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

APPELLANTS' REPLY BRIEF

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Contrary to Appellees' melodramatic declaration out of the blocks that while "the world remains gripped by a pandemic without equal in at least a century . . . Plaintiffs seek to void every emergency action Arkansas has taken to fight COVID-19," (Appellees' Brief, p. 15) Appellants seek only rededication to the fundamental proposition that ours is a "government of laws, and not of men." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). It is the very fact of the unforeseen severity and historically uniqueness of COVID-19 that causes us to reflect upon the Governor's actions rationalized by current exigencies that "[e]mergency does not create power. Emergency does not increase power or remove or diminish the restrictions imposed upon power granted or reserved." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

Fortunately for the citizens of the State of Arkansas, the General Assembly had the prescience to impose restrictions on that power granted or reserved to the Governor and the Arkansas Department of Health ("the ADH") in cases of health emergency. Existing legislation in the form of the Administrative Procedures Act (the APA") and that forming the Department of Health found in A.C.A. § 20-7-101 *et seq*., specifically address state actions to be taken when public health and safety are threatened and by emergency declaration, the Governor can neither add nor detract from that existing law. Therefore, the only purpose served by the

Governor's executive orders was an unprecedented and illegal assumption of powers taken in the legislature's absence, a veiled attempt to expand upon the statutory restrictions of time and scope applicable to health emergencies previously imposed. The Governor's recognition in his March 11, 2020 Executive Order EO 20-03, issued after consultation with his ADH Secretary, that COVID-19 was "a new disease," dispels speculation that the pre-existing 2019 Rules of the Department of Health anticipated the virus or are applicable here. Nevertheless, the agency's powers under said rules are limited to restrictions and regulations regarding isolation and quarantine, affecting persons who, by the agency's own definitions, are subject to either one or the other. (RP 33, 40) It is only through executive order that the Governor has assumed power to hyperregulate intrastate commerce and impose mandates carrying criminal penalties on the citizens of Arkansas without regard to whether they are subject to isolation or quarantine. And it is a misrepresentation of Appellant's argument that they seek a declaration that existing law is unconstitutional. On the contrary, it is only the Governor's application of his perceived powers under the Emergency Service Act ("the ESA") and his interminable exercise of plenary authority that raises a constitutional issue. If one were to adhere to Appellees' arguments that, "[a]s the Chief Executive of the State, the Governor has inherent authority to respond to a crisis like COVID-19" (Appellees' Brief, p. 16), that he has "an independent mandate to prevent the

spread of contagious disease that dates to 1895," (*Id*.), and since he "personif[ies] the [State's] sovereignty" and, by inference, the state's police power, (Appellees' Brief, p. 19), not only would the ESA be rendered unconstitutional, we could no longer claim a republican form of government. Appellants' argue, to the contrary, that a plain reading of the ESA saves it. Appellees' Brief, p. 26. And as to Appellees argument that Appellant's "may not challenge the constitutionality of the Emergency Services Act's renewal provision because they did not raise this challenge below," the following exchange is from the hearing transcript:

> THE COURT: Why should – the reason I'm thinking, why should a judge read a requirement to limit the number of times to renew into a statute that the legislature enacted when the statute is written not in limiting but in expansive language?
>
> MR. PAYNE: To read it otherwise would be to read it as unlimited delegation of authority, which is unconstitutional. (RT 24).

Further, in Paragraph 69 of their Amended Petition, Appellants allege that "for the Governor to claim emergency authority for additional periods and to be renewed indefinitely in his sole discretion under A.C.A. 12-75-107, such a delegation would represent a vague, standardless and unconstitutional delegation of authority by the General Assembly." (RP 144)

Appellees further state that "Plaintiffs cite no constitutional or statutory provisions empowering the General Assembly to direct the State's emergency response" (Appellees' Brief, p. 18) despite Appellant's argument that the police power of the state resides solely with the legislature. (Appellant's Brief, p. 20.) Nevertheless, it should be noted that Appellant's express no desire to direct the state's response to COVID-19 with any particularity, but only to ensure that procedures safeguards are followed, legislative oversight preserved and individual rights protected. The point to be made is that the Governor and the ADH would have no authority to engage a public health emergency whatsoever were it not delegated by the General Assembly and the questions presented are whether the ESA applies in the face of specific statutory provisions elsewhere, and, if so, has the executive branch exceeded its delegated authority since "[a] statute which 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, 572 (2011). To that end, Appellants will address Appellees' responsive arguments in the manner in which they are presented.

I. The Justiciability Question

As this Court has previously stated, "when interpreting statutes . . . it is for this court to decide what a statute means." *Hobbs v. Jones*, 2012 Ark. 293, 412

S.W.3d 844, 850 (2012). For interpretation the operative provisions of the ESA, then, it is wholly immaterial whether the Legislature is currently in a position to act, a fact not in evidence, if the Governor can run roughshod otherwise through loose and self-serving interpretation of Arkansas law. For these purposes, Appellant's challenge applicability of the Emergency Services Act and the Governor's executive orders issued since March 11, 2020. The issues presented are of separation of powers and statutory interpretation, both within the purview of this Court. Nevertheless, the Arkansas' declaratory judgment statutes, A.C.A. § 16-111-102, states that:

> Any person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relationship.

Moreover, "[d]eclaratory relief will lie where: (1) there is a justiciable controversy; (2) it exists between parties with adverse interests; (3) those seeking relief have a legal interest in the controversy; and (4) the issues involved are ripe for decision. *McGhee v. Arkansas State Bd. of Collection Agencies*, 375 Ark. 52, 58, 289 S.W.3d 18, 23 (2008). In this instance, as legislators, business owners and private citizens, Appellants are persons whose personal and institutional rights have been adversely affected by the actions of the Governor regulating all aspects

of intrastate commerce by operation and effect of the Emergency Services Act as applied, and the ADH which has been charged with enforcement of the Governor's executive orders, and they are entitled to a declaration of their rights, status and legal relationships that are woefully uncertain. At issue here is process, not policy, the effect upon Appellants' rights under the law, and a demand that express limitations on executive authority contained in that law be respected, all of which are to be determined by statutory interpretation and "it is for this Court to decide what a statute means." *Baker Refrigeration Sys., Inc. v. Weiss*, 360 Ark. 388, 201 S.W.3d 900 (2005). Moreover, this Court has, on numerous occasions, entertained cases regarding separation of powers since that doctrine in to be found in Article 4, Section 2 of the Arkansas Constitution "is a basic principle upon which our government is founded, and should not be violated or abridged." *Department of Human Services v. Howard*, 367 Ark 55, 283 S.W.3d 1 (2006). Appellees' nonjusticiability argument is without merit.

II. The Governor's Authority to Respond to Health Emergencies

Appellants fail to see the relevance of Act 152 of 1895, that Appellees cite here for the first time, to the issue of interpretation of A.C.A. § 20-7-101 *et seq*., specifically A.C.A. § 20-7-110 (b) that provides that

> Whenever the health of the citizens of this state is threatened by the prevalence of any epidemic in this or any adjoining state and, in the judgment of the Governor, the public safety demands action on the part of the board, then the Governor shall call the attention of the

> board to the facts and order it to take such action as the public safety of the citizens demands to prevent the spread of the epidemic or contagious disease.

If it is to suggest that the Governor has an "independent" mandate that has been in existence for 126 years,[1] clearly that is not the case since in 1965, six years prior to the consolidation of government agencies into cabinet level departments accountable to the Governor,[2] this Court recognized the previous hierarchy in which the Department of Health reported to the legislature, not the Governor, in stating that "[t]he legislature, acting through its duly constituted agency, is the proper forum to determine by a reasonable enactment what the health, morals and safety of the public require for the common good." *Wright v. DeWitt School Dist. No. 1 of Arkansas County*, 238 Ark. 906, 385 S.W.2d 644 (1965). Nevertheless, current law found in A.C.A. § 20-7-110 delegates no power to ADH, whose power to issue "all necessary and reasonable rules of a general nature" is found in A.C.A. § 20-7-109 and all of which rules are subject to review by House and Senate committees on Public Health, Welfare and Labor. A.C.A. § 20-7-109(a)(2).

A. The ESA and Health Emergencies

It is not for the executive branch to determine which law to apply to a health emergency. It is for the legislature to "make a law and prescribe the condition

[1] Appellees' Brief, p. 29.
[2] Act 38 of 1971.

upon which it may become operative." *Leathers v. Gulf Rice Arkansas, Inc*., 338 Ark. 425, 994 S.W.2d 481, 484 (1999). It is disingenuous to the point of absurdity for Appellees to suggest that the Governor and Secretary, having determined the existence of a new disease, and the legislature having enacted emergency rulemaking legislation applicable to instances in which "an agency finds that imminent peril to the public health, safety, or welfare" as found in the Administrative Procedures Act, A.C.A. § 25-15-204(c)(1), can ignore existing law because the word "health" appears randomly in the ESA. Appellees' Brief, p. 25. Such is consistent with the precedent of this Court that "has long held that a general statute must yield to a specific statute involving a particular subject matter." *Lambert v. LQ Management*, LLC, 2014 Ark. 114, 426 S.W.3d 437, 440 (2013).

Arkansas law requires that when the health of the citizens of this state is threatened by an epidemic or contagious disease, the Governor is to call the facts to the attention of the Department of Health pursuant to A.C.A. § 20-7-110(b) which can be done, presumably, by an executive order such as EO 20-03. The ADH is then empowered to make all necessary and reasonable rules for the protection of public health and safety under A.C.A. § 20-7-109, which rules are to be reviewed by the House and Senate Committees on Public Health, Safety and Welfare as required by A.C.A. § 20-7-109(a)(2). If the threat is imminent, the expedited

procedures of emergency rulemaking provisions of A.C.A. § 25-15-204(c)(1) apply. But in no instance does Arkansas law provide for the Governor to exercise authority for an indefinite period encompassing all aspects of economic and personal behaviors in the State without legislative review.

B. The Governor has No Independent Mandate

The Governor's reference in EO 20-03 to A.C.A. § 20-7-110 is appropriate, but his authority ends when he orders the ADH to "take such action as the public safety of the citizens demand to prevent the spread of the epidemic or contagious disease." A.C.A. § 20-7-110(b). Appellant's Brief, p. 31. Unfortunately for Appellees' position here, no powers are granted the ADH under that section, powers that are to be found in the preceding section, A.C.A. § 20-7-109, *i.e.*, the power to make rules and all of which rules are subject to legislative review. A.C.A. § 20-7-109(a)(2). It is solely to avoid that procedural safeguard that the ADH has issued directives, rules by another name. Moreover, A.C.A. § 20-7-101 provides for the penalties for violation of ADH rules properly promulgated to prevent the spread of contagious disease, and again requires legislative oversight in that "[a]ll rules promulgated pursuant to this subsection shall be reviewed by the House Committee on Public Health, Welfare, and Labor and the Senate Committee on Public Health, Welfare, and Labor or appropriate subcommittee thereof."

A.C.A. 20-7-101(b)(4). The Governor has, however, avoided legislative oversight altogether.

III. Constitutional Attack on the ESA

Appellant's make no attack on the constitutionality of the ESA except to call out the Governor's abuses by pointing out that "a valid statute cannot delegate unlimited powers to an administrative officer, and that, to be valid, the statute must 'provide 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). Without the adequate yardstick of 60-day emergency declaration with a renewal, the ESA is without reasonable guidelines, leading to the conclusion, as Appellees here do repeatedly, that "the ESA does not restrict the duration of an emergency declaration." Appellees' Brief, p. 34. Read in that fashion, the ESA is 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*, supra. Appellants simply argue that, therefore, the ESA must, and does, contain reasonable time limitations on the Governor's ability to act unilaterally.

IV. The Secretary's Directives Were Not Authorized by the APA

In Executive Order 20-03, the Governor vaguely ordered that "[t]he Arkansas Department of Health shall act as the lead agency to work in concert with

the Arkansas Division of Emergency Management and other State agencies to utilize state resources and do everything reasonably possible to respond to and recover from the COVID-19 virus." (RP 48). Pursuant to A.C.A. § 20-7-109-110, everything reasonably possible for the ADH means to promulgate rules pursuant to the emergency rulemaking provisions of the APA.

In the alternative, Appellees suggest the agency directive were issued pursuant to the existing ADH 2019 Rules on Reportable Diseases. Appellees' Brief, p. 39. Appellees thus far have taken great pains to distance themselves from the 2019 Rules. No mention is made of existing rules in the Governor's executive orders in which he referred to COVID-19 as a "new disease," (RP 48) after consultation with his Secretary of Health (RP 48). And in fact, Appellees have argued in their Motion to Dismiss 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." (RP 75). That is undoubtedly due to the fact that the Governor sought power beyond said rules since they pertain only to isolation and quarantine regulations as restricted by those 2019 Rules. In his executive orders, he sought authority over all "restrictions on commerce and travel," a power grab of unheard of proportions unauthorized anywhere in Arkansas law.

CONCLUSION

Appellees engage in a semantic shell game hoping that the observer fails to keep their eyes on the ball. Fundamentally, however, the legislature has provided a road map for the Governor and the Arkansas Department of Health to follow when dealing with a viral outbreak such as COVID-19. They are to promulgate rules in accordance with the emergency rulemaking provisions of the APA that allow for an expedited review process by the Executive Subcommittee of the Legislative Council. The Governor, as Chief Executive Officer, cannot make up law as he goes along. He has no inherent authority within the constitutional framework of separation of powers to either add or detract from existing law. If he had chosen to invoke the existing 2019 ADH Rules, he could have instructed the Director to "take whatever steps necessary for the investigation and control of the disease," (RP 39) including "quarantine restrictions and regulations upon commerce and travel." (RP 40). The Governor, however, sought authority "over all instances of quarantine, isolation, and restrictions on commerce and travel throughout the state." (RP 48) The 2019 Rules were simply too restrictive for the economic measures the Governor sought to implement. So, he simply assumed by mandate, power unauthorized by statute, knowing it would be almost a year before the legislature would be back in session and able to invoke, by concurrent resolution, an end to the Governor's emergency declaration. This Court is obligated to

recognize the constitutional and statutory limitations on the Governor's authority and the ADH, the present health emergency notwithstanding, and declare the rights of Appellees under the law.

CERTIFICATE OF SERVICE

I, Gregory F. Payne, hereby certify that I have served a true and correct copy of the foregoing Appellants' Reply Brief on the following counsels of record this 23rd day of February, 2021 through the Court's e-flex system pursuant to Administrative Order No. 21, § 7(a).

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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 2,867 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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