.W.3d 911, 914-15 (2019)……. 18

Arkansas State Board of Election Commissioners v. Pulaski County Election Commission, 2014 Ark. 236, 437 S.W.3d 80, 89 (2014)……27

Arkansas Tobacco Control Board v. Sitton, 357 Ark. 357, 166 S.W.3d 550, 553 (2004)…… 26

Bakalekos v. Furlow, 2011 Ark. 505, 410 S.W.3d 564, 571 (2011)…….. 24, 26, 26

City of Rockport v. City of Malvern, 2010 Ark. 449, 375 S.W.3d 660, 665 (2010)…… 29

Cude v. State, 237 Ark. 927, 377 S.W.2d 816, 819 (1964)……... 34

Dachs v. Hendrix, 2009 Ark. 542, 354 S.W.3d 95, 100 (2009)……. 29

Eldridge v. Board of Correction, 298 Ark. 467, 768 S.W.2d 534 (1989)…….. 34

Foster v. Graves, 168 Ark. 1033, 275 S.W. 653 (1925)……. 43

Haile v. Johnston, 2016 Ark. 52, 482 S.W.3d 323, 325 (2016)…….15

Harvey v. A.F. Peters, 237 Ark. 687, 375 S.W 2d 654, 655 (1964)…….. 20

Hobbs v. Jones, 2012 Ark. 293, 412 S.W.3d 844, 851 (2012)……23, 24, 25

Home Building & Loan Ass'n v. Blaisdell, 54 S.Ct. 231, 290 U.S. 398, 425-26 (1934)……... 42

Lambert v. LQ Management, LLC., 2013 Ark. 114, 426 S.W.3d 437, 440 (2013)…… 21

McClane Company, Inc., v. Davis, 353 Ark. 539, 110 S.W.3d, 251, 255 (2003)…….. 38

Orsini v. State, 340 Ark. 665, 13 S.W.3d 167, 169-70 (2000)……. 22

Osborn v. Bryant, 2009 Ark. 358, 324 S.W.2d 687 (2009)…….. 29

Poff v. Peedin, 2010 Ark. 136, 366 S.W.3d 347, 349 (2010)…… 15

Prewitt v. Warfield, 203 Ark. 137, 156 S.W.2d 238, 239 (1941)…….. 16

Rea v. State, 2015 Ark. 431, 474 S.W.3d 493, 496 (2015)…… 23

Rockefeller v. Hogue, 244 Ark. 1029, 29 S.W.2d 85, 92 (1968)…… 27

Sharp v. State, 350 Ark. 529, 88 S.W.3d 848, 850 (2002)……. 15

State v. Martin and Lipe, 134 Ark. 420, 204 S.W. 622 (1918)…… 33

Terrell v. Loomis, 218 Ark. 296, 235 S.W.2d 961, 963 (1951……. 20, 24

Thompson v. Arkansas Social Services, 282 Ark. 369, 669 S.W.2d 878, 881 (1984)…….. 29

Walden v. Hart, 243 Ark. 650, 420 S.W.2d 868, 870 (1967)…….. 24

B. CONSTITUTIONAL PROVISIONS:

Ark. Const, of 1874, Art. 4, § 2…….. 25
Ark. Const. of 1874, Art. 5, § 1…….. 25
Ark. Const. of 1874, Art. 5, § 42…… 28
Ark. Const. of 1874, Art. 6……. 25

C. STATUTES:

A.C.A. § 10-3-309(a)(2)……..…… 23
A.C.A. § 10-3-309(d)(1)…….. 19
A.C.A. § 12-75-102(a)……..……..…….. 19
A.C.A. § 12-75-102(a)(1)……..…….. 20
A.C.A. § 12-75-103(2)……..…… 19

A.C.A. § 12-75-103(4)(B)…….. 19
A.C.A. § 12-75-107(a)(2)……. 29
A.C.A. § 12-75-107(b)(2)…….. 25, 28, 29
A.C.A. § 12-75-114(b)(1)……. 22
A.C.A. § 12-79-101…….. 20
A.C.A. § 20-7-101(a)(1)…….. 23, 40
A.C.A. § 20-7-109(a)(1)……... 18, 21, 35, 37
A.C.A. § 20-7-109(a)(2)……. 18
A.C.A. § 20-7-110(b)……. 18, 20, 40
A.C.A. § 25-2-101(a)(1)……. 38
A.C.A. § 25-2-101(a)(4)…… 38
A.C.A. § 25-2-101(a)(5)……. 38
A.C.A. § 25-15-203(9)(A)…….. 18
A.C.A. § 25-15-204(b)(1)……... 30, 32, 34
A.C.A. § 25-15-204(c)(1)……... 18
A.C.A. § 25-15-204(c)(2)……... 41
A.C.A. § 25-15-204(c)(3)……. 26, 41
A.C.A. § 25-15-204(h)…….. 41, 42

D. RULES:

Arkansas State Board of Health, Rules and Regulations Pertaining to Reportable Disease, Effective January 1, 2019…….. 30

V.

JURISDICTIONAL STATEMENT

1. On March 11, 2020, Governor Hutchinson issued an initial executive order, EO 20-03, declaring an emergency exists due to the outbreak of coronavirus disease 2019 (COVID-19) in the State of Arkansas. In said executive order, the Governor ordered the Arkansas Department of Health "to do everything reasonably possible to respond to and recover from COVID-19." **(RP 48)** On September 3, 2020, Plaintiffs, members of the Arkansas legislature and private citizens, filed a Petition for Declaratory Judgment in Pulaski County Circuit Court alleging that the Governor, through repeated renewal of his executive orders has exceeded his authority under the Emergency Services Act, **(RP 21)**, and the Secretary of the Department of Health who has issued numerous directives under the auspices of the Governor's executive orders **(RP 18)** without the process of legislative review mandated by the Administrative Procedure Act, **(RP 19)** have engaged in lawmaking in violation of separation of powers. **(RP 18)**

On the 22nd day of September, 2020, Appellees filed a Motion to Dismiss **(RP 65-67)** and Brief in Support **(RP 68-94)** based in part on Appellants' failure to name the Governor as a necessary party. Appellants filed their Response to Appellees motion on October 1, 2020 **(RP 95-97)** and their Response Brief **(RP 98-116)**, to which Appellees replied **(RP 117-124)**. Prior to the hearing

secheduled for Appellees' Motion to Dismiss, Appellants filed an Amended Petition for Declaratory Judgment adding Governor Hutchinson as a party. **(RP 125-152)**.

On the 14th day of October, 2020, the trial court held a hearing on Appellees' Motion to Dismiss. On the 23rd day of October, 2020, the Circuit Court issued its Opinion and Order granting Appellees Motion to Dismiss, a final order of the court that disposed of all the parties' claims. (**R. at 153**)

Appellants timely filed their Notice of Appeal within 30 days of the date of final judgment pursuant to Rule 4(a) of the Arkansas Rules of Appellate Procedure on the 4th day of November, 2020, (**R. at 158**) and their Amended Notice of Appeal requesting an electronic record on the 19th day of November, 2020. (**R. at 160**)

Jurisdiction upon appeal is proper in this Court by virtue of the Court's general superintending control over all courts of the state pursuant to Amendment 80 to the Arkansas Constitution, Section 4, and under Rule 1-2(a)(1) of the Supreme Court Rules in that this appeal involves the interpretation or construction of the Constitution of Arkansas;

2. I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of legal significance for jurisdictional purposes:

a. Whether the Emergency Services Act applies when the state is threatened by the prevalence of any epidemic or a contagious disease given the existence of more specific statutory provisions applicable in instances of imminent peril to public health, safety, or welfare.

b. Whether the Emergency Services Act contains reasonable guidelines on the Governor's ability to act, or, in the alternative, can the Governor declare an emergency and renew that emergency declaration indefinitely.

c. Whether the Governor's actions in authorizing the Secretary of the Department of Health to issue directives without legislative oversight is a violation of the constitutional doctrine of separation of powers.

d. Whether statements of the Department of Health of general applicability and future effect are directives issued pursuant to the Governor's executive orders or rules as defined in the Administrative Procedure Act subject to the emergency rulemaking provisions of that Act.

e. Whether the 2019 Rules of the Department of Health Pertaining to Communicable Diseases that mention specific coronaviruses are effective to address the Department of Health's actions taken to respond to COVID-19 since those rules when presented to legislative committees were not based on the best reasonably obtainable scientific, technical, economic, or other evidence as it

applied to COVID-19 available concerning the need for, consequences of, and alternatives to those rules.

f. Whether the Department of Health in issuing directives or rules generally applicable to the citizens of the State of Arkansas exceeded the scope of its authority to impose quarantine and isolation restrictions on commerce and travel without consideration of the known or presumed differences in susceptibility to COVID-19, and made applicable to otherwise healthy individuals not subject to quarantine or isolation.

Respectfully submitted,

/s/ Gregory F. Payne
Gregory F. Payne

VI.

STATEMENT OF THE CASE

Since Governor Hutchinson issued the first of five executive orders on March 11, 2020, initiating a public health emergency due to the emergence of the COVID-19 under powers he claims as authorized by the Arkansas Emergency Services Act **(RP 142-47)**, the Secretary of the Arkansas Department of Health has issued directives, forty-three (43) to date **(RP 140)**, the violation of which carry potential criminal penalties, none of which has been subjected to legislative review. **(RP 140)** Appellants claim that even in the instance of a threat to the public health from an epidemic or contagious disease, any rules, and said directives are rules, issued by the Department of Health are subject to legislative review pursuant to the doctrine of separation of powers and under the mandatory emergency rulemaking provisions of the Administrative Procedure Act. (**RP 140**) Appellees argue the Secretary's directive are not rules in the ordinary sense, but issued pursuant to the Governor's executive orders, and no review is necessary by virtue of the Governor's powers under the Emergency Services Act. (**RP 80**) Appellants counter that even if that were true, and the Emergency Services Act applied to a health emergency, express time limitations contained in the ESA limit the effective date of executive orders to an initial 60 days with one 60-day renewal. (**RP 114**) Respondent's argue the lack of specificity in the time limitations

appearing in the ESA, that is, since additional renewals are not expressly prohibited they are allowed (**RP 82-83**), gives the Governor unlimited authority, a point to which Appellants counter that such a delegation by the General Assembly of unlimited authority to the Governor would render the Emergency Services Act either unconstitutionally vague or unconstitutional as a delegation of unlimited authority. (**RP 115**)

The trial court agreed with Appellees and granted their Rule 12(b)(6) Motion to Dismiss, in finding under the Emergency Services Act, the Governor could order the Secretary to issue directives and, in addition, that there is no time limitation on the Governor's authority. (**RP 156**) Moreover, the court found that the existing 2019 Rules of the State Board of Health Pertaining to Reportable Disease, which mentions Novel Coronavirus in a list of notifiable diseases and conditions, necessarily includes COVID-19 as a related novel coronavirus and gave authority for the Secretary to issued his directives. (**RP 155**)

VII.

ARGUMENT AND AUTHORITIES

A. STANDARD OF REVIEW

The Arkansas Supreme Court reviews the denial of a declaratory judgment action after a bench trial under a clearly erroneous standard. *Poff v. Peedin*, 2010 Ark. 136, 366 S.W.3d 347, 349 (2010). That is, though there is evidence to support the lower court's decision, this Court is left with a definite and firm conviction that a mistake has been committed. *Sharp v. State*, 350 Ark. 529, 88 S.W.3d 848, 850 (2002). Appellants seek review of the actions of the Governor and his Secretary of the Department of Health ("the Secretary" or "the Director") that, in assuming absolute authority under the Emergency Service Act to address COVID-19, have violated the Administrative Procedure Act in violation of separation of powers, the Circuit Court's interpretation of those statutory provisions is to be reviewed *de novo*. *Haile v. Johnston*, 2016 Ark. 52, 482 S.W.3d 323, 325 (2016). In making that interpretation, "no word is left void, superfluous, or insignificant, and meaning and effect are given to every word in the statute if possible." *Id*. Here, the Circuit Court applied the general language appearing in the Emergency Services Act to actions of the Governor and the Secretary in issuing executive orders and directives, while ignoring specific provisions of Arkansas law. Moreover, the Court applied ADH rules that were not

based on the best available scientific evidence regarding COVID-19 such that the legislature was unable to perform its legitimate legislative oversight function. The Circuit Court's decision having been issued in error, this Court is not obligated to accept that court's interpretation of the law as it appears in its October 23, 2020 Order. *Id*.

B. THE TRIAL COURT ERRED IN HOLDING THAT THE ESA GRANTS THE GOVERNOR UNLIMITED AUTHORITY IN A HEALTH EMERGENCY

1. The Governor Overstepped the Bounds of His Authority under the Emergency Services Act

Governor Hutchinson's initial March 11, 2020 proclamation, EO 20-03, citing A.C.A. § 12-74-114 of the Emergency Services Act ("the ESA"), did not proclaim a disaster, *per se*, but only that "an emergency exists" due to the outbreak of COVID-19 within the State of Arkansas. **(RP 48)** He further declared that the Secretary of Health, in consultation with himself, "shall have sole authority over all instances of quarantine, isolation, and restrictions on commerce and travel throughout the state." **(RP 48)** That particular language does not empower the Secretary, however, but is part of the preamble acting only an expression of the Governor's intent. See, *Prewitt v. Warfield*, 203 Ark. 137, 156 S.W.2d 238, 239 (1941). Nevertheless, in his subsequent proclamation statement, the Governor ordered the Arkansas Department of Health ("the ADH") "to do everything reasonably possible to respond to and recover from the COVID-19 virus." (**RP 48**)

2. The Authority to Respond to a Health Emergency is not Found in the Emergency Services Act

The trial court found the Emergency Services Act, A.C.A. § 12-75-101 *et seq*., conferred on the Governor the authority to issue the executive orders at issue in this case. **(RP 155)** Likewise, Appellees argue that the ESA is the governing law in this instance because it "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*." [emphasis theirs] **(RP 76)** However, though the ESA lays out the Governor's responsibilities in a disaster emergency, he carefully avoids use of the word "disaster" in EO 20-03 in favor of declaring a "state of emergency" due to the threat to public safety represented by COVID-19 and the need for "necessary and effective public health measures" to control its spread. **(RP 48)** That being the case, invoking the ESA was wholly unnecessary since by two specific statutory provisions, the Arkansas General Assembly has anticipated health emergencies and provided the process by which Arkansas government is to react to such an event. The first provides 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 [State Board of Health], 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.

A.C.A. § 20-7-110(b). **(RP 137)** But while that section provides notice, it grants no specific powers to ADH which are to be found in A.C.A. § 20-7-109(a)(1). Under that section, in the interest of public health and safety, ADH has the ability to make all necessary and reasonable rules of a general nature, *inter alia*, for "the suppression and prevention of infectious, contagious, and communicable diseases," and for "the proper enforcement of quarantine, isolation, and control of such diseases." The word "rule" used here is a term of art, and defined in the Administrative Procedures Act, A.C.A. § 25-15-201, *et seq*., ("the APA") as "an agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy . . . ." A.C.A. § 25-15-203(9)(A). Moreover, all rules issued by the ADH shall be reviewed by the House and Senate Committees on Public Health, Welfare, and Labor. A.C.A. § 20-7-109(a)(2).

The second appears in the APA, which provides for an expedited emergency rulemaking process also when an agency finds "imminent peril to the public health, safety, or welfare," as the prevalence of COVID-19 presumably qualifies. A.C.A. § 25-15-204(c)(1). That particular provision "contemplates emergent situations requiring swift agency response; specifically, where the agency finds that imminent peril to the public health, safety, or welfare . . . requires adoption of a rule upon less than thirty days' notice." *Arkansas Department of Human Services, v. Ledgerwood*, 2019 Ark. 121, 571 S.W.3d 911, 914-15 (2019). Just as all ADH

rules of a general nature are subject to legislative review, emergency rules are not be to adopted until reviewed by the Executive Subcommittee of the Legislative Council under A.C.A. § 10-3-309(d)(1). In essence, by issuing EO 20-03, the Governor sought to take extraordinary measures to the exclusion of the legislative oversight mandated by Arkansas law.

3. The Governor Has Exercised Police Power He Does Not Possess

The legislative purpose of the ESA set forth in A.C.A. § 12-75-102(a) is "generally to provide for the common defense and protect the public peace, health, safety and preserve the lives and property of the state." Further, since it applies to a disaster emergency, the term "disaster" is defined in A.C.A. § 12-75-103(2) 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." Appellees suggest that requiring legislative review of emergency rules in this instance "would render the emergency powers of the Governor practically void." **(RP 80-81)** But there are multiple other scenarios that can arise requiring the Governor to invoke the ESA to immediately react and direct remedial actions by his agencies such as firefighting, rescue and restoration of public facilities, or numerous other emergency management responses anticipated in A.C.A. § 12-75-103(4)(B). **(RP 136)** For that purpose, the General Assembly enacted the ESA and

created the Arkansas Department of Emergency Management. A.C.A. § 12-75-102(a)(1). The outbreak of a communicable disease is simply not on the list, and reaction to imminent threats to public health and safety are specifically anticipated in A.C.A. § 20-7-110(b) and allow for emergency measures to be taken without the Governor's sweeping assumption of plenary authority. **(RP 76)**

Fundamentally, the police power of the state resides in the legislature, not with the Governor. See, *Harvey v. A.F. Peters*, 237 Ark. 687, 375 S.W 2d 654, 655 (1964). Moreover, the General Assembly cannot delegate its power to make law but only to establish the conditions under which the law becomes operative. *Terrell v. Loomis*, 218 Ark. 296, 235 S.W.2d 961, 963 (1951). In this instance, the legislature has made the law, but the Governor has expanded conditions to include a health emergency in the attempt the make the ESA operable, and in doing so has exceeded his authority. **(RP 138)** Appellees argue, however, that "COVID-19 is a disease spread both through the air and via surfaces, so it meets the statutory definition of disaster," a logical leap given that the harmful release of air and surface borne toxic materials is addressed in the Arkansas Hazardous and Toxic Materials Emergency Notification Act, A.C.A. § 12-79-101, *et seq*. (**RP 78**). Alternatively, they argue that COVID-19 could be classified under the "other catastrophe" language of A.C.A. § 12-75-103's "catch-all" definition of "disaster." **(RP 78)** Nevertheless, comparing the language of the ESA applicable to disasters

to other statutory provisions that specifically mention health emergencies, "[t]his court has long held 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). **(RP 110)**

4. The ADH Issued "Directives" are Emergency Rules Subject to Legislative Review

The applicable statutory provisions make prolific use of the word "rule." **(RP 111)** Though circumstances seem to dictate, the ADH has not issued rules in response to COVID-19 as provided in A.C.A. § 20-7-109(a)(1), or engaged in emergency rulemaking in compliance with the APA, but has issued "directives" ostensibly pursuant to the Governor's emergency powers under the ESA. **(RP 75)** Though the term "directive" is undefined in either the ESA or the APA, the Director has issued forty-three (43) such directives in following the Governor's instruction to take action in the interest of public safety. **(RP 140)** The choice of the word "directive," as opposed to rule, is simply a semantic device used by the Governor and the Secretary to avoid the mandate of legislative review. **(RP 140)**. Appellees counter that Appellants 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." **(RP 70)** To follow their logic, the directives are not subject to review, and may never be since they have determined a lack of discernible time

limitations appearing in the ESA. Appellees, however, play fast and loose with the definition of "rule," and substitute "directive" which is used in no other context. **(RP 140)** They point out, for example, that "the Governor may issue executive orders, proclamations, and rules and amend or rescind them" under A.C.A. § 12-75-114(b)(1). **(RP 84)** He certainly can, in response to disasters not applicable here, but when the ADH issues "rules," they must be reviewed by the legislature as required by the emergency rulemaking process of the APA. **(RP 140)** This Court has had occasion to distinguish between an agency directive and a rule or regulation and held that a directive appears to be merely "a policy statement issued by the Department and not a regulation adopted by the Board." *Orsini v. State*, 340 Ark. 665, 13 S.W.3d 167, 169-70 (2000). That distinction is significant since "[r]egulations adopted pursuant to legislative authority are considered to be part of the substantive law of this state." *Id*. at 170. The agency directives in this case were issued without that legislative authority, though the Governor seeks to impose criminal sanctions for their violation. **(RP 140)**

5. Directives are Unenforceable

Just as the ADH has the power to make all necessary and reasonable rules of a general nature, violation of those rules issued by the Secretary has been made punishable by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) or by imprisonment not exceeding one (1) month, or both.

A.C.A. § 20-7-101(a)(1). **(RP 140)** Thought the Secretary has issued no COVID-19 emergency rules, by the Governor's incorporation of his directives into the executive orders "pursuant to his statutory authority and pursuant to authority *granted to him by the General Assembly*" [emphasis theirs] **(RP 80)**, said directives have been given "force of law." Indiscriminate use of the word directive in this context is particularly troublesome since "the substantive power to prescribe crimes and determine punishment is vested with the legislature . . . ." *Rea v. State*, 2015 Ark. 431, 474 S.W.3d 493, 496 (2015). Citizens of the State of Arkansas including Appellants as legislators, business owners and private citizens, are subject to criminal penalties for violation of directives issued by a sole, unelected individual in the executive branch. **(RP 140)**

C. THE TRIAL COURT ERRED IN FINDING THAT THE ESA CONTAINED NO TIME LIMITATIONS ON THE GOVERNOR'S AUTHORITY TO ISSUE EXECUTIVE ORDERS

1. The Legislature has Imposed Reasonable Restrictions on all Administrative Rulemaking as Required Under the Doctrine of Separation of Powers

Rulemaking authority delegated to executive agencies is distinct from that of the ability to make law which under Article 5, § 1 of the Arkansas Constitution which is the unique province of the legislature. Pursuant to Article 6, the Governor executes the law, and under that constitutional doctrine separation of powers, neither shall exercise the power of the other. Ark. Const. Art. 4, § 2. That

constitutional separation of powers is a fundamental principle upon which our government was founded, and should not be violated or abridged. *Hobbs v. Jones*, 2012 Ark. 293, 412 S.W.2d 844, 852 (2012).

Via agency rulemaking, the legislature delegates to executive officers the discretion to determine certain facts, or the happening of a certain contingency, on which the operation of the enabling statute is made to depend. As this Court has held, "[t]he true distinction is between the delegation of power to make the law, which necessarily involves the discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. The first can not be done. To the latter no valid objection can be made." *Terrell v. Loomis*, *supra*. But while discretionary power may be delegated, reasonable guidelines must be provided, since a statute 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. *Bakalekos v. Furlow*, 2011 Ark. 505, 410 S.W.3d 564, 571 (2011). To enjoy a presumption of constitutionality, however, a statute must contain "an adequate yardstick for the guidance of the executive or administrative body or officer empowered to execute the law." *Walden v. Hart*, 243 Ark. 650, 420 S.W.2d 868, 870 (1967).

2. The ESA Contains Reasonable Guidelines

The ESA provides "[n]o state of disaster emergency may continue for longer than sixty (60) days unless renewed by the Governor." A.C.A. § 12-75-107(b)(2). The trial court had to ignore that language in finding "that there is no time limitation on the Governor's authority on the Governor's authority to issue Executive Orders relating to a public health emergency such as COVID-19." **(RP 156)** The Court's opinion seems to acknowledge a grant of unrestricted discretion by the legislature to the Governor in the ESA which, if correct, represents an unlawful delegation of authority. *Hobbs*, *supra*. **(RP 131)**

The trial court agreed, apparently, with Appellees suggestion that the Governor's use of discretion in determining a disaster has occurred or that disaster is imminent is a reasonable guideline. **(RP 120)** That use of discretion, however, can only be used to determine sufficient facts exist for application of the ESA, but cannot be construed as any meaningful limitation on the scope of the measures to be taken and for how long. *Walden*, *supra.* In further support of their proposition, Appellees use terms suggesting the Governor has "plenary authority," **(RP 76)**, subject to "catch-all" provisions, **(RP 78)**, or is granted "complete authority," **(RP 78)** with "wide latitude to control and respond," all of which is unrestricted by law. **(RP 82)** Though adequately descriptive of the actions taken by the Governor in response to COVID-19, such a delegation of unlimited discretion would render the ESA invalid. *Id*. That being the case, there are only two ways to read the 60-

day provision appearing in the ESA, stark in their differences: 60 days, plus an additional 60 days as a reasonable limitation on the Governor's emergency authority, **(RP 144)** or, as Appellees do, infinitely renewable 60 days periods, *i.e.* no limitation. (**RP 82**) However, the ESA must be read to contain reasonable time limitations since to presume otherwise renders the statute unconstitutional and courts resolve all doubts in favor of constitutionality. *Arkansas Tobacco Control Board v. Sitton*, 357 Ark. 357, 166 S.W.3d 550, 553 (2004). Plain language interpretation of the ESA suggests, therefore, that the Governor has, at most, one hundred twenty (120) days to deal with any disaster emergency and anything more would be *ultra vires*. **(RP 143)** Harmonizing the ESA with the APA emergency rulemaking provision contained in in A.C.A. § 25-15-204(c)(3) that limits the life of an emergency rule to a similar one hundred twenty (120) days, legislative intent seems clear and consistent. **(RP 145)** Without that reasonable time restriction, the ESA could be read, as Appellees improperly do, as granting the Governor unlimited power for an indefinite period, rendering the ESA unconstitutional on its face in reposing absolute, unregulated, and undefined discretion to the executive branch in a health emergency, an unlawful delegation of legislative powers. *Bakalekos, supra*.

Appellees, however, present the operative provisions of the ESA and APA in isolation, contending that Appellants "cannot claim that any law restricts

Emergency Orders to 120 days because no law does." (**RP 82**) Likewise, they argue that "[t]he [ESA] does not say 'unless renewed by the Governor an additional time,' (**RP 82**) nor does it say "unless renewed by the Governor for a maximum or 120 days," (**RP 82-83**), and indeed it does not. Their reading suggests a canon of construction whereby silence begets permission, but it is the General Assembly, not the Governor, which 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, 29 S.W.2d 85, 92 (1968). **(RP 146)** Contrary to Appellees' desire to exploit perceived legislative loopholes in the ESA, the Governor is prohibited in his quest for power where none in expressly granted, and his attempt to fill statutory gaps, add language or exploit oversights by the legislature, is, in essence, legislating. *Arkansas State Board of Election Commissioners v. Pulaski County Election Commission*, 2014 Ark. 236, 437 S.W.3d 80, 89 (2014). Filling in the blanks to serve his purposes "contravenes the basic principle of separation of powers." *Id*. And in acting under a self-serving reading of the ESA as a grant of unlimited authority, the Governor was undeniably legislating and is here asking the courts to amend the ESA by redaction though "it is not the courts' business to legislate." *Id*. Likewise, it is not the business of the Governor or the ADH, as part of the executive branch, to do so either. *Id*.

3. To Find No Reasonable Guideline on Executive Power Renders a Statute Unconstitutional

For the trial court to find the Governor's power is unlimited under the ESA was to have endowed the executive with unlimited discretion, which is prohibited. **(RP 156)** Given that statutes are presumed constitutional, and, therefore, all doubts resolved in favor of the ESA's constitutionality, weight must be given to the 60-day guideline contained therein. Even considering that the "guidelines rule" is relaxed in matters involving public health and safety, a statute which "reposes absolute, unregulated or undefined discretion in an administrative body will not be upheld." *Walden*, *supra.* The Circuit Court found, however, that "there is no time limitation on the Governor's authority to issue Executive Orders relating to a public health emergency," **(RP 156)**, its decision effectively rendering the statute unconstitutional as applied since discretionary power may only be delegated to an agency so long as reasonable guidelines are provided. *Bakalekos*, *supra*. The judge ignored those timelines.

4. Legislative Intent Was to Limit the Governor's Authority

Appellees contend that to determine with any specificity the duration of a state of emergency from A.C.A. § 12-75-107(b)(2) of the ESA requires the Court "to delve into the individual minds of members of the General Assembly and ascertain the intended meaning of the statute," as though that was a foreign concept in statutory interpretation. (**RP 83**). Giving effect to the intent of the legislature, however, is basic, and one determines legislative intent from the ordinary meaning

of the language used. *Dachs v. Hendrix*, 2009 Ark. 542, 354 S.W.3d 95, 100 (2009). To suggest that there are no ascertainable time limitations applicable to the A.C.A. § 12-75-107(b)(2) though the Legislature included a 60-day period with a renewal, would require this Court to ignore that language and that found elsewhere in the APA. Interpretation of the statutory language that "[n]o state of disaster emergency may continue for longer than sixty (60) days unless renewed by the Governor," as no time limitation is to render those words void, superfluous and insignificant, an interpretation prohibited to the courts. *See*, *Osborn v. Bryant*, 2009 Ark. 358, 324 S.W.2d 687 (2009). Moreover, the Court's endorsement of the Governor's actions, that is, to declare an emergency in his sole discretion and to maintain the ability to renew that declaration into perpetuity to the exclusion of the legislature is absurd. *See*, *City of Rockport v. City of Malvern*, 2010 Ark. 449, 374 S.W.3d 660, 665 (2010). For the Court to permit unlimited renewal of disaster declarations renders that section of the ESA unconstitutionally vague as it gives neither the Governor, nor the legislature, guidance on the limits of his authority thereunder. *See*, *Thompson v. Arkansas Social Services*, 282 Ark. 369, 669 S.W.2d 878, 881 (1984). As it has been applied, A.C.A. § 12-75-107(a)(2) is vague enough: in EO 20-25, the Governor renewed his initial emergency proclamation in EO 20-03 for forty-five (45) days (**RP 50-52**); by EO 20-37, at the end of that 45 days, the Governor declared EO 20-03 terminated and declared an emergency

anew for sixty (60) days (**RP 53-55**); with EO 20-45, the Governor renewed EO 20-37 for an additional sixty (60) days (**RP 56-58**); EO 20-48 again renewed EO 20-37 for sixty (60). Each time one of the Governor's emergency proclamations is set to expire, statutory vagueness arises as to whether he can renew, can terminate and declare anew, or if he can renew a renewal, so at various times during the current lifespan of his emergency proclamations he has chosen all three. There is no such uncertainty under the APA.

D. THE TRIAL COURT ERRED IN FINDING THAT THE EXISTING 2019 RULES OF THE ADH PERTAINING TO REPORTABLE DISEASES APPLIED TO COVID-19

1. The 2019 ADH Rules Did not Anticipate the Outbreak of COVID-19

Epidemics raising concerns for public health have occurred before in Arkansas history, so the ADH periodically promulgates rules on how to respond, the latest iteration being the Rules and Regulations Pertaining to Reportable Disease effective January 1, 2019 ("the 2019 Rules"). **(RP 30-47)** When said rules were promulgated on April 26, 2018 **(RP 47)**, and reviewed by the Legislative Council on December 21, 2018 **(RP 29)**, the Board possessed only the "best reasonably obtainable scientific, technical, economic, or other evidence available concerning the need for, consequences of, and alternatives to the rule," available to it at the time as is required before a rule is adopted. A.C.A. § 25-15-204(b)(1). Included in Section IV of the 2019 Rules was a list of "notifiable diseases and

conditions," with parenthetical references made specifically to "Middle Eastern Respiratory Syndrome or Severe Acute Respiratory Syndrome virus,", i.e., MERS and SARS. **(RP 134)** Appellants contend, invoking the *expressio unius est exclusio alterius* doctrine, that the express mention of MARS and SERS in the 2019 Rules necessarily excludes other unanticipated coronaviruses, such that the current rules did not anticipate the drastic social and economic consequences of COVID-19. **(RT 19)** Consequently, both the ADH and the Legislative Council would have been woefully uneducated of the social and economic consequences associated with the 2020 emergence of COVID-19, acknowledged by Appellees as the worst viral epidemic to strike the State of Arkansas in 100 years. **(RT 6)**

Once the health, social and economic consequences associated with COVID-19 became known to the ADH either through its own empirical research or from authoritative sources such as the World Health Organization or the Centers for Disease Control, they should have passed that information on to the legislature and sought an amendment to the 2019 Rules to fulfill the purpose of the APA and the provision of A.C.A. § 10-03-309 referenced therein that would allow the legislature to engage in their constitutional and statutory functions of legislative review. A.C.A. § 10-03-309(a)(2). **(RP 139)** That procedural safeguard would guarantee that an agency would not adopt 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).

2. The Trial Court Disagreed with Both Parties to Find the 2019 Rules Applicable

In his executive orders, the Governor declared that he was acting, in part, under the authority of A.C.A. § 20-7-110, the statutory provision engaging the ADH to take such remedial action as public safety demands. **(RP 48)** That was the effect of EO 20-03, by which the Governor proclaimed the appearance of COVID-19 as "a new disease and there is more to learn about how it spreads, the severity of the illness it causes, and to what extent it may spread." **(RP 48)** The Governor came to that conclusion "after consultation with the Secretary of Health." **(RP 48)** Presumably, if existing rules of the ADH were applicable to this new disease, this 100-year event, the Governor, and certainly the Secretary, would be aware of them. Yet, no mention is made of the 2019 Rules in the executive orders by which the Governor assumed his authority under the ESA. **(RP 48)** In fact, Appellants' allegation appearing in their Complaint that the unanticipated appearance of COVID-19 required an amendment to the existing 2019 Rules **(RP 139)**, prompted Appellees' response that "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," [emphasis theirs] (**RP 75**), and that "Appellants' reliance on the 2019 Rules is at least misguided and at worst a

red herring." (**RP 85**). Once again, at the October 14, 2020 hearing, in their closing argument, Appellees attempted to abandon the 2019 Rules **(RT 25)** only for the court to find that it "cannot read novel coronavirus out of that rule and the Court disagrees with the Respondents Governor Hutchinson and Dr. Romero in the argument that the 2019 rule is inapplicable." **(RT 37)**

3. Actions Taken in Response to COVID-19 Were Not Pre-authorized by the Legislature

The trial court failed to distinguish the unique properties of COVID-19 from the only historic analogy available, that of a smallpox epidemic from the precedent cited by Appellees from the 1918 case of *State v. Martin and Lipe*, 134 Ark. 420, 204 S.W. 622 (1918). **(RP 121)** The *Martin* case held that broad powers conferred upon the State Board of Health to make all necessary rules for the suppression and prevention of infectious, contagious and communicable diseases, necessarily included measures to address an outbreak of smallpox. *Id*. Smallpox was not an unknown quantity in 1918 or a new disease as COVID-19 is in 2020, as the court in *Martin* found recognizing that "[i]t is commonly known that smallpox comes within the class of infectious and contagious diseases, and that it is prevented by vaccination and best controlled by isolation and quarantine." *Id*. As this Court has acknowledged, "[i]t is a matter of common knowledge that prior to the development of protection against smallpox by vaccination, the disease, on occasion, ran rampant and caused great suffering and sickness throughout the

world." *Cude v. State*, 237 Ark. 927, 377 S.W.2d 816, 819 (1964). COVID-19 in 2020 is simply not analogous to smallpox in 1918 and, therefore, responses to the new disease do not fall within the Secretary's previously authorized authority. *See*, *Eldridge v. Board of Correction*, 298 Ark. 467, 768 S.W.2d 534 (1989).

4. The 2019 Rules Were Not Based on the Best Available Scientific Evidence for COVID-19

To assert simply that "novel means 'new,'" as the Court here did **(RP 155)**, that any novel coronavirus is presumably covered under the 2019 Rules, is problematic as so open ended that no disease, no matter how new, unique or unanticipated by the medical community could be excluded. The Court also ignored a fundamental requirement of rulemaking that rules are not to be adopted unless based on the best reasonably obtainable scientific, technical, economic, or other evidence so it could consider the need for, consequences of and alternatives to those rules as it regards a particular disease. A.C.A. § 25-15-204(b)(1). For the people's representatives to fully perform their oversight function, COVID-19 should have prompted an amendment to the 2019 Rules under the APA so the Legislative Council could debate those consequences and alternatives. **(RP 148)** Appellees, however, in perhaps the ultimate distillation of their arguments, complain that APA compliance is simply too burdensome since "[t]he ever-changing demands of a public health crisis such as a pandemic require quick action" that "cannot be met completely through the legislative process." (**RP 91**).

Considering the emergency rulemaking process of the APA applicable with a finding by the ADH of imminent peril to the public health, safety, or welfare, the failure of Appellees to even acknowledge the importance of legislative review appears based more on intransigence, hubris and authoritarianism than principled objection.

5. The Secretary has Exceeded His Statutory Authority Over Necessary Quarantine and Isolation Measures

Assuming, *arguendo*, that the 2019 Rules do apply to the current epidemic, one must further examine the scope of authority the ADH enjoys under those rules. Power is conferred on the ADH, *inter alia*, to make all necessary and reasonable rules of a general nature for the protection of public health and safety, for the general amelioration of sanitary and hygienic conditions within the state, for the suppression and prevention of infectious, contagious and communicable diseases, and for the enforcement of quarantine, isolation and control of such disease. A.C.A. § 20-7-109(a)(1). The terms "quarantine" and "isolation," however, are not defined by statute. The 2019 Rules mention "isolation" in Section IX in the context of "the duty of the attending physician, immediately upon discovering a disease requiring isolation, to cause the patient to be isolated pending official action by the Director," meaning that isolation applies only to those individuals testing positive for exposure to a communicable disease. **(RP 40)**.

"Quarantine" appears in the Section I definitions part of the 2019 Rules, distinguished between "Complete quarantine," defined as "the limitation of freedom of movement of such well persons . . . as have been exposed to a communicable disease, and "Modified quarantine," or "the selective, partial limitation of freedom of movement or persons . . . commonly on the basis or known or presumed differences in susceptibility. **(RP 33)** Under the 2019 Rules, therefore, the ADH has control over such persons who have either been exposed to or contracted a communicable disease. Nowhere in the 2019 Rules, in the powers granted the ADH in A.C.A. § 20-7-109, or in the Supervision and Control provisions of A.C.A. § 20-7-110, is to be found the sole authority over all instances of restrictions on commerce and the consequent infringement of significant liberty interests of citizens of the State of Arkansas who have neither been exposed to nor contracted COVID-19, i.e., well people, as appears to be assumed by the Governor in EO 20-03 when he declared that "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." [emphasis added] **(RP 48)** That sentence references the authority of the Secretary appearing in Section X of the 2019 Rules whereby "[t]he Director shall impose such quarantine restrictions and regulations upon commerce and travel by railway, common carriers, and 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." **(RP 138)** The source of that authority springs from A.C.A. § 20-7-109(a)(1)(d) pursuant to which power is conferred upon the ADH to issue rules regarding communicable diseases for "[t]he proper enforcement of quarantine, isolation, and control of such diseases."

Through syntax, *i.e*., commas strategically inserted after the words "quarantine" and "isolation" in EO 20-03 and thereafter, in issuing his directives, the Secretary has assumed and exercised "sole authority over all instances of quarantine, isolation, *and restrictions on commerce* and travel throughout the state," a distinction with significant difference as an exercise of blanket authority over all intrastate commerce generally, as opposed to his delegated authority to "impose such *quarantine restrictions and regulations upon commerce* and travel" authorized him under the 2019 Rules and A.C.A. § 20-7-109(A)(1) [emphasis added]. (**RP 138**) Through sleight of hand amendments to existing law, filling in the blanks to serve their purposes, Appellees have assumed authority not delegated to them in violation of separation of powers. *Arkansas State Board of Election Commissioners*, *supra*. **(RP 138)** The result is the usurpation of the legislative police power by a sole, unelected member of the executive branch, unconstitutional encroachment upon the institutional rights of the General Assembly and an infringement upon the fundamental liberties and economic interests of each citizen

of the State of Arkansas who is unaffected by COVID-19. (**RP 141**) Promulgated thereunder, Appellees' forty-three (43) directives have been issued without regard to time or scope limitations contained in the ESA, the process of legislative review required of emergency rulemaking under the APA, or regard to the inherent limitations of quarantine and isolation authority under its own rules, and are not entitled to a presumption of validity since "the court is limited to considering whether the administrative action was arbitrary, capricious, an abuse of discretion or **otherwise not in accordance with the law**. *McClane Company, Inc., v. Davis*, 353 Ark. 539, 110 S.W.3d, 251, 255 (2003). **(RP 141-42)** [emphasis added]

CONCLUSION

The Administrative Procedure Act consists of more than a mere procedural hurdle and an annoyance to the executive, it is a manifestation of legislative intent in delegating rulemaking authority to administrative agencies "to create a structure of state government which will be responsive to the needs of the people of this state" A.C.A. § 25-2-101(a)(1). Procedural safeguards are incorporated into the APA not to hinder the executive but to "strengthen the role of the General Assembly in state government," A.C.A. § 25-2-101(a)(4), not to facilitate agency overreach, but to "encourage greater participation of the public in state government." A.C.A. § 25-2-101(a)(5). However, in delegating authority, the General Assembly maintains oversight responsibility without which no assurance

can be given "of reasonable uniformity of practice and fair procedural methods for the benefit of all persons affected by state administrative action,"[1] especially relevant in instances of emergency. Appellees argue that Appellants are asking for "veto power over executive power." **(RP 120)**. On the contrary, Appellants are asking for recognition of their institutional integrity, and protection of their constitutional and statutory rights and obligations of legislative oversight of executive action in the public interest.

Likewise, interpreting the 2019 Rules of the ADH regarding reportable diseases to include a new, unforeseen disease that Respondent's acknowledge is the worse epidemic in 100 years **(RT 6)** would require a court to ignore the continuous obligation of executive agencies to provide legislative committees with the best obtainable scientific evidence so that they can correct and address potential abuses of rulemaking authority and clarify legislative intent. After all, it would be difficult to imagine a scenario much more susceptible to abuse of rulemaking ability than an assumption of "sole authority over all instances of quarantine, isolation, and restrictions on commerce and travel throughout the state" **(RP 48)** for an unlimited period of time as Appellees seek here.

[1] Editor's Note, Uniform Law Comment, Prefatory Note to the Administrative Procedure Act.

The only means to salvage the ESA from nullification, and the powers of the Governor and the Secretary of Health necessary to respond to CODIV-19 unconstitutional for violation of the doctrine of separation of powers, is to harmonize all applicable law in light of the mandatory provisions of the APA. Simply put, under the ESA the Governor can respond to enumerated emergencies in coordination with his Department of Emergency Management for up to 120 days, but when he orders the Secretary to "do everything reasonably possible to respond to and recover from the COVID-19 virus" **(RP 48)** compliance with the applicable, specific statutory provisions and the emergency rulemaking provisions of the APA prior to taking remedial action for a disease such as COVID-19 not anticipated by existing rules. That reading is entirely consistent with the provision in A.C.A. § 20-7-110 "[w]henever the health of the citizens of this state is threatened by the prevalence of any epidemic or contagious disease . . . 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 . . . ." A.C.A. § 20-7-110(b). It also satisfies the provisions of A.C.A. § 20-7-109 that power is conferred on the State Board of Health to make all necessary and reasonable rules, that those rules are to be review by House and Senate Committees, and that violation of those rules made and promulgated are punishable as crimes. A.C.A. § 20-7-101(a)(1) and (a)(4). Moreover, that process does not require the Governor to issue interminable

emergency declarations in the instance of a health emergency since emergency measures are already anticipated by statute. As an addition guarantor against administrative overreach, the APA provides that emergency rules are effective for no longer than one hundred twenty (120) days. A.C.A. § 25-15-204(c)(3). Consistent with the provision for legislative oversight on a continuous basis appearing in A.C.A. § 10-3-309(a)(2), as noted in A.C.A. § 25-15-204(c)(2), for an agency to renew an emergency rule, thirty (30) days must pass after expiration of the emergency rule before it can be resubmitted.

Application of the APA is the only available means for the legislature to adequately exercise its police power in the interest of the public health and safety and defer to the subject matter expertise of the ADH based on the best available scientific evidence, while also assuring that the constitutional liberties of the people are not arbitrarily or capriciously restrained. That is not to say that the Governor and the Secretary cannot act expeditiously, only that they follow the law. But the "directives" issued by the Secretary since the Governor proclaimed a statewide emergency on March 11, 2020 are, and should be declared to be, invalid as not having been issued in substantial compliance with the emergency rulemaking provisions of the APA. A.C.A. 25-15-204(h).

Article 5, § 42 of the Constitution states that "the General Assembly may provide by law for the review by a legislative committee of administrative rules

promulgated by a state agency before administrative rules become effective." From that authority, the General Assembly enacted the APA to establish the "ample safeguards" for agency rulemaking of continuing legislative review. A.C.A. § 10-3-309(a)(2). Without that procedural safeguard, the promulgation of orders, rules, regulations or "directives," is an unlawful exercise in executive lawmaking unless that rule is adopted in substantial compliance with the APA. A.C.A. § 25-15-204(h). **(RP 142)** As a fundamental proposition, there is no emergency exception to the APA which, itself, anticipates an emergency. As best stated by the U.S. Supreme Court:

> Emergency does not create power. Emergency does not increase granted power of remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of 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). In fact, legislative participation in emergency management is anticipated throughout Arkansas law. Faced with "extraordinary occasions" like the emergence of COVID-19, the Governor can call the legislature into special session under Article 6, § 19 of the Constitution, though "[h]ow it shall be called, and what notice of the call is to be given, are also for him alone. The Constitution is silent as to these matters, and wisely so, for emergencies may arise, such as riots, insurrections, widespread

epidemics, or general calamities of any kind, requiring the instant convening of the Legislature . . . .” *Foster v. Graves*, 168 Ark. 1033, 275 S.W. 653, 654–55 (1925).

VIII.

REQUEST FOR RELIEF

Appellees respectfully request it be declared that:

1. There are reasonable time guidelines contained in the ESA requiring that once the Governor issued a disaster declaration that such declaration shall not have continued for more than 60 days, unless renewed by him for an additional 60 days, at which time such declaration shall have terminated. In the alternative, if those guidelines are indeterminate, the ESA is unconstitutional as a delegation of unlimited executive authority.

2. The Secretary of the Department of Health, has issued forty-three (43) agency “directives” by the authority of by Governor Hutchinson through executive order that are actually rules as defined in the APA, and in so doing has acted unlawfully in bypassing the procedural safeguards of the APA that are an essential element of the emergency rulemaking process, representing an unconstitutional violation of separation of powers by the executive branch and are invalid unless and until they comply with the APA.

3. The 2019 Rules of the ADH are ineffective in addressing remedial measures in reaction to the unprecedented COVID-19 epidemic since they are not

based on the best available scientific evidence regarding that particular disease, and any rules issued by the ADH since the Governor called to its attention the fact of the COVID-19 epidemic should have been reviewed by the appropriate legislative committees. In the alternative, in pursuing remedial measure in response to the COVID-19 epidemic, the ADH has exceeded its quarantine and isolation authority under said rules in that it has not limited its directives to those persons subject to quarantine as having been exposed to the disease or who have contracted the disease and are subject to isolation, the ADH not having issued its directives considering limitations based on known or presumed differences in susceptibility as required by the 2019 Rules, and all such directives are invalid.

IX.

CERTIFICATE OF SERVICE

I, Gregory F. Payne, hereby certify that I have served a true and correct copy of the foregoing Appellants' Brief on the following counsels of record this 31st day of December, 2020 through the Court's e-flex system pursuant to Administrative Order No. 21, § 7(a).

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The undersigned attorney does hereby further certify that a true and correct copy of the foregoing has been served upon the following via U.S. Mail, First Class, postage prepaid, on the 31st day of December, 2020:

The Honorable Wendell Griffen
401 West Markham, Room 410
Little Rock, AR 72201

By: */s/ Gregory F. Payne*
Gregory F. Payne

X.

CERTIFICATE OF COMPLIANCE WITH ADMINISTRATIVE ORDER NO. 19, ADMINISTRATIVE ORDER 21 SEC. 9, AND WITH WORD-COUNT LIMITATIONS

I, the undersigned attorney, hereby certifies that the attached Appellant's Brief complies with Administrative Order No. 19 in that all "confidential information" has been be excluded from the "case record" by (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal, as applicable and, pursuant to Administrative Order 21, Section 9, this brief does not contain hyperlinks to external papers or websites.

Further, the undersigned states that the foregoing Brief conforms to the word-count limitation identified in Rule 4-2(d), that the Jurisdictional Statement, Statement of the Case and the Facts, the Argument and the Request for Relief contains 8,257 words.

The following original paper documents are not in PDF format and are not included in the PDF document(s) file with the Court: None

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