No. CV-20-721

IN THE SUPREME COURT OF ARKANSAS

Representative/Senator-elect DAN SULLIVAN; Senator BOB BALLINGER; Senator ALAN CLARK; Senator TERRY RICE; Senator GARY STUBBLEFIELD; Senator KIM HAMMER; Representative MARY BENTLEY; Representative STEVEN MEEKS; Representative JOSH MILLER; Representative JOHN PAYTON; Representative MARCUS RICHMOND; Representative LAURIE RUSHING; Representative BRANDT SMITH; Representative RICHARD WOMACK; Representative HARLAN BREAUX; Representative BRUCE COZART; Representative JUSTIN GONZALEZ; and Representative NELDA SPEAKS, each in their official and individual capacities; and IRIS STEVENS; JAMES DAVID HAIGLER; SCOTT and ANGELA GRAY; MIKE and STEPHANIE DUKE; and DAVE ELSWICK,
Appellants,

v.

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 Pulaski County Circuit Court, Fifth Division
No. 60CV-20-4915 (Hon. Wendell Griffen)

Appellees' Brief

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STATEMENT OF THE CASE AND THE FACTS

A. Arkansas's Response to COVID-19

The World Health Organization identified "Severe Acute Respiratory Syndrome Coronavirus 2," or "SARS-CoV-2," as causing the global scourge we now know as COVID-19 on February 11, 2020.[1] (RP86). COVID-19 is a contagious disease that poses special dangers to vulnerable populations such as the elderly, diabetics, cancer patients, and more. Troublingly, many infected persons have no symptoms but can still infect others. As COVID-19 spread across the globe, air travel was restricted and entire countries went on lockdown. When it reached the United States, governors began imposing across-the-board orders requiring citizens to stay home. *See, e.g.*, *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 65-66 (2020) ("impos[ing] very severe restrictions on attendance at religious services"); *Esshaki v. Whitmer*, 813 F. App'x 170, 171 (6th Cir. 2020) (Michigan's stay-at-home orders and strict enforcement of ballot-access provisions severely burdened First Amendment activity).

[1] https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it

But in stark contrast to governors elsewhere (like in California, Michigan, and Wisconsin) Governor Hutchinson took a sensible, measured approach. He did not order Arkansans to stay home or otherwise restrict their travel. Rather, he declared an emergency under the Emergency Services Act, Ark. Code Ann. 12-75-101 et seq., and directed the Arkansas Department of Health to respond to the threat of contagious disease, *see id.* 20-7-110(b). (RP48). Shortly thereafter, this Court issued an opinion recognizing the Governor's declaration of a public health emergency. *In re Response to the COVID-19 Pandemic*, 2020 Ark. 116, at 1 (per curiam).

Governor Hutchinson issued his emergency executive orders in consultation with Dr. Nathaniel Smith, then the Secretary of Health, *see, e.g.*, (RP48, 54), whom he authorized "to do everything reasonably possible to respond to and recover from the COVID-19 virus[.]" (RP48). The Secretary recognized COVID-19 is a notifiable disease. *See, e.g.*, *Standardized Case Definition and Notification for Coronavirus,* Ark. Dep't of Health (April 10, 2020).[2] He issued directives that this

[2] https://www.healthy.arkansas.gov/images/uploads/pdf/COVID_19_Case_DefinitionsFinal4.10.20.pdf

Court itself acknowledged by ordering that "courthouses and courtrooms shall continue to comply with" them. *In re Response to the COVID-19 Pandemic*, 2020 Ark. 187, at 2 (per curiam).

The Secretary's directives were authorized by both the Governor's executive orders and the Board of Health's 2019 Rules and Regulations Pertaining to Reportable Disease. (RP29-47). The Rules expressly contemplated the need to respond to a "Novel Coronavirus," including "Severe Acute Respiratory Syndrome." (RP35, 36, 37). That description precisely fits the virus causing COVID-19, which is "Severe Acute Respiratory Syndrome Coronavirus 2," previously known as "2019 Novel Coronavirus." *See* (RP86). Thus, the Board promulgated its 2019 Rules for the express purpose of combating an epidemic like this one.

In adopting its Rules, the Board acted under authority given by the General Assembly. Over a century ago, the General Assembly empowered it "to make all necessary and reasonable rules," among other things, for "the protection of the public health, . . . for the suppression and prevention of infectious, contagious and communicable diseases, and for the proper enforcement of quarantine, isolation and control of such diseases." Act 96, sec. 6, 1913 Reg. Sess., 39th Ark. Gen. Assemb., 1913 Acts of Ark. 348, 351 (Feb. 25, 1913); *see* Ark. Code Ann. 20-7-

109(a), -110(a). (RP29, 30, 33). Beyond generally empowering the Board to issues rules, the General Assembly's Legislative Council approved the 2019 Rules in particular. (RP29).

Since the Secretary began implementing the 2019 Rules in response to the pandemic, the General Assembly has not acted—*qua* legislature—to express any disapproval, despite the statutory and constitutional power to do so. For instance, the General Assembly retains power to end a state of emergency at any time by concurrent resolution. Ark. Code Ann. 12-75-107(c)(1); *see* Ark. Const. art. 6, secs. 15, 16. But it neither did that nor requested a special session to deal with the COVID-19 emergency. *See* (RT22-23).

B. History of this Litigation

Eighteen General Assembly members, acting in their official capacities, and seven of their constituents filed suit against Secretary of Health Dr. Jose Romero (who succeeded Dr. Smith on August 5, 2020), challenging the Governor's COVID-19-related executive orders and the Secretary's directives. (RP27-28). They did not initially sue the Governor.

Plaintiffs brought only a statutory challenge under the Emergency Services Act. They conceded that the Act empowers the Governor to respond to emergencies, including by issuing executive orders. (RP147 ¶ 89); *see* (RT21-11, 34-36). But they claimed, variously, that the Act does not apply to *health* emergencies, that

there is a non-textual 120-day limit on emergency declarations, and that the Secretary's directives were not issued under the Governor's executive orders or preexisting Board rules.

After the Secretary filed a motion to dismiss (RP65), Plaintiffs amended their petition to add the Governor as a Defendant. (RP125). At the hearing, *see* (RT1-40), Defendants requested that the court construe the motion to dismiss as covering the amended petition, which the court did. (RT5) (RP154). Afterwards, the circuit court entered its findings, which included, in pertinent part:

> All parties agree that the Administrative Procedure Act does not apply to Governor Hutchinson, as the Governor is not an "agency."
>
> The Petitioners concede that the Arkansas Emergency Services Act of 1973 (A.C.A. Section 12-75-101 et seq.[)] conferred emergency powers upon the Governor and upon certain state agencies to address natural or human-caused disasters.
>
> The Court holds that Ark. Code Ann. Section 20-7-110(b) constitutes a legislative delegation of authority to the Governor to order the Secretary of Health to "take such action as the public safety of the citizens demands to prevent the spread of . . . epidemic or contagious disease." Executive Order 20-03, issued March 11, 2020, and successive Executive Orders issued by Governor Hutchinson ordering the Secretary of Health to "issue orders of isolation and/or quarantine as necessary and appropriate to control the disease [COVID-19]["] fall within that legislative delegation of authority.
>
> The Arkansas State Board of Health Department of Health [sic] promulgated Rules pertaining to Reportable Diseases in April 2018 which were reviewed by the Legislative Council, approved by that body in December 2018, and which took effect in January 2019. The 2019 Rules explicitly included "novel coronavirus" among the reportable diseases. The parties agree that COVID-19 is a novel coronavirus.

> Novel coronavir[u]s is spec[i]fically included in the 2019 Rule promulgated by the Board of Health and approved by the Legislature.
>
> Therefore, the Court holds that Governor Hutchinson's Executive Orders concerning the coronavirus infection pandemic associated with COVID-19 are within the powers delegated to the Governor by the General Assembly concerning the COVID-19 emergency and that the 2019 Rules of the Arkansas State Board of Health Pertaining to Reportable Diseases satisfy the rulemaking requirement of the Admin[i]strative Procedure Act insofar as the Secretary of Health is concerned.

Judge Note, *Sullivan v. Romero*, No. 60CV-20-4915 (Oct. 14, 2020, 8:56 AM) (paragraph breaks and some alterations added). The circuit court issued a written order dismissing the amended petition (RP153), and Plaintiffs appealed.

ARGUMENT

The world remains gripped by a pandemic without equal in at least a century—a pandemic that has not spared Arkansas. Despite conceding the threat to Arkansans, Plaintiffs seek to void every emergency action Arkansas has taken to fight COVID-19. *See* Appellants' Br. 31 (acknowledging "the drastic social and economic consequences of COVID-19").

They claim that blocking Arkansas's emergency response would safeguard the separation of powers. But the opposite is true. The General Assembly has the power to do exactly what Plaintiffs ask this Court to do. Yet the General Assembly has not yet exercised that power. Because Plaintiffs are eighteen General Assembly members (along with some constituents), they have avenues to encourage their 117 colleagues to exercise their collective power. Instead, Plaintiffs seek a court order to accomplish ends that Arkansas's Constitution and statutes commit to the political branches. First, then, without reaching the merits, this Court should decline to entertain this appeal because it asserts a nonjusticiable political question. Or at least the Court should reject Plaintiffs' claim on separation-of-powers grounds.

Second, were the Court to reach the merits, it should hold that Arkansas law authorized the Governor's emergency actions. As the Chief Executive of the State,

the Governor has inherent authority to respond to a crisis like COVID-19. Additionally, the General Assembly has statutorily empowered him to respond to health emergencies through both the Emergency Services Act and an independent mandate to prevent the spread of contagious disease that dates to 1895, *see* Ark. Code Ann. 20-7-110(b).

Third, Plaintiffs may not now challenge the constitutionality of the Emergency Services Act's renewal provision because they did not raise this challenge below. In any event, their challenge would fail because the renewal provision is neither unconstitutionally vague nor does it violate the separation-of-powers doctrine, and the Governor has not exceeded his constitutional authority by acting consistent with its terms.

Finally, the Secretary's directives were authorized by the Governor's executive orders and the Board of Health's Legislative Council-approved 2019 Rules. The kind of virus that causes COVID-19 is expressly contemplated by those Rules, and, in any case, the Rules apply regardless of any express reference to COVID-19. *See* (RP39). The Secretary's directives are not themselves "rules" under the Administrative Procedure Act because they are not "statement[s] of general applicability and future effect" applicable across disease outbreaks or beyond the end of the COVID-19 emergency. Ark. Code Ann. 25-15-202(9)(A).

This Court reviews the circuit court's dismissal of the amended petition only for an abuse of discretion. *Henson v. Cradduck*, 2020 Ark. 24, at 4, 593 S.W.3d 10, 14; *see Kimbrell v. Thurston*, 2020 Ark. 392, at 6, 611 S.W.3d 186, 190 ("When a complaint is dismissed on a question of law, this court conducts a de novo review."). For the reasons explained herein, the circuit court did not abuse its discretion, and this Court should affirm its dismissal order.

I. Plaintiffs' challenge is a nonjusticiable political question, or at least must be rejected on separation-of-powers grounds.

Plaintiffs ask this Court to side with 18 legislators in disputing the Governor's policy for protecting Arkansans from COVID-19. But the General Assembly can protect its own interests in this dispute if it wishes. It might exercise its general legislative power and amend the statutes authorizing the Governor's and the Secretary's emergency actions. Or it might declare that the COVID-19 emergency is over. A simple majority of both houses "by concurrent resolution may terminate a state of disaster emergency at any time"—even without the Governor's approval. Ark. Code Ann. 12-75-107(c)(1); *see* Ark. Const. art. 6, secs. 15, 16. And there is no dispute that the General Assembly—which is sitting today—could do so today if it wished.

The General Assembly has made a political decision, however, not to take any of those actions. And Plaintiffs' lawsuit effectively seeks judicial review of

that political decision. *See* (RT22). But courts lack jurisdiction to decide this political question—an issue that, like all questions of subject-matter jurisdiction, can be raised for the first time on appeal. *See Catlett v. Republican Party of Ark.*, 242 Ark. 283, 286, 413 S.W.2d 651, 653 (1967); *Ark. Dep't of Fin. & Admin. v. Naturalis Health, LLC*, 2018 Ark. 224, at 6, 549 S.W.3d 901, 906. Because the circuit court lacked jurisdiction over this lawsuit, it correctly dismissed the amended petition.

Plaintiffs do not allege any violation of their or anyone else's individual, constitutional rights. Rather, without alleging *any* particularized harm whatsoever, Plaintiffs asked the court below to declare that the Governor and the Secretary overstepped the bounds of their executive authority to the detriment of the General Assembly, a coordinate branch of government. But Plaintiffs cite no constitutional or statutory provision empowering the General Assembly to direct the State's emergency response. And they cannot avoid the General Assembly's own decision to authorize the Governor's and the Secretary's actions. Ark. Code Ann. 12-75-101 et seq.; *id.* 20-7-110(b). Whether those actions represent sound policy is not a "justiciable matter" but a political question this Court should decline to entertain. Ark. Const. amend. 80, sec. 6(A).

The political-question doctrine "is primarily a function of the doctrine of separation of powers." 16 C.J.S. Constitutional Law, sec. 392. The Governor is

vested with the "supreme executive power of this State." Ark. Const. art. 6, sec. 2. Justice Jackson's framework for the separation of powers at the federal level applies with equal force to Arkansas government. When the Governor "acts pursuant to an express or implied authorization of [the General Assembly], his authority is at its maximum, for it includes all that he possesses in his own right plus all that [the General Assembly] can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). "In these circumstances," the Governor "personif[ies] the [State's] sovereignty." *Id.* at 635-36. An action he takes pursuant to a legislative authorization is likely constitutional unless "the [State's] Government as an undivided whole lacks power" to take that action. *Id.* at 636-37.

The Governor has not exceeded his authority here because not even Plaintiffs suggest that the State itself "lacks power" to respond to emergencies. Nor could they. A long line of federal and state precedent grants Arkansas broad power to handle public-health emergencies. *In re Rutledge*, 956 F.3d 1018, 1029 (8th Cir. 2020) (upholding a directive postponing elective surgeries to preserve personal protective equipment and limit social contact in light of COVID-19); *see also, e.g.*, *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 25 (1905) ("[T]he police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public

safety."); *Skallerup v. City of Hot Springs*, 2009 Ark. 276, at 10, 309 S.W.3d 196, 203 ("The police power of the state . . . is always justified when it can be said to be in the interest of the public health, public safety, public comfort[.]").

Courts have repeatedly concluded that separation-of-powers principles are advanced, not subverted, when public-health statutes are construed to enable the executive "to meet the exigencies of the occasion." *Bd. of Trustees of Highland Park Graded Common Sch. Dist. No. 46 v. McMurtry*, 184 S.W. 390, 394 (Ky. 1916).

COVID-19 itself has led to many examples. The Kentucky Supreme Court recently rejected a claim that its State's governor unconstitutionally encroached on legislative authority. *Beshear v. Acree*, No. 2020-SC-0313-OA, — S.W.3d —, 2020 WL 6736090, at *16 (Ky. Nov. 12, 2020). The Pennsylvania Supreme Court rejected a similar claim. *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 903 (Pa. 2020). That court held that the authority to issue those orders was "inherent in the broad powers authorized by the General Assembly." *Id.* at 893. And the Oregon Supreme Court upheld COVID-19-related orders issued under a broad emergency statute that gave the Oregon governor "the right to exercise, within the area designated in the proclamation, all police powers vested in the state by the Oregon Constitution in order to effectuate the purposes of [its emergency-management statutes]." *Elkhorn Baptist Church v. Brown*, 466 P.3d 30, 42 (Or. 2020) (quoting Or.

Rev. Stat. 401.168(1)). These courts agree with Justice Jackson: when a governor exercises his power bolstered by legislative authorization, the separation of powers counsels substantial deference to executive action.

It makes sense for legislatures to grant governors broad emergency powers. Legislatures are not institutionally equipped to make and enforce time-sensitive judgments based on rapidly changing vectors of contagion, shifting epidemiological understandings, and unexpected challenges to the implementation of measures to protect public health. That is particularly true for COVID-19—"a global pandemic caused by a new and rapidly spreading virus, during which conditions change on a daily basis." *Elkhorn Baptist*, 466 P.3d at 35. "COVID-19 . . . require[s] public officials to constantly evaluate the best method by which to protect residents' safety against the economy and a myriad of other concerns." *Ill. Republican Party v. Pritzker*, 470 F. Supp. 3d 813, 828 (N.D. Ill. 2020).

Responding effectively requires continuous assessment of (among other things) evolving health and economic data from across the State, the Nation, and other parts of the world that are experiencing related crises. In the United States, much of this data comes from CDC guidelines, which "provide the authoritative source of guidance on prevention and safety mechanisms for a novel coronavirus in a historic global pandemic where the public health standards are emerging and changing." *Mays v. Dart*, 974 F.3d 810, 823 (7th Cir. 2020). But even the CDC's

guidance is often in flux. This has required the "implement[ation] [of] several rounds of measures guided by ever-changing CDC recommendations." *Valentine v. Collier*, 956 F.3d 797, 799 (5th Cir. 2020).

During the pandemic, infection rates have spiked, diminished, and spiked again. *See generally Press Releases*, Arkansas Governor Asa Hutchinson (providing updates on COVID-19).[3] Hospital beds, ventilators, and personal protective equipment have become available and exhausted. *In re Rutledge*, 956 F.3d at 1023 ("PPE[] for healthcare workers is in short supply while concerns remain about the demand for ventilators"). Schools and businesses have been opened and closed. *Id.* The complicated federal–state relationship has had to be navigated. Vaccines have been developed, only to create new problems of scarcity. *See* Admin. Order No. 10 (E.D. Ark. Dec. 31, 2020) ("Vaccinations are proceeding. The pace, though, is slower than planned, and that road is not short.").[4] New variants have emerged. *New Variants of the Virus that Causes COVID-19*, Ctrs. for Disease Control and Prevention.[5] These and other contingencies coalesce into ever-new circumstances.

[3] https://governor.arkansas.gov/news-media/press-releases/

[4] https://www.are.uscourts.gov/sites/are/files/AdminOrder10.pdf

[5] https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html

That is why, like every other state legislature, the General Assembly wisely recognized that emergency disease control belongs to the executive branch. *See* Lawrence O. Gostin & Lindsay F. Wiley, Public Health Law 426 (3d ed. 2016) (explaining that States "broadly authoriz[e] action where necessary to protect" the public "in the face of a novel infectious disease"). Immediate and decisive action—and the flexibility to immediately pivot when the facts change—is necessary to protect Arkansans' life, health, and livelihood against needless harm during the crisis. Through statutes that place flexible discretion in executive departments, lawmakers avoid "the confusions and delays" that would arise were they compelled to respond by legislating in the midst of an acute public health crisis. *State v. Superior Court for King Cty.*, 174 P. 973, 978 (Wash. 1918). They also minimize "the danger of partisan opinion" flaring up and wreaking havoc. *Id.*; *see id.* (observing that "the judgment and discretion of [those] learned in the science of medicine" is indispensable during an acute public health crisis).

This Court has recognized that "our state constitution divides governmental powers among three distinct departments: legislative, executive and judicial; each of which is prohibited from exercising powers properly belonging to either of the other two." *Goodall v. Williams*, 271 Ark. 354, 354-56, 609 S.W.2d 25, 27 (1980). "[T]he right of executive discretion is constitutionally preserved" to the executive branch, and "the enforcement of [this constitutional commitment] is essential to

preserve the orderly processes of government and its basic integrity." *Id.* at 356, 609 S.W.2d at 27. As this Court held in *Goodall*, the grant of even a liquor license "hinges on executive discretion." *Id.* at 356, 609 S.W.2d at 27. De novo judicial review of such decisions "constitutes an unconstitutional exercise of executive powers by the judiciary." *Id.* at 355, 609 S.W.2d at 26. De novo judicial review of the discretionary executive response to this public-health emergency would just as surely violate the constitutional separation of powers.

This appeal fails to invoke the subject-matter jurisdiction of this Court because it presents a political question that cannot be entertained. Or, at least, the Court must reject Plaintiffs' challenge on separation-of-powers grounds. In either case, this Court should decline Plaintiffs' invitation to sit in judgment of the Governor's management of the COVID-19 crisis, and it should affirm the circuit court's dismissal of the amended petition.

II. The Governor has authority to respond to health emergencies.

In addition to the Governor's exercise of the "supreme executive power of this State," Ark. Const. art. 6, sec. 2, the General Assembly has empowered him to respond to health emergencies in two separate statutes, the Emergency Services Act of 1973, which generally empowers the Governor to respond to emergencies, and Act 152 of 1895, which *mandates* that he prevent the spread of contagious disease.

A. The Emergency Services Act empowers the Governor to respond to health emergencies.

The Emergency Services Act of 1973 (ESA) envisions "a major emergency or a disaster of unprecedented size and destructiveness" resulting from "natural or human-caused catastrophes." Ark. Code Ann. 12-75-102(a); *see* Act 511, 1973 Reg. Sess., 69th Ark. Gen. Assemb., 1973 Acts of Ark. 1419 (Mar. 30, 1973). The ESA plainly contemplates health emergencies like the COVID-19 pandemic, expressing the purpose "to ensure that this state will be prepared to deal with such contingencies in a timely, coordinated, and efficient manner and generally to . . . protect the public . . . health . . . and preserve the lives and property of the state." Ark. Code Ann. 12-75-102(a).

The General Assembly committed power to declare emergencies in cases of disaster exclusively to the Governor. A "disaster" includes "any . . . air or surface-borne toxic or other hazardous material contamination, or other catastrophe, whether caused by natural forces, enemy attack, or any other means which . . . [*i*]*n the determination of the Governor* . . . is or threatens to be of sufficient severity and magnitude to warrant state action." *Id.* 12-75-103(2)(A) (emphasis added). Further, "[a] disaster emergency shall be declared by executive order or proclamation of the Governor *if he or she finds* a disaster has occurred or that the occurrence or the threat of disaster is imminent." *Id.* 12-75-107(a)(1) (emphasis added). This

language of these provisions shows that the General Assembly vested exclusive authority in the Governor, reserving no prerogative to second-guess his determinations that state action is warranted.

Accordingly, the General Assembly used sweeping language to "[c]onfer upon the Governor . . . emergency powers." *Id.* 12-75-102(a)(2). He "is responsible for meeting and mitigating, *to the maximum extent possible*, dangers to the people and property of the state presented or threatened by disasters." *Id.* 12-75-114(a) (emphasis added). To equip him to do that, the General Assembly empowered the Governor to "issue executive orders, proclamations, and rules" that—without the legislature's imprimatur—"have the force and effect of law." *Id.* 12-75-114(b). And the General Assembly declared him the "Commander-in-Chief" of all emergency forces, while leaving unrestricted his authority to "delegate or assign operational control" by emergency order. *Id.* 12-75-114(d).

Plaintiffs urge that "legislative intent was to limit the Governor's authority" and that his actions "exceeded his authority under the Emergency Services Act." Appellants' Br. 9, 28 (capitalization omitted). But after-the-fact arguments about the 69th General Assembly's legislative intent cannot trump the ESA's plain text, especially where this Court has "held that the testimony of the legislators with respect to their intent in introducing legislation is clearly inadmissible." *Cave City Nursing Home, Inc. v. Ark. Dep't of Human Servs.*, 351 Ark. 13, 23, 89 S.W.3d

884, 890 (2002). Rather, the Court "construe[s] the statute just as it reads, giving the words their ordinary and usually accepted meaning in common language. *State v. Higginbotham*, 2020 Ark. 315, at 5, 612 S.W.3d 164, 167.

The circuit court did not, as Plaintiffs wrongly contend, hold "that the ESA grants the Governor *unlimited* authority in a health emergency." Appellants' Br. 16 (emphasis added). In fact, the circuit court expressly *denied* that "the governor's powers are absolute or boundless." (RT36). For one thing, the court recognized that the Governor's emergency authority is not unlimited because the General Assembly is itself empowered to terminate a state of emergency. Ark. Code Ann. 12-75-107(c)(1) ("The General Assembly by concurrent resolution may terminate a state of disaster emergency at any time."); *cf.* Ark. Const. art. 6, secs. 15, 16. (RT22). And again, the General Assembly—which is in session now—could do that today.

Further, commitments of emergency power to executive officials in a pandemic are subject to appropriate standards: These powers may be exercised only for the duration of an extraordinary and specifically articulated threats, and any actions must be calculated to meet and mitigate the dangers posed by the threat. Ark. Code Ann. 12-75-103(2)(A), 12-75-107(a)(1), (b)(1), (d)(1); *see id.* 12-75-102(a), 12-75-114(a). Here, Governor Hutchinson's executive orders fall well within those parameters. He invoked the ESA only after COVID-19 reached Arkansas,

delegated appropriate control to the Secretary, and has crafted his orders to contain and mitigate the pandemic's effects on Arkansans' lives and property. *See* (RP48-58).

It makes no difference whether Plaintiffs think it was "unnecessary" to invoke the ESA because (as they claim) the Governor could have relied on the Administrative Procedure Act (APA). Appellants' Br. 17. For one thing, whether the APA might have *additionally* authorized the Governor's actions has no bearing on whether the ESA independently authorized those actions. But just as importantly, Plaintiffs' specific claim—that the APA's emergency-rulemaking provision, Ark. Code Ann. 25-15-204(c)(1), negates the Governor's authority under the ESA to respond to a pandemic—is wrong on the merits.

In fact, it fails for at least three reasons. First, Plaintiffs concede that the Governor's power to issue executive orders is *not* subject to the APA. *See* (RT11); (RP99-100 ("[T]he Governor is not subject to the provisions of limited delegated authority appearing in the APA.")). Indeed, the APA *expressly excludes* him from its procedural requirements. *See* Ark. Code Ann. 25-15-202(2)(A) (excluding "the Governor" from the definition of "agency"). Second, the APA also expressly "does not repeal delegations of authority as provided by law." *Id.* 25-15-202(2)(D). Plaintiffs cannot, therefore, look to the APA for limitations on independent statutes like the ESA. And third, the General Assembly has demonstrated

elsewhere in the ESA that it is capable of including statutory language that subjects certain kinds of gubernatorial action to APA review. *See id.* 12-75-115(c)(4) (subjecting the Governor's disaster-prevention power of suspending inadequate standards to APA judicial review); *see also id.* 12-75-119(f)(1)(B) (requiring a jurisdiction's request for reimbursement to be adopted as an APA rule). When the legislature includes particular language in one section of a statute but omits it in another," it is presumed that it "acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012) ("[A] matter not covered is to be treated as not covered."). Therefore, the fact that the General Assembly chose not to subject the Governor's emergency actions to APA review demonstrates that the Governor did not improperly invoke the ESA.

By passing the ESA, the General Assembly authorized the Governor to take emergency action against disasters like the COVID-19 pandemic, and this Court should affirm the dismissal of Plaintiffs' claim to the contrary.

B. The Governor has an independent mandate to contain the spread of contagious disease.

Besides the Governor's authority under the ESA's expansive language, he also has a 125-year-old mandate to order the Board of Health "to take such action as the public safety of the citizens demands to prevent the spread of [an] epidemic

or contagious disease." Act 152, sec. 1, 1895 Reg. Sess., 30th Ark. Gen. Assemb., 1895 Acts of Ark. 236, 237 (Apr. 20, 1895) (current version codified at Ark. Code Ann. 20-7-110(b)). This mandate independently authorizes the Governor and the Secretary to take decisive measures to control and mitigate COVID-19's harmful effects.

Curiously, Plaintiffs fault the Governor for failing to act pursuant to this disease-containment mandate. Appellants' Br. 17. But in addition to the ESA, his orders repeatedly invoke this authority. *See* (RP48 ("acting under the authority vested in me by Ark. Code Ann. §§ 12-75-101 *et seq*. and § 20-7-110")); *accord* (RP54, 57). Plaintiffs also claim that this mandate limits the Board to making rules subject to legislative review. Appellants' Br. 18. But both the history and plain language of the statute contradict that claim.

First, the Governor's disease-containment mandate long predates, and is unlimited by, any provisions governing the Board's rulemaking. The General Assembly enacted this mandate in 1895. *See* Act 152 of 1895, sec. 1, *supra*, 1895 Acts of Ark. at 237 (enacting Ark. Code Ann. 20-7-110(b)). It thus predates by nearly 20 years the Board's independent rulemaking authority, which the General Assembly enacted in 1913. *See* Act 96 of 1913, sec. 6, *supra*, 1913 Acts of Ark. at 351-52 (enacting Ark. Code Ann. 20-7-109(a)(1)). And the Governor's disease-containment mandate predates by more than 70 years the statutory precursor to the

APA. *See* Act 434, 1967 Reg. Sess., 66th Ark. Gen. Assemb., 1967 Acts of Ark. 996 (Mar. 16, 1967) (enacting Ark. Code Ann. 25-15-204).

None of these subsequent enactments purported to alter the Governor's 1895 mandate to order the Board "to take such action as the public safety of the citizens demands to prevent the spread of the epidemic or contagious disease." Ark. Code Ann. 20-7-110(b). The history of these provisions, therefore, contradicts Plaintiffs' claim that the Governor overstepped his authority.

Second, the plain language of the statute contradicts Plaintiffs' suggestion that the Governor's disease-containment mandate requires legislative review. The General Assembly committed exclusive authority to the Governor to make the relevant determinations. Whenever, "*in the judgment of the Governor*, the public safety demands action," he must order the Board to act. *Id.* (emphasis added). Plaintiffs misinterpret this provision as authorizing the Governor only to give notice of the health threat to the Board. Appellants' Br. 18. But it expressly mandates that "*the Governor shall . . . order it to take such action* as the public safety of the citizens demands to prevent the spread of the epidemic or contagious disease." Ark. Code Ann. 20-7-110(b) (emphasis added).

The General Assembly has also expressly provided that the Governor may act under both the ESA and his disease-containment mandate simultaneously. *See*

Ark. Code Ann. 12-75-104(4) (providing that the ESA does not limit the Governor's authority to exercise "any other powers vested in him" by "independent" statutes). So the Governor's exercise of his disease-containment authority does not exclude action under the ESA.

Plaintiffs complain that they are subject to misdemeanor penalties for violations of COVID-19-related directives without legislative authorization. They suggest both that "a sole, unelected individual in the executive branch"—presumably the Secretary—made them subject to penalty and that the Governor's actions led to this result. Appellants' Br. 23. But neither is accurate. The *General Assembly* enacted the statute that makes the violation of a directive a misdemeanor offense, *see* Ark. Code Ann. 20-7-101(a), and this remains the case regardless of any action taken by the Governor. True, the Governor has ordered the Secretary to issue COVID-19-related directives, but the General Assembly also enacted statutes that empower him to do that. Ark. Code Ann. 12-75-114(d)(2), 20-7-110(b). So Plaintiffs have no basis to assert that potential misdemeanor penalties for violations of COVID-19-related directives lack proper legislative authorization.

Over a century ago, the General Assembly mandated that the Governor protect Arkansans by preventing the spread of contagious disease. That mandate authorizes—indeed, *mandates*—executive action to control the COVID-19 pandemic, and this Court should affirm.

III. This Court should reject Plaintiffs' constitutional attack on the Emergency Services Act's renewal provision.

Plaintiffs did *not* challenge the ESA's constitutionality below and thus may not challenge it now. But even if they could, their claim would fail.

A. Plaintiffs forfeited their constitutional challenge to the Emergency Services Act by failing to raise it below.

The Governor's executive orders rest in part on his authority under the ESA. Plaintiffs purport to raise on appeal the question whether the ESA should be "nullifi[ed]" as unconstitutionally vague or as violating the separation-of-powers doctrine. Appellants' Br. 40; *see id.* 14, 23-30, 43. Although Plaintiffs contended below that the constitutional-avoidance doctrine requires that statutes must be *interpreted* so that they do not violate the separation-of-powers doctrine, *see* (RP130-32 ¶¶ 17-24), they did *not* challenge the ESA's constitutionality—let alone obtain a ruling on that issue. "It is an appellant's responsibility to obtain a ruling to preserve an issue for appeal, and the failure to obtain a ruling precludes [the Court's] review on appeal." *Douglas Cos. v. Walther*, 2020 Ark. 365, at 9, 609 S.W.3d 397, 402. So Plaintiffs are precluded from asking this Court to rule on the ESA's constitutionality. And that alone is sufficient to resolve this claim.

B. The renewal provision is neither unconstitutionally vague nor does it violate the separation-of-powers doctrine.

Plaintiffs' argument fails in any case. They argue that the ESA is unconstitutionally vague or violates the separation-of-powers doctrine because (they claim)

it does not contain a "reasonable guideline" in the form of a 120-day limit on emergency executive orders. Appellants' Br. 23-30. But Plaintiffs' argument improperly relies on case law interpreting *agency* authority. Those cases apply only to "administrative bod[ies]." *Holloway v. Ark. State Bd. of Architects*, 352 Ark. 427, 440, 101 S.W.3d 805, 814 (2003). Their principles have never been applied to the Governor's emergency powers.

Plaintiffs seek to graft the APA's agency-rulemaking restrictions onto the ESA, where they do not belong. The APA generally restricts the life of emergency rules to 120 days. Ark. Code Ann. 25-15-204(c)(3). But, as explained above, the APA expressly preserves the Governor's emergency and disease-containment powers, which derive from independent statutory authorizations. *See id.* 25-15-202(2)(D) (the APA "does not repeal delegations of authority as provided by law"); *id.* 25-15-202(2)(A) (excluding "the Governor" from the definition of "agency"); *see also* (RT11); (RP99-100 (Plaintiffs concede that "the Governor is not subject to the provisions of limited delegated authority appearing in the APA.")).

Unlike the APA, the ESA does not restrict the duration of an emergency declaration. Rather, the Governor may renew an emergency declaration that would otherwise expire. *See* Ark. Code Ann. 12-75-107(b)(2) ("No state of disaster emergency may continue for longer than sixty (60) days unless renewed by the

Governor."). The renewal provision "is clear," so it must be "given its plain meaning": The Governor may renew an emergency declaration that would otherwise expire, and no limit on renewals is provided. *Pruitt v. Smith*, 2020 Ark. 382, at 3, 610 S.W.3d 660, 662. Plaintiffs' proposed 120-day restriction appears nowhere in the renewal provision, and as this Court has long held, it cannot "read into a statute language that was not included by the legislature." *BHC Pinnacle Pointe Hosp., LLC v. Nelson*, 2020 Ark. 70, at 17, 594 S.W.3d 62, 73.

Comparing the ESA with the APA highlights this point. The APA provides that an emergency "rule may be effective for no longer than one hundred twenty (120) days." Ark. Code Ann. 25-15-204(c)(3). The ESA's renewal provision, on the other hand, does not contain any remotely comparable language. It does not say, as Plaintiffs suggest, "unless renewed by [the Governor] for an additional 60 days, at which time such declaration shall have terminated." Appellants' Br. 43. Nor does it say "unless renewed by the Governor for a maximum of one hundred twenty (120) days." If the General Assembly had intended to restrict the duration of emergency declarations, it plainly could have done so, just as it restricted the life of emergency rules under the APA. But it didn't, and this Court has made clear that it will not read language into a statute that the General Assembly did not include. *Nelson*, 2020 Ark. 70, at 16, 594 S.W.3d at 73.

Even if the ESA's language had restricted the duration of emergency declarations, that would not prevent the Governor from declaring an emergency anew. The ESA still "empowers him to declare successive disasters, even if they stem from the same underlying crisis." *Cassell v. Snyders*, 458 F. Supp. 3d 981, 1001 (N.D. Ill. 2020) (holding the Illinois governor can declare successive disasters so long as he makes new findings that an emergency still exists).

The absence of a durational restriction in the ESA creates no constitutional issues. Even assuming that the requirement of a "reasonable guideline" applies in this context, "the General Assembly must spell out *appropriate* standards" to satisfy it. *Holloway*, 352 Ark. at 440, 101 S.W.3d at 814 (emphasis added). This "appropriate standards" criterion recognizes that delegations should be as reasonably precise as the subject matter permits. Not every delegation will admit of meticulous guidelines. *See McMurtry*, 184 S.W. at 394 ("In the very nature of things it would be utterly impracticable for the legislative department of the state to undertake to define the conditions that must exist before these boards could take such action as might be necessary to control" an epidemic.). And where meticulous guidelines cannot be prescribed, it not unconstitutional for the General Assembly to refrain from prescribing them. Rather, in those cases a power may be circumscribed by setting forth the parameters within which it may be exercised.

The General Assembly has prescribed appropriate standards for the Governor to exercise emergency powers. He may exercise them only in cases of "a major emergency or a disaster of unprecedented size and destructiveness resulting from enemy attack, natural or human-caused catastrophes, or riots and civil disturbances." Ark. Code Ann. 12-75-102(a). Further, the Governor's executive orders must "indicate the nature of the disaster, the area or areas threatened, and the conditions which have brought it about." *Id.* 12-75-107(d)(1). These provisions ensure that the Governor's power is exercised only for the duration of specific, extraordinary threats. Further, once the Governor has declared an emergency, his declaration may continue only until "the threat or danger has passed," or "[t]he disaster has been dealt with to the extent that emergency conditions no longer exist." *Id.* 12-75-107(b)(1). Moreover, the General Assembly can end it at any time by concurrent resolution. Ark. Code Ann. 12-75-107(c)(1); *see* Ark. Const. art. 6, secs. 15, 16. So the ESA already contains appropriate durational standards without reading into it an arbitrary, 120-day restriction.

Finally, to the extent Plaintiffs suggest a restriction should be implied on public-policy grounds, that too lacks merit. Indeed, the Governor has not simply reissued existing declarations, but in each new or continued declaration, he has responded to the facts on the ground and made modifications in response to those

facts. *See, e.g.*, (RP50-58). And that sensible approach contrasts with the approaches taken by so many other chief executives.

The ESA is not unconstitutionally vague nor does it violate the separation-of-powers doctrine, and the Governor has not exceeded his constitutional authority by acting consistent with its terms. Therefore, this Court should affirm.

IV. The Secretary's directives were authorized by the Governor's executive orders and the Board of Health's preexisting rules.

A. The directives were authorized by the Governor's executive orders.

First, the Secretary's directives were properly issued pursuant to the Governor's executive orders, which were authorized under his inherent authority as Chief Executive of the State, in conjunction with the emergency and disease-containment authority committed to him by the General Assembly. *See* Ark. Code Ann. 12-75-114(d)(2) (Governor's authority during an emergency to "delegate or assign operational control"); *id.* 20-7-110(b) (mandating that "the Governor shall . . . order [the Board] to take such action as the public safety of the citizens demands to prevent the spread of [an] epidemic or contagious disease").

The Governor expressly invoked both provisions in the pertinent executive orders. Ordering that "[t]he Arkansas Department of Health shall act as the lead agency to work in concert with . . . other State agencies to utilize state resources and to do everything reasonably possible to respond to and recover from the

COVID-19 virus," the Governor cited both the ESA and the disease-containment mandate. *See* (RP48 ("acting under the authority vested in me by Ark. Code Ann. §§ 12-75-101 *et seq*. and § 20-7-110")); *accord* (RP54, 57). Plaintiffs do not contend that the Secretary's directives fall outside of the Governor's mandate "to do everything reasonably possible to respond" to the health emergency posed by COVID-19. (RP48). In fact, those directives are reasonable and were properly issued under the Governor's authority. Therefore, the Governor's executive orders authorized the Secretary's directives.

B. The directives were authorized by the Board of Health's preexisting rules.

Second, the Secretary's directives were authorized by the Board of Health's preexisting rules, which were duly adopted in accordance with the APA and other statutory requirements and approved by the General Assembly's Legislative Council. *See* (RP29). Plaintiffs wrongly represent Defendants as contending below that the 2019 Rules do not authorize the Secretary's directives. Appellants' Br. 32-33. Rather, Defendants consistently maintained that the directives were authorized under the Governor's executive orders along with the 2019 Rules, but that appealing to the Rules is unnecessary because the directives were properly issued pursuant to the Governor's executive orders, which provide sufficient authorization in themselves. *See* (RT9-10, 27). Regardless, the Court "may affirm for any reason that

has been developed in the record." *Foust v. Montez-Torres*, 2015 Ark. 66, at 6, 456 S.W.3d 736, 739.

1. The General Assembly empowered the Board to adopt its 2019 Rules, which expressly contemplate Severe Acute Respiratory Syndrome.

The General Assembly empowered the Board with "direction and control to suppress . . . and prevent the[] spread" of "all infectious, contagious, and communicable diseases within the state." Ark. Code Ann. 20-7-110(a)(3). As part of its statutory authority, the Board is empowered "to make all necessary and reasonable rules of a general nature for":

- "The protection of the public health and safety," *id.* 20-7-109(a)(1)(A);
- "The suppression and prevention of infectious, contagious, and communicable diseases," *id.* 20-7-109(a)(1)(C); and
- "The proper enforcement of quarantine, isolation, and control of such diseases," *id.* 20-7-109(a)(1)(D).

Accordingly, the Board promulgated its 2019 Rules and Regulations Pertaining to Reportable Disease. (RP29-47).

These Rules "provide for the prevention and control of communicable diseases and to protect the public health, welfare and safety of the citizens of Arkansas." (RP33). They identify particular "notifiable diseases," which include "Novel Coronavirus (Middle Eastern Respiratory Syndrome or Severe Acute Respiratory

Syndrome virus)" and "SARS." (RP35, 36, 37). On February 11, 2020, the World Health Organization identified "Severe Acute Respiratory Syndrome Coronavirus 2," or "SARS-CoV-2," previously known as "2019 Novel Coronavirus," as causing the disease we now know as COVID-19.[6] *See* (RP86). So the virus that causes COVID-19 is expressly accounted for by the Rules.

Plaintiffs purport to "invok[e] the *expressio unius est exclusio alterus* doctrine, that the express mention of MARS [sic: MERS] and SERS [sic: SARS] in the 2019 Rules necessarily excludes other unanticipated coronaviruses." Appellants' Br. 31. But COVID-19 *is* a SARS virus, which the 2019 Rules expressly mentions—twice. (RP36, 37). So *on Plaintiffs' own terms*, COVID-19 is not an excluded "unanticipated coronavirus." Appellants' Br. 31. Indeed, to make any plausible argument that the 2019 Rules do *not* cover COVID-19, Plaintiffs must specify what alternative language the Board could possibly have included to make the Rules apply. But short of clairvoyance—foreknowing the precise name of the virus that causes COVID-19—there is no clearer language.

[6] https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it

But even supposing that Plaintiffs were right that COVID-19 does not come within the express terms of the 2019 Rules, those Rules would still apply. They provide that "[o]ther diseases not named . . . may at any time be declared notifiable as the necessity and public health demand, and these regulations shall apply when so ordered by the Director." (RP39). The Secretary has declared COVID-19 to be a notifiable disease. *See, e.g., Standardized Case Definition and Notification for Coronavirus*, Ark. Dep't of Health (April 10, 2020) (recognizing "COVID-19 is a notifiable disease").[7] So there is no doubt that the 2019 Rules apply to COVID-19.

Plaintiffs argue that the 2019 Rules cannot be applied in unanticipated circumstances. Appellants' Br. 31. But even though the precise details of the COVID-19 outbreak weren't foreseen, it still cannot fairly be described as "unanticipated" by the Rules in the sense that they fail to apply to COVID-19. General categories can be formulated "without knowing all the items that may fit" within those categories. Scalia & Garner, *Reading Law*, 101. The Rules were designed to apply in the event of an outbreak of "Novel Coronavirus"—precisely describing COVID-19. (RP36). Plaintiffs' interpretive principle would unreasonably restrict their applicability and frustrate the purpose of rulemaking.

[7] https://www.healthy.arkansas.gov/images/uploads/pdf/COVID_19_Case_DefinitionsFinal4.10.20.pdf

Plaintiffs concede that when the 2019 Rules were adopted, "the Board possessed only the 'best reasonably obtainable scientific, technical, economic, or other evidence available,'" as the law requires for any adopted rule. Appellants' Br. 30 (quoting Ark. Code Ann. 25-15-204(b)(1)). Yet they assert that the 2019 Rules "did not anticipate the drastic social and economic consequences of COVID-19." Appellants' Br. 31. Even if true, this is a red herring because a failure to anticipate such consequences is irrelevant to the question of whether the Rules apply to COVID-19.

Regardless, this assertion is false. The Rules expressly state that novel coronaviruses, including SARS viruses, "are of special importance or may indicate a bioterrorism event," and "must be reported immediately to the Arkansas Department of Health." (RP37). Drastic social and economic consequences are precisely the sorts of things that result from acts of bioterrorism. And the mandated urgency of reporting such viruses "immediately" demonstrates that the 2019 Rules do in fact anticipate drastic potential threats to "the public health, welfare and safety," with all the social and economic consequences that can result from them. (RP33, 37). Plaintiffs are simply wrong to contend that rules do not apply to COVID-19.

Plaintiffs did not raise a constitutional challenge to any statute below. Rather, they argued that the Secretary "issu[ed] directives outside the scope of authority delegated to him under the [APA], in violation of the constitutional doctrine of

separation of powers." (RP126 ¶ 1); *see* (RP138 ¶ 52, 140 ¶ 59, 142 ¶ 63, 149 ¶ 94). But, in an era before the Board's actions were subject to legislative review or the APA, this Court held that its authority to issue "rules," "regulations," and "orders" was *not* an unconstitutional "delegation of legislative authority." *State v. Martin*, 134 Ark. 420, 204 S.W. 622, 625 (1918) ("The necessity for, and reasonableness of, the regulations is one largely within the judgment of the board. Every presumption is indulged in favor of the necessity of the rule, and courts will not interfere with acts of health authorities unless it is apparent that the rule is arbitrary."); *see Jacobson*, 197 U.S. at 27 (holding that it was "surely . . . appropriate" and "not an unusual, nor an unreasonable or arbitrary, requirement," to vest with authority a board of health composed of persons in the community who were fit to respond to an "epidemic of disease").

Although Plaintiffs suggest a feeble distinction between the COVID-19 pandemic and the threat of smallpox at issue in *Martin*, it remains the case that "the language of the act necessarily includes the disease . . . , and clearly confers the power upon the board of health to prevent its entry into and spread throughout the state by rule or order." 134 Ark. at 420, 204 S.W. at 634.

In fact, the validity of the Rules here is even more apparent than in *Martin*. After the Board promulgated these Rules, the Legislative Council approved them. (RP29). Thus, when the Secretary acted pursuant to those Rules, he acted on an

express delegation of power by the General Assembly—via Arkansas Code Annotated sections 20-7-109, -110—according to agency rules that the General Assembly had specifically blessed. These are the circumstances Justice Jackson had in mind in which executive authority is at its maximum. *See Sawyer*, 343 U.S. at 635.

The 2019 Rules authorized the Secretary's COVID-19-related directives. They impose a duty upon the Secretary, and empower him with appropriate discretion, to respond to outbreaks of communicable diseases such as COVID-19. *See* (RP39 ("When the Director has knowledge, or is informed of the existence of a suspected case or outbreak of a communicable disease . . . [*t*]*he Director shall* take *whatever steps* [*are*] *necessary* for the investigation and control of the disease." (emphasis added))). The Rules do not require the Secretary to seek legislative approval of the steps he determines are necessary. In fact, they further impose a duty on the Secretary, and empower him, to exercise *his own discretion* to control the spread of disease by regulating businesses and individuals. *See* (RP40 ("The Director *shall* impose such quarantine restrictions and regulations upon *commerce and travel* . . . and upon *all individuals*[8] as *in his judgment* may be necessary to

[8] Plaintiffs are simply mistaken to assert that the 2019 Rules do not confer authority upon the Secretary to restrict and regulate commerce and travel of

prevent the introduction of communicable disease into the State, or from one place to another within the State." (emphases added))).

When it comes to controlling the spread of contagious disease during a pandemic, the duly adopted and Legislative Council-approved 2019 Rules prohibit second-guessing the Secretary's judgment, because he is uniquely situated with experience, expertise, and all the resources of the Department of Health. The Rules recognize that requiring the Secretary to submit his COVID-19-related directives for legislative review would be not only unnecessary but counterproductive.

2. The directives are not APA "rules."

Finally, the challenged directives are not themselves APA "rules." They are not "statement[s] of general applicability and future effect." Ark. Code Ann. 25-15-202(9)(A) (defining "Rule"). They are not statements with "future effect" because the duration of their effectiveness is circumscribed by the COVID-19 emergency, and they will be of no effect once the emergency is resolved.

Nor are the directives generally applicable. *Id.* Anything qualifying as a "rule" would establish durable protocols for issues anticipated to recur across disease outbreaks. But the Secretary's directives do not do this, and in this regard

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individuals who have not contracted or been exposed to COVID-19. *See* (RP40); Appellants' Br. 36, 44.

they are like the Department of Correction's selection of a site for a prison facility that this Court considered in *Eldridge v. Bd. of Correction*, 298 Ark. 467, 471, 768 S.W.2d 534, 536 (1989). The Department acted pursuant to the law that authorized it to establish prisons. *Id.* at 470, 768 S.W.2d. at 536. But because its selection of the particular location was not "an agency statement of general applicability," it did not constitute "the adoption of a rule within the meaning of [the APA]," and it was not subject to APA rulemaking requirements. *Id.* at 471, 768 S.W.2d. at 536. Perhaps, had the Department made some decision applicable to the selection of prison sites generally, that would have constituted a rule. In any event, like the Department of Correction's decision concerning the location of its prison facility, the Secretary's directives address the unique challenges of the COVID-19 pandemic. They are limited measures that, by design, address the immediate situation the Secretary is presently contending with.

Given that the very purpose of the 2019 Rules is to enable the Secretary "to take swift steps to prevent contagion, the Court cannot conclude that the actions they authorize are also rules" subject to review. *Chambless Enterprises, LLC v. Redfield*, No. 3:20-CV-01455, 2020 WL 7588849, at *11 (W.D. La. Dec. 22, 2020). The Secretary's directives, therefore, are not APA rules. Because they were authorized by the Governor's executive orders and the Board's preexisting Rules, the Court should affirm.

REQUEST FOR RELIEF

For the reasons set forth above, the Court should affirm the circuit court's dismissal of the amended petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Administrative Order No. 19 in that all "confidential information" has been 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.

Further, this brief conforms to the word-count limitations identified in Rule 4-2(d). The statement of the case and the facts, the argument, and the request for relief together contain 8598 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.

/s/ Michael A. Cantrell
Michael A. Cantrell

CERTIFICATE OF SERVICE

I certify that on February 8, 2021, I electronically filed this document with the Clerk of Court using the eFlex electronic-filing system, which will send notification of the filing to any participants.

/s/ Michael A. Cantrell
Michael A. Cantrell