In the court of appeals in Knoxville

State of Tennessee, ex rel. David Jonathan Tulis	)	
Relator-Appellant	)	
	)	Case No.
V.	)	E2021-00436-COA-R3-CV
	)	
Bill Lee	)	
Governor, State of Tennessee	)	
Respondent-Appellee	)	
	)	
Rebekah Barnes	)	
Administrator, Hamilton County Health Department	)	
Respondent-Appellee	)	

Appeal from Hamilton County chancery court

Response to appellees' answers

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Overview of this reply brief

The abuse of state of Tennessee's petition for mandamus and equity on relation comes into focus in this brief. The appellant's petition is sufficient for mandamus to lie on two grounds. (1) Respondents' arguments about not being subject to T.C.A. § 68-5-104 indicate they have no ground, warrant or non-fraudulent exigency by which to have a state of emergency, which thus must fail and be condemned as a harm and fraud. (2) Respondents' frivolous claims about relator's standing prove a snare to chancery, which in conjoining itself with them overthrows a just cause and the instrument of mandamus as the citizenry's spoiler of government wrongdoing.

Casting down these fraudulent representations about mandamus, the brief details the lengths public officials will go to deceive the public, injure its members' rights and overthrow the division of powers and the protections of the Tennessee constitution.

Injury to law is controlling concept in mandamus

The court is being invited by respondents into a con job against the people of Tennessee and their rights, and the relator is here to put a stop to this misadventure by insisting that his petition for equity and writ of mandamus (p. 8 ff) be properly and justly considered. The jurisprudence of the writ is clear: Standing in a mandamus case does not come from evidence of relator's harm, but by (1) his signature on the duly sworn affidavit of support and (2) the affirmative legal duty imposed on the public official by positive law.

Chancery and respondents have pretended otherwise.

Appellant's understanding of petition sufficiency arises from *Tennessee Jurisprudence*, *52 AmJur 2d.*, *Gibson's Suits in Chancery* and a fourth authority. Mandamus is directed to an official "commanding the performance of a particular act *** belonging to his or their public, official or ministerial duty, or directing the restoration the complainant to rights or privileges of which he has been illegally deprived," *TennJur,* Mandamus § 2.

It is not outcome determinative that relator have personal injury to sue. Personal concrete harm and particularized injury to relator — or alleged lack thereof — are not available to respondents as a defense in a mandamus suit. The lower court upholds a perversion of the mandamus doctrine and appears to intend that the court set precedent on a novel argument. That theory is that mandamus is *not available to the people of Tennessee* for crime, malfeasance,

misfeasance, official misconduct and breach of oath unless the relator shows and proves concrete particularized harm to him- or herself.

The lower court proffers the court a draft piece of judicial legislation to reduce the power of mandamus as a remedy for official misconduct and abuse.

The theory published by the lower court is a fraud on the court.

It has no basis in law.

It appears to be a concerted effort among the parties in this case to knowingly use a false issue to reduce the public's mandamus rights and due process via an appellate court ruling declaring relator's cause fails on grounds of no subject matter jurisdiction because no concrete, specific particular injury is perceived to give him standing.

Petition has all the essential elements for the writ of mandamus. The lower court has subject matter jurisdiction over respondents.

The lower court refuses to rule on the merits of the case. It repeats the respondents' frivolous counterattack upon the relator by the distraction over standing. It takes advantage of relator's non-lawyer background and imperfect expression to mislead the court and him. It forgets the main point in a mandamus case.

Injury to the law.

Injury to the law is in the petition. The concept is repeatedly in the petition (see appeal brief, pp. 24, 25, for citations). As the phrase "injury to the law" is not used, the petition invited cunning respondents-in-fraud to distract relator and sideline him in the presence of the court.

Relator has standing by virtue of his notarized signature attesting he is the party behind the petition and that the petition is true. His affidavit of support is a description of the harm caused by the violations of law alleged therein, giving the court indication to what extent it might exercise its discretion in ordaining compensation to relator for harm.

The affidavit would have been sufficient with a single sentence attesting to its accuracy, under oath.

In mandamus, injury to the law is primary. Personal injury upon the relator is nonessential for the case to be justiciable. "The complaint or petition must show a clear right to mandamus, or at least make out a prima facie case. Further, the petition must be properly sworn." *TennJur* § 25.

The chancery court dismissed the appellant's petition on the *peripheral* issue, the non-outcome-based determination of personal harm.[1]

Relator's injury is, by law, described not as in its effects (on relator), but as arising from the respondents (their violation of law). In no way is it *equitable*, in no way does it accord with the longstanding jurisprudence in Tennessee courts to construe mandamus as chancery has done, in furtherance of respondents' fraud against the state and her free people.

Mandamus petitions stand as sworn by the relator. It has been so since prior to the Civil War, when mandamus was codified.

> Defendants also assert infirmity of the action brought by plaintiff because it was not supported by an affidavit, relying upon T.C.A. s 23-2001. This code section merely states that circuit judges and chancellors have power to issue writs of mandamus upon petition or bill, **supported by affidavit.** At the time this section was originally enacted, 1858, the term "affidavit" was used interchangeably with "sworn petition." The **intent of the statute is simply that the facts alleged** in a bill or petition for the writ of mandamus **be supported by oath or affidavit**. Cf. Whitesides v. Stuart, 91 Tenn. 710 at 714, 20 S.W. 245 (1892).

Blair v. State ex rel. Watts, 555 S.W.2d 709, 711 (Tenn. 1977) (emphasis added)

An improperly sworn petition might impede a case. Whitesides v. Stewart, 91 Tenn. 710, 20 S.W. 245, 246 (1892) turned partly on a mandamus dismissal because it had not been properly sworn.[2]

[1] In former times this writ was **not deemed "a writ of right," but only used at the discretion of the Court. But no such doctrine now prevails.** Angell & Ames, p. 633, commenting on the present application of the writ, say: "It was introduced to prevent disorder from a failure of justice and a defect of police. Therefore it ought to be used upon **all occasions** where the law has established no specific remedy, **and where in justice and good government there ought to be one**. The value of the matter, or the decree of its importance to the public police, is not scrupulously weighed. If there be a right and no other specific remedy, this should not be denied." See 6 Bacon Ab., 418. Again they say, at pp. 640, 641:"The ancient writ appears to have been confined exclusively to officers of a public nature; but in modern times the writ of mandamus, as we have remarked, **lies wherever there is a right, and no other specific remedy to enforce it.**" Again, at p. 644, they say: "The modern decisions upon this subject seem indeed to be made in the spirit of Lord Mansfield's rule, that wherever there is a right, and no other specific remedy, this will not be refused."

Mobile & O. R. Co. v. Wisdom, 52 Tenn. 125, 142–43 (1871) (emphasis added)

[2] Because the petition was not sworn to as required by law. It was sworn to before the clerk of the county court. Our statute, (Mill. & V. Code, § 4310), is taken from section 1, c. 51, Acts 1831, entitled "An act to regulate the practice on writs of *mandamus*," is as follows: "That the circuit judges of this state shall have power to issue writs of *mandamus*, upon petition, supported by affidavit, before any judge, justice of the peace, or clerk of any circuit court." It will thus be seen that, by the very terms of the statute, the affidavit must be made before a judge, justice of the peace, or a clerk of the circuit court.

Petition establishes a clear right to mandamus and to equity. Equity is in play and the mandamus lies when the petition involves "*a question of great importance to the citizens.*" State ex rel. Sneed v. Hall, 43 Tenn. 255, 260 (1866). "Although a petition for mandamus is strictly a common law form of action the pleading and practice concerning this action have evolved to the point that today they conform to equity practices." Bradley v. State ex rel. Haggard, 222 Tenn. 535, 538–39, 438 S.W.2d 738, 739 (1969).

A review of mandamus in *Tennessee Jurisprudence* and *Gibson's Suits in Chancery* finds no support for the defenses raised against this suit.

Allegations of insufficient personal harm are unknown.

A "bill being duly sworn," as Gibson puts, § 1132 (1955 edition), makes the petition valid. T.C.A. 29-25-101 states that judges have the power to issue the writ upon petition or bill, "supported by affidavit." Earlier cases give no precedent for attacking a relator's affidavit in support as in this case (and then ignoring its content regarding relator harm).

The lower court, incited by parties in fraud, magnifies the *content* of the affidavit to make its alleged lacks controlling. These harms are particular, individualized and concrete, sufficient for standing had this lawsuit been an ordinary case in equity or at law for damages.

But as public duty is in view in mandamus, and disobedience to law and resulting *ultra vires* acts, the gravity of relator's harms is irrelevant to the merits of the suit. The authorities indicate relator must have a "personal interest" in the case, and he does, being a "private man claiming all of his rights, whether antecedent or pursuant to the Tennessee constitution and its bill of rights" and "one of 'the free people' in the state of Tennessee and a citizen of this state" (p. 10).

Official breach of duty is sufficient harm to any member of the public, apart from any possible personal, concrete or particularized harm to the relator, according to these authorities.

The petition clearly sets forth the breach of respondents. "Respondents act without bona fide demonstrable exigence or jurisdiction and by their unwarranted and unconstitutional premature actions or arbitrary and capricious, even deadly, purported mitigation measures are causing irreparable harm and injustice, wreaking havoc on the relator, fellow Tennesseans and the state of Tennessee" (pp. 8,9), "Respondents' acts 'wrongfully abrogate[] T.C.A. § 68-5-104, the state legislature's **due process protections** and that of requiring the identification of the demonstrable

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Whitesides v. Stewart, 91 Tenn. 710, 20 S.W. 245, 246 (1892)

exigency sufficient to lawfully invoke police power, or a breach of the principle separation of powers" (p. 33) (emphasis in original).

Taxpayer, citizen, resident have standing

In other cases, no test is argued over relator's personal harm as qualifying him to sue.

➢ One files petition for writ of mandamus as a "resident citizen and taxpayer of the city of Memphis" demanding right to inspect the city's books, State v. Williams, 110 Tenn. 549, 75 S.W. 948, 950 (1903). No duty on part of relator to show personal harm or injury.

➢ In a mandamus case to obtain a license, the duty of the licensor is the controlling issue, and relator is not obligated to show how denial injured or harmed him if he fulfilled requirements of the application. "It must be shown that a clear legal duty to issue the license, not involving discretion, is enjoined by law" on the official, "that there is statutory authority for the performance of the act, and that the performance of the duty has been refused." *AmJur 2d.* Mandamus § 196 — Legal duty to issue license.

➢ A relator who sought mandamus under the Acts of 1921 for a county to pay the premium on his official bond does not prevail because "[h]e does not show in his petition that he has kept an account of fees or made a statement to the Chairman of the county court, or made a semiannual settlement in which he paid to the county fees derived from the excess above the maximum salary allowed by the act." Absent completion of duties, he lacks standing for a writ to compel performance because "[i]t was incumbent upon petitioner to affirmatively show a clear and not a doubtful right to the writ of mandamus" Jellicorse v. Russell, 3 Smith (TN) 411, 156 Tenn. 411, 1 S.W.2d 1011. The relator's right is premised in the Acts of 1921, and each party's obedience thereto.

➢ "The question, who shall be the relator, in an application for a mandamus, depends upon the object to be attained by the writ," says James L. High in *A Treatise on Extraordinary Legal Remedies* (1874).

> Where the remedy is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced must become the relator. He is considered as the real party, and his right to the relief demanded must clearly appear. The stranger is not permitted officiously to interfere, and sue out a mandamus in a matter of private concern. But where the object is the enforcement

> of a public right, the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. I*t is enough that he is interested, as a citizen, in having the laws executed, and the right in question enforced.* *** The object of the suit is not a matter of individual interest, *but of public concern.* ***Any citizen of the county***, especially of the locality interested in having the improvements prosecuted, could become the relator, and obtain the mandamus.

P. 305, footnote, citing Judge C.J. Treat, Pike Cty. Comm'rs v. People ex rel. Metz, 11 Ill. 202, 207–08 (1849) (emphasis added)

Upon the facts in the petition, respondents' answers are deceitful, evasive and admit the case set forth therein. The court accepts evidence of fraud and holds that equity allows fraud to subsist before the court of equity.

The record shows no fact harmful to relator, no defect or lack in relator. No law stands in the way of the issuance of a peremptory or alternate writ or order to show cause forthwith.

Respondent arguments, and the court's agreement with them, are frivolous and in bad faith.

The petition is evidence of the facts of this case, and the affidavit under the signature rule is presumed proper. No claim is made of it being vexatious, fraudulent or harassing, or that relator is an "officious intermeddler." [3] If chancery's test of relator's standing on the basis of personal harm were indeed valid, relator's evidence meets it.

Davidson County issue, subject matter jurisdiction on Lee

Respondent Lee says the lower court has no subject matter jurisdiction because relator, who represents the state, filed "a suit against the State" that Lee says "must be brought in Davidson

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[3] Similarly, it has been held that a person's status as taxpayer, voter or citizen may be sufficient to establish standing to bring a mandamus action to compel performance of a duty for the public's benefit. In such cases, it is sufficient that the individual is interested as a citizen having the laws executed and the duty in question enforced. The rationale is that the people of the state are a real party in interest when a mandamus petition poses a question of public right or enforcement of public duty. *AmJur 2d*. Mandamus § 382 — Standing as taxpayer, voter or resident

"Inasmuch as the people themselves are the plaintiffs in a proceeding by mandamus, it is not of vital importance who the relator should be, so long as he does not officiously intermeddle in a matter with which he has no concern. The office which a relator performs is merely the instituting a proceeding in the name of the people, and for the general benefit." Certainly, it cannot be affirmed that these relators are "officious intermeddlers," or have in view any other than the public good.

Harris v. State, 96 Tenn. 496, 34 S.W. 1017, 1019 (1896)

County" if it is justicticiable. Agreeing with Lee, chancery denies the petition as an admitted record of fraud and disobedience to statutory duty. Respondent Lee is acting outside of his office and in personal capacity, as a man, in violation of oath to administer the law in respect of the people's rights to honest government. Lee's reply to appellant keeps up the facade. In *no case prior under mandamus or equity* — ***in no case*** touching on the duty of governor — **has fraud been alleged.**

Earlier cases relied on by chancery pertain to *commissioners*, who are governor servants. They refer to *policy disputes*. Relator's petition is about *criminal acts* (p. 26 ¶ 129, p. 37 ¶ 189) privately prosecuted civilly, absent criminal indictment, for fraud as relator's brief sets forth (p. 17).

Respondent Lee acted in a personal capacity in his fraudulent state of emergency, outside of his authority and outside the law. He lacks immunity or the right to choose the forum for a lawsuit and to demand to be sued in Davidson County.

Mandamus limit no shield in fraud

Respondent Lee cites four mandamus cases that declare no governor is subject to a writ of mandamus for "duties of a purely executive or political nature" (Lee brief, p. 11).

> As to purely executive or political functions devolving upon the chief executive officer of a state, or as to duties necessarily involving the exercise of official judgment and discretion, we think it may be safely assumed that mandamus will not lie.

Clements v. Roberts, 144 Tenn. 129, 230 S.W. 30, 35 (1921)

The duties set forth in Tenn. Code Ann. § 68-5-104 contain the protections of members of the public against a use of power and force that, being illicit, otherwise harms the people in their rights. In enumerating duties, the law ***limits*** state actors' acting without warrant or authority. The law imposes a duty to make determination of an agent of contagion, its cause or source. The people in their general assembly, by writing laws, outlaw acts without authority; they outlaw fraud — as the petition states ¶ 176 — to prevent Lee from crying, "The sky is falling — the sky is falling" when the sky isn't. The law requires a determination be made of the infectious agent before ***any*** steps are taken, either in mitigation or emergency under Title 58.

Chancery accepts respondent Lee's claim he is under no duty to obey T.C.A. § 68-5-104. That is a judicial finding, effectively, *that there is no legal basis for the state of emergency.* The frivolous claim that Lee is not subject to the law and has no duty under it is admission that he did not fulfill that duty.

By saying he has no duty to obey the statute, **he erases his claim to authority for the health emergency** under Title 58, in EO No. 14 of March 12, 2020, **which he would obtain only in compliance with the law at § 68-5-104, with its six requirements that he make a determination of the agent of contagion of the set of symptoms called SARS-CoV-2.**

"'COVID-19' is not a virus, or any other infectious agent," according to the petition (p. 16 ¶¶ 59, 60). "'COVID-19' is not a communicable disease. Without identification of an infectious agent, it is only symptoms."

Thus has respondent Lee admitted **no authority for a health emergency** under a pretended pandemic. The exhibits show <u>no compliance</u> with Tenn. Code Ann. § 68-5-104, and no isolate for Covid-19 flu by which to make "determination." Without § 68-5-104 obeyed and applied, respondent Lee has no basis for a health emergency premised on SARS-Co-V-2.

Chancery accepts this state of affairs of fraud and breach.

Not only does respondent Lee, in his filings, deny the basis for his pretended emergency and thus admit the state of emergency lacks a nonfraudulent exigency, a lawful warrant or reason. His filings are admissions of crime, specifically Tenn. Code Ann. § 39-16-401, which crime relator brought to chancery's attention *of felony criminal misconduct* law at T.C.A. § 39-16-402 (pp. 471. 478-480; March 30, 2021, hearing transcript, p. 6 line 19, pp. 26-28). Not only the governor and respondent Barnes, but court officers Kleinfelter and Milling have a duty under their rules of professional ethics to halt crimes and offenses brought to their notice, and to see to it that prosecutors are made aware of criminal offenses of their clients. Relator believes these officers of the court are involved in misprision of felony in refusing to meet with the district attorney of either Davidson or Hamilton County.

Mandamus is more powerful, and more beneficial to the people of Tennessee, than a criminal indictment against respondents for felony official misconduct. It has power to remedy the harm and wrong done by respondents. "An indictment, at the most, is merely punitive, and not remedial in its nature, and can only punish the neglect of duty, without compelling its performance. It can not, therefore, take the place or usurp the functions of a mandamus, which

affords specific relief by commanding the performance of the identical thing sought." *Id.*, High, p. 20.

Mandamus court cases in Tennessee relate to **executive action** and **political action.** The courts' earlier opinions do not pertain to admitted **criminal action** or to **fraud** under state law by the governor, acting in his personal capacity as William Byron Lee, apart from his office and constitutional and statutory duty, and under color of law, to harm relator and the rest of the people in state of Tennessee. Chancery, if it has discretion on mandamus, *exercises it in favor of fraud, in violation of equity, and refuses* to "comply with the law," as per Rule 1.1 of the judge ethics rules.

Petition demands mandamus ***or*** equity; it demands equity in mandamus. If chancery is barred in the use of mandamus upon the governor in the office or in his person apart from the office, it still has duty to render relief and justice to relator in his cause in equity.

Governor not named?

Chancery says Lee is not responsible for administering the law because he is not named in § 68-5-104. But the constitution Art. 3, Sect. 10, says respondent Lee "***shall take care*** that the laws be ***faithfully executed***."

The plain meaning in the subjunctive tense of "be *** executed" is that of will, wish or desire; the governor is responsible for actions among his 21 commissioners in respective agencies and he wills they fulfill, execute and administer the laws. He is to see to it and "take care" this task is done. He is responsible for executing the laws and obeying them; of this fact and law relator demands the court take notice.

'New arguments' on commissioner

Respondent Lee's defense is that he is not liable to show cause in this suit and is not under "*any* duty" (italics in original, p. 137) to obey the law, impliedly because he has agents. Respondent says relator's mention of Lee's having a commissioner is a "new, previously untried or unasserted [theory] or legal [argument]" disallowed under Rule 59. However, the petition and exhibits address respondent Lee in context of his agent, Commissioner Dr. Lisa Piercey. "These parties are subject to the Tennessee constitution and Tennessee Code Annotated, T.C.A., *as*

regulatory upon government agents, and to the petitioner having the right to compel" (petition p. 10 ¶ 12) (emphasis added). See petition p. 12 ¶ 31, p. 13 ¶ 36, 40, 41, p. 35 ¶ 180; affidavit of harm p. 45 ¶ 26. See exhibit No. 2, pp. 47-50, 54, 55, 57, 62, 63, 63, 66, 70.

The claim upon Lee is caused by failings of his commissioner (Lee via agency) to obey the law. The governor administers the law as overlord, or sees that it is administered, not personally and himself. He acts by agents.

Of this *custom and usage* a court *takes judicial notice*. It is not a new argument.

* * * *

From admitted violation of 68-5-104 and its requirement (the making a determination of the agent of contagion), the respondent Bill Lee operated 615 days unmoored from the constitutional limits upon his office,[4] with full cooperation of the judicial branch. He legislated public life (and much private) by executive order, in violation of the people's rights and in overthrow of the separation of powers (petition, p. 15 ¶ 53, p. 25 ¶ 121, p. 33 ¶ 163 also, p. 99 ¶ 53, p. 100 ¶ 56). He shut down the state's economy and abolished free movement (in breach of T.C.A.. § 68-5-201 that quarantine power be exercised ***"with the least inconvenience to commerce and travel"***) April 2, 2020, executive order No. 23 ("An order amending executive order No. 22, requiring Tennesseans to stay home unless engaging in essential activity or essential services"). His acts were an abuse of power without precedent in state history and without lawful authority. Like a tidal wave, the order swept against the lives of relator and the state's 6.8 million people upon whom he intended to direct it,[5] irreparably harming them.

Playing its part to serve policy set by the chief justice, Hamilton County chancery says it cannot get to the merits of state of Tennessee's case on relation — to the sworn signature on relator's affidavit of support (or, as he has argued earlier, to his personal injury facts, as needed). The lower court cannot "see" state law at T.C.A. § 68-5-104, nor fraud under the law.

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[4] His state of emergency ended Nov. 19, 2021, though respondent Lee says he may revive the state of emergency. "Should our state face any future surges, we will consider temporarily reinstating this tool." See Appendix No. 1.

[5] Executive orders apply to government agencies and their employees, and not to members of the public, except as when used fraudulently and abusively. See 93d Congress, Senate report no. 93-549, 1st session emergency powers statutes: provisions of federal law now in effect delegating to the executive extraordinary authority in time of national emergency report of the special committee on the termination of the national emergency. U.S. Senate, Nov. 19, 1973 U.S. Government Printing Office Washington: 1973, 24-509 o. Special Committee on the Termination of the National Emergency

Zeno the 5th century Greek argued that an arrow cannot hit a wall because it must always travel half the distance in ever smaller increments of divisible space; the arrow tip may be a millimeter from the wall, but the arrow can't hit the wall mathematically because it still has **half a millimeter** to travel — and so on *ad infinitum*.

Chancery's cavils unjustly harm relator's substantial rights to protection under two sweeping provisions of the Tennessee constitution. (1) The ban on martial law, art.1, sect. 25, "That martial law, in the sense of the unrestricted power of military officers, ***or others,*** to ***dispose of*** the persons, liberties or property of the citizen, is inconsistent with the principles of free government, and is not confided to any department of the government of this state," (emphasis added) and (2) the ban on state legerdemain at art. 11 sect. 16, "The declaration of rights hereto prefixed is declared to be a part of the Constitution of the state, and shall never be violated ***on any pretense whatever.*** And to guard against transgression of the high powers we have delegated, we declare that ***everything in the bill of rights*** contained, is excepted out of the general powers of the government, and shall forever remain inviolate" (emphasis added).

Pattern of due process violation

The court says respondent Barnes may ignore the statute, citing discretion operative within the statute. It says Lee can ignore the law "because nowhere in T.C.A. 68-5-104 does the statute delineate ministerial duties that the Governor is to perform" (p. 505). Respondents admit noncompliance with the law, with their defense hanging on the fraudulently argued personal-harm-to-relator theory.

Respondent Lee says relator failed to bring up *other* instances of bias and partiality of the court and "therefore waive[s] any issue" regarding chancery's treatment of the petition or his person. Respondent Barnes says relator "waived the issue regarding the trial court's bias, as he did not bring this allegation to the trial court's attention."

Respondent Barnes suggests relator should have filed motion for recusal upon the judge to secure his due process rights. That would have been unnecessary. Relator's calls for fairness and complaints of unfairness are intended to appeal to the chancellor as a moral being, in an office dispensing equity and justice. Appeal, complaint and objection have been relator's choice means in seeking openness, in winning finally a hearing of his cause and getting good faith treatment by the court of equity. The court opted repeatedly, however, to ignore his reminders about equity

and many citations to Chancellor Gibson. Unconvinced, chancery secures relief not for the victim of official misconduct, but *for admitted purveyors of mass irreparable harm and breach of powers malefactors*.

Relator's objections to delay, bias and due process violations are numerous. The record reveals statements such as "A giant fraud and misdeed are admitted in the record, including by the court" (p. 303) and "Dismissal causes the reverse of equity and justice. It is not in the public interest. It gives unholy succor to respondents-in-fraud having no equity. It aids and abets fraud, it endorses fraud on the court, it enwraps the court as a participant in the fraud as foreseen in the petition," (p. 292). Since the court below rejects equity and won't enforce the mandamus nor the health law, such analyses fill this record.

➢ **Forthwith violation** Due process is denied in chancery's rejection of the forthwith command, which urgency respondent Lee says applies to the respondent, and not upon the judge (brief p. 18). Forthwith applies to the court, as mandamus cases are extraordinary when ministerial duty by an officeholder is refused or denied, and every hour of disobedience is "a failure of justice" Williams v. Saunders, 45 Tenn. 60, 81 (1867).

> (b) The alternative writ commands the defendant to do the act required to be performed or show cause before the court **forthwith,** or at a specified time and place, why the defendant has not done so, and that the defendant then and there return the writ.
>
> (c) The peremptory writ commands the defendant to do the act and return the writ accordingly.

Tenn. Code Ann. § 29-25-102 (emphasis added)

Mandamus lies when there is a clear and certain right to it and that the official duties of respondents are "plainly defined and peremptory," ministerial, nondiscretionary,[6] and the "prosecutor must be clothed with a clear, legal and equitable right to something which is properly the subject of the writ," [7] and the wrong of the violation is enlarged every hour the law

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[6] Bass Anglers Sportsman's Soc. of Am. v. Scholze Tannery, Inc., 329 F. Supp. 339, 349 (E.D. Tenn. 1971)

[7] Winters v. Burford's Heirs, 46 Tenn. 328, 330 (1869)

is disobeyed (p. 92 ¶ 60, p. 94 ¶ 19, p. 111 ¶ 7, p. 317 and many other demands for immediate action). Petition lays out facts of disobedience in evidence before the suit was filed Oct. 2, 2020, a Friday. Relator had a right to an in-chambers hearing Tuesday or Wednesday the next week, given the extraordinary nature of petition's evidence, claims and respondents' admissions prior to suit in a mass violation of the people's rights under a fraudulent and nonwarranted state of emergency.

The hearing would have been for respondents to show cause for their actions and prove their compliance with state law. Respondent Lee's reading of the mandamus law decoheres and de-amalgamates its meaning; **forthwith** applies to the entire process — over which the court presides.

The lower court has boldly violated state law and due process. Relator demands justice.

➢ **Motions to strike** Lee scoffs at relator's analysis of his right to file a motion to strike before exercising his right to file his answer, insisting chancery is correct to convert his strike motion into his answer, that "such error would not amount to a due process violation." In his strike filing, relator explicitly reserves the right to answer (pp. 187, 193). This demand is ignored in violation of equity rules.

Respondent Barnes chides relator: "Petitioner had more than a month — through January 9, 2021 — to respond to Mrs. Barnes' motion to dismiss" (brief p. 21). It is unreasonable for respondents to think that relator will write and submit a response simultaneously with a motion to strike. A response comes after a motion to strike is defeated.

➢ **Misrepresentation of suit, assignment of costs** The court follows respondents in misrepresenting the petition as a case for damages in circuit court. Wrongfully adopting this fiction, the court allows respondents to prevail in arguing the issue of personal concrete harm and standing that might be required in a suit or damages in circuit..

But this suit is at equity under mandamus. The subject matter is unprecedented. The equity relief demanded on relation is not a damages suit at law. The equity-based chancery-bound petition does not require considerations of causation or remoteness, or of any exculpatory factors.

The petition of the state on relation in chancery is self-sufficient, a notarized evidence of unrebutted facts claiming, as equity principles provide, that the breach of official duty is the

harm in and of itself, authorization to grant the needful equity relief demanded, forthwith. The specific performance failure of the respondents to demonstrate the nonfraudulent exigency for their emergency determinations, discretion or orders provides the basis for relief and chancery-determined — not relator demanded — **compensation sufficient to impress the conscience of any wrong-doing official**, (p. 40, ¶ 209) with the affidavit of irreparable harm marking the suitor's prior position for that relief assessment, not limited to mandamus, that the loss would not have happened had there not been the breach of duty; and the requirement of the relator in equity to sue respondents personally which the legislature wrongfully penalizes and the court exploits in its award of costs to respondent Barnes, contrary to equity principles and the constitutionally guaranteed relief to the relator as applied.

The equitable compensation demanded is not a money claim for injury at law as the court and respondents repeatedly and premeditatedly confuse in their evasion of justice.

The affidavit of irreparable harm in chancery (p. 42 ff) is evidence of the non-benign effects of the breach of official duty, respondents' failing to demonstrate the non-fraudulent exigency for respondents' diktats, and *to mark the position of the relator and the state on relation prior to the respondents' breach of duty that they admit*.

Each respondent is required to avoid the breaches relator's petition claims. Each respondent has failed to show cause, well beyond forthwith, how they are not in breach of their persisting primary duties, contrary to settled equity principles, statutory mandates and constitutional obligations.

The dismissal orders of the court incorrectly obscure the fact the respondents, as settled equity principles require, have not and cannot avoid their dereliction of duty through fraud, nor do these orders provide relief therefrom in the suit's demand for justice.

➢ **<u>Incompetence on subject matter jurisdiction</u>** Chancery declaims subject matter jurisdiction over respondent Lee but keeps the case 201 days, holds four hearings and forbears multitudinous filings. This imprisonment of the state of Tennessee's cause while the court alleges no subject matter jurisdiction over the Davidson County statute regarding his commissioners is a judicial monstrosity. It broadcasts contempt for the citizenry, contrary to Rule 1.2 in Rule 10, Tennessee code of judicial conduct, that a judge shall act in a way that "promotes public confidence in the independence, integrity, and impartiality of the judiciary," the officers of which "shall avoid impropriety and the appearance of impropriety."

➢ **<u>Denial of right to object</u>** Granting Barnes extension of time prior to getting relator's timely filed objection, the order filed 9 minutes before relator arrived at the clerk's office to time stamp and file his motion. Relator timely says he "reasonably perceives bias and prejudice" in the court's actions (p. 110 ¶ 5).

➢ **<u>Prejudice of delay</u>** State of Tennessee's filings on relation argue against delay in an emergency "forthwith" mandamus case (pp. 111, 112). The pro confesso motion, denied, is the goad relator used to prod the court into acting forthwith. In the petition, relator "has a right to a ruling on rnotion pro confesso **BEFORE APPEARANCE** of respondents, as the motion requires of a court of justice to consider the entire record as an admission and confession of wrongdoing, disobedience and disregard to black-letter law, the petition taken to be true. **The court's nonanswer = denial = lack of due process for relator = injustice**" (p. 111 ¶ 6) (emphasis in original).

➢ **<u>Fictionalizing the record</u>** The court claims "The record reflects that Governor Lee was served on October 26, 2020" (p. 184). No it doesn't. The record shows Lee was served Oct. 6, 2020 (p. 117, letter by Chattanooga postmaster). Record shows relator disputes this claim, p. 284. See appeal brief p. 47. Chancellor clearly violates Rule 2.2 on impartiality and fairness to "perform all duties *** fairly and impartially."

Relator reminds the court that mention here of due process violations should incorporate those listed in his brief, and detailed in his two motions to alter (Lee p. 250, Barnes p. 297).

Barnes' discretion

The lower court supports respondent Barnes' pitting two elements of relator's mandamus petition against each other, making one part of the petition of the state on relation to cannibalize the other. On one side, the public interest in the claims of the petition and, on the other, relator's personal interest in the suit,[8] verified by his signature under oath of the petition (p. 41) and in the affidavit (p. 42). See Barnes brief, pp. 17 18.

The thesis of a self-deleting petition aids the imaginative attack on relator for his alleged lack of standing, makes operative the pretended requirement that relator prove personal harm

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[8] State on relation's claim could be denied "if simply affecting a private right," <u>N. Brit. & Mercantile Co. v. Craig</u>, 106 Tenn. 621, 62 S.W. 155, 159 (1901).

before the merits of mandamus upon ministerial duties are considered. These two rationales are frauds the court proffers so it might ignore the affidavit in support.

A false matter, a false claim and a distraction — to which relator objects and demands remedy.

Respondent Barnes in her appeal brief follows chancery's claim that the reference to discretion at T.C.A. § 68-5-104 implies that the entirety of the law is discretionary, and that she can thereby ignore and transgress the law as if having no claim upon her (brief p. 16). The command at § 68-5-104 to "determine the source or cause of the disease" and to "take such steps **as may be necessary to isolate or quarantine** the case or premise upon which the case, cause or source may be found," chancery opines (p. 208), can be ignored in its entirety because respondent Barnes is directed to take "such steps" "as may be necessary" — and that discretion about the steps to take saves her from obeying the entire statute, chancery says.

The petition identifies six duties of respondent Barnes under § 68-5-104 (p. 13 ¶¶ 36-41) that are her duty in any contagion or disease outbreak.

Tenn. Code Ann. § 68-5-104, in part, reads:

> (a)(1) It is the duty of the local health authorities, on receipt of a report of a case, or suspected case, of disease declared to be communicable, contagious, or one which has been declared by the commissioner of health to be subject to isolation or quarantine, to **confirm or establish the diagnosis**, to determine the source or cause of the disease and to take such steps **as may be necessary to isolate or quarantine** the case or premise upon which the case, cause or source may be found, as may be required by the rules and regulations of the state department of health. [Emphasis added]

Relator's case empowers chancery, and the court, to remind respondents about the rudiments of government service. That is, to take the law, read it and to obey its plain meaning as continuing notice upon the office, and the man or woman filling it. *Actus legitimi non recipiunt modum.* Acts required by law to be done, admit of no qualification. Hob. 153 (Bouvier's Maxims).

The parties in this case cited Tusant v. City of Memphis, 56 S.W.3d (Tenn. Ct. App. 2001) extensively. The Bradley case is equally helpful, dealing with the duty of a public body to redistrict, highlights the role of discretion as not subject to mandamus.

> The defendants argue that even though the plaintiffs are entitled to relief, mandamus is not the correct remedy. The crux of the defendants' contention is that mandamus can be used to compel a public official to perform only ministerial and not discretionary acts. They conclude that since redistricting requires the exercise of discretion by the members of the Quarterly Court, redistricting is a discretionary act which mandamus cannot compel. The defendants' argument is invalid.' **Regardless of the amount of judgment involved in redistricting, the decision whether or not to redistrict is not discretionary with the Quarterly Court.** In the legal sense an act is discretionary when an official has the lawful authority to determine of his own will whether or not he will perform the act. When the performance of an act is discretionary in the sense referred to above the only legal duty of the official is to exercise his discretion which he can do by either performing or declining to perform the act. **When the performance of an act is truly discretionary, a writ of mandamus can only compel the official to exercise his discretion one way or another, it cannot dictate how the discretion is to be exercised.**
>
> Whether mandamus can be used to compel the Hamblen County Quarterly Court to reapportion itself depends on whether the members of the court have a legal duty to reapportion. The object of a writ of mandamus is to compel an official to perform an act which he has a legal duty to perform. **When the details of performance require a public official to exercise judgment he may be compelled by mandamus to perform the duty but his judgment concerning the details of performance is left unfettered.**

Bradley v. State ex rel. Haggard, 222 Tenn. 535, 539–40, 438 S.W.2d 738, 740 (1969) (emphasis added)

This case, as have others cited by relator, show that Barnes and Lee are wrongdoers and lawbreakers by falsely claiming to have no duty under Title 68 but somehow exercise discretion outside the law, rather than within its confines in obedience. Their arguments, with complicity of chancery court, are puerile, destructive, fraudulent and harmful to relator and to the people in this state.

Relief sought

Respondent Lee indicates he will return to emergency conditions as a "tool" as he believes necessary, apart from the law. He had no nonfraudulent exigency for his first declaration March 12, 2020, and he intends to exercise these wrongs again as he sees fit, according to his press statements (Appendix No. 1). "Stay at home orders" don't work to reduce any flu. Mask

mandates have not shown themselves to "slow the spread." Regardless of whether respondents' mitigation efforts reduce mortality in two flu seasons, they are without legal warrant and lack a nonfraudulent exigency to avoid their becoming governor-originating legislation upon the people, in violation of their constitutional liberty.

The searing wrongs against the people and against Tennessee's form of divided powers the relator are not detailed in this suit.

The overthrow of the bill of rights is the rolling stock behind the Lee/Barnes locomotive into which relator has directed his legal tracer fire. State of Tennessee on relation targets respondent Lee's *first error* — his bold violation of T.C.A. § 68-5-104 — that pulls along the rest of his wrongs, boxcar after boxcar.

The chuffing engine of *ultra vires* policy has caused a train of harms to fill a book.

Among the chapters: Closure of the courts and the claim the chief justices are "ensuring that *core constitutional functions* and rights are protected" (italics added) while casting out from public buildings in 95 counties onlookers, supportive family members, defendant allies, clergypersons, court watchers, justice activists and ball-capped woolgathering courthouse lookers-on ("Order suspending in-court proceedings," March 13, 2020, p. 2), and threatening to arrest relator, a member of the press, on entering the Hamilton County courthouse for the "crime" of a bare face (p. 42).

Either Tennessean have God-given, unalienable, inherent and constitutionally guaranteed rights — or they don't. There are **no "core constitutional rights,"** as if some rights are "ensured" while others are deleted. The courts, the governor's office, the general assembly lack authority to make such determination, no matter how great the perceived crisis that beckons officials to extreme "solutions."

The petition is narrowly focused and so reduces the lifting state of Tennessee must do on relation to restore the government to the people and to make it subservient to them and respectful of their rights. Relator-appellant, however, wishes to suggest the larger scope of affairs in Tennessee by a judge's ruling to restore constitutional government in Missouri. Appendix No. 2 is a ruling seven days ago in the Cole County circuit court by Judge Daniel R. Green. His Nov. 22, 2021, order shows what evils transpire when state actors throw aside duty under supreme and black-letter law and operate upon the mass public on ***presumption***.

Indeed, in Tennessee, presumption, suspicion and fear control the operation of government. T.C.A. § 68-5-104 is intended by the people in general assembly to save them from that set of evils. The law vests officials with authority to act for the public health, safety and welfare. Vesting occurs when the six duties written into the law are fulfilled, and not before. Until officials are vested, they can do nothing lawful. They act on personal opinion and "abolish representative government," as Judge Green puts it. The petition verifies and establishes no lawful activity either in Hamilton County or in Nashville as touching on the condition called Covid-19 or SARS-CoV-2.

That lack makes the petition proper, timely filed, sufficient in its citations to law, ample in its evidence and exhibits, directing the court to its duty to uphold the law and bring the relief demanded.

Respectfully submitted,

State of Tennessee, ex rel. David Jonathan Tulis

CERTIFICATE OF SERVICE

David Jonathan Tulis certifies that a true and exact copy of this brief is being sent by first-class mail to the parties below with sufficient postage on them as to carry it to its destination, or he sends the document via email, on this 29th day of November 2021.

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David Jonathan Tulis

Appendix No. 1

- HOME
- ABOUT TNJ
- SAMPLE
- ON THE HILL
- LOGIN

« Nashville-London flight is back. More Euro destinations to come?
New TNJ edition alert: Kelsey hires new legal team, Griffey confirms departure,… »

Lee to let state of emergency expire nearly 7 months after declaring end of public health crisis

Published November 19, 2021 | By Erik Schelzig

Gov. Bill Lee speaks to reporters outside the War Memorial Auditorium in Nashville on Jan. 19, 2021. (Erik Schelzig, Tennessee Journal)

Gov. Bill Lee in April declared COVID-19 no longer presented a public health crisis in Tennessee. Now, 206 days later, Lee is announcing he won't renew a state of emergency related to the pandemic when it expires Friday night.

Here's the statement from the governor:

> For almost 20 months, this tool has provided deregulation and operational flexibility for hospitals and industries most affected by COVID's challenges. Should our state face any future surges, we will consider temporarily reinstating this tool, but in the meantime, we are evaluating opportunities for permanent deregulation."

Appendix No. 2

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

SHANNON ROBINSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	20AC-CC00515
	)	
MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES,	)	
	)	
Defendant.	)	

JUDGMENT

This case is about whether Missouri's Department of Health and Senior Services regulations can abolish representative government in the creation of public health laws, and whether it can authorize closure of a school or assembly based on the unfettered opinion of an unelected official. This Court finds it cannot.

Plaintiffs Shannon Robinson, B&R STL, and Church of the Word (a benevolent corporation) filed this action seeking a declaratory judgment pursuant to Mo. Rev. Stat. § 536.050 that rules issued by the Department of Health and Senior Services ("DHSS"), codified at 19 CSR 20-20.010 et seq., which authorize the Director of DHSS or a local health agency director to exercise personal discretion to (1) implement discretionary "control measures" including the "creation and enforcement of orders" affecting individuals, schools, organizations, businesses and other entities, and (2) close schools and places of public assembly based solely on his/her opinion, are invalid. 19 CSR 20-20.010(26); 19 CSR 20-20.040(2)(G)-(I); 19 CSR 20-20.040(6); 19 CSR 20-20.050(3) (collectively "DHSS regulations"). This matter comes to this court as a Motion for Summary/Declaratory Judgment. The Court concludes that the DHSS regulations (1) violate separation of powers principles of art. II, § 1 of the Missouri Constitution;

(2) violate the Missouri Administrative Procedure Act, Mo. Rev. Stat. § 536.010 et seq.; (3) are inconsistent with the public health law framework established by Missouri statutes; and (4) violate the equal protection clause of the Missouri Constitution, MO. CONST. art. II, § 1.

1. The DHSS regulations violate separation of powers principles of art. II, § 1 of the Missouri Constitution.

Separation of powers among the three branches of government – legislative, administrative, judicial – is fundamental to the preservation of liberty. DHSS regulations break our three-branch system of government in ways that a middle school civics student would recognize because they place the creation of orders or laws, and enforcement of those laws, into the hands of an unelected administrative official.

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Baron de Montesquieu, The Spirit of the Laws (London: J. Nourse and P. Vaillant, 1758), Book XI, ch. 6, p. 16. "One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority." Cooley, Constitutional Limitations (1886), pp. 116-117. "It is incumbent on the courts to ensure decisions are made according to the rule of law, not hysteria. . . . One hopes that this great principle—essential to any free society, including ours—will not itself become yet another casualty of COVID-19." *Dept. of Health and Human Services v. Manke*, CC: 20-004700-CZ (Mich. 2020, Justice Viviano, concurring).

The Missouri Constitution provides as follows:

> The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of

> powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

> Mo. Const. art. II, § 1.

Thus, absent express direction or express permission in the Missouri Constitution for one of three departments of government to exercise powers belonging to either of the other two departments, acts done "must incontinently be condemned as unwarranted by the constitution. . . .Each department of the government is essentially and necessarily distinct from the others, and neither can lawfully trench upon or interfere with the powers of the other; and our safety, both as to national and state governments, is largely dependent upon the preservation of the distribution of power and authority made by the constitution, and the laws made in pursuance thereof." *Missouri Coalition for Environment v. Joint Committee on Administrative Rules,* 948 S.W.2d 125 (Mo. 1997), *citing Albright v. Fisher,* 164 Mo. 56, 64 S.W. 106, 108–09 (1901).

The Missouri Supreme Court has recognized that a legislative body generally cannot delegate its authority, but alone must exercise its legislative functions. *Automobile Club of Mo. v. City of St. Louis*, 334 S.W.2d 355 (Mo. 1960); *State ex rel. Priest v. Gunn*, 326 S.W.2d 314, 320, 321 (Mo. banc 1959). A law delegating certain authority "is constitutional if a definite standard is provided and no arbitrary discretion is involved." *State v. Bridges*, 398 S.W.2d 1, 5 (Mo. 1966); *Behnke v. City of Moberly*, 243 S.W.2d 549 (Mo. App. 1951). Any law "which attempts to clothe an administrative officer with arbitrary discretion, without a definite standard or rule for his guidance, is an unwarranted attempt to delegate legislative functions to such officer, and for that reason is unconstitutional." *Lux v. Milwaukee Mechanics Ins. Co.*, 15 S.W.2d 343 (Mo. 1929).

The Missouri Supreme Court has well developed case law on the subject of unconstitutional delegations of power to executive branch officials. Although "a legislative body cannot delegate its authority," the Court has held that "it may empower certain officers, boards and commissions to carry out in detail the legislative purposes and promulgate rules by which to put in force legislative regulations." *Auto. Club of Mo. v. City of St. Louis*, 334 S.W.2d 355, 358 (Mo.1960). This is particularly so where the executive agency possesses special expertise. *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 74 (Mo.1982). Delegation is constitutional only when the delegating statute or ordinance "contains sufficient criteria or guidelines" to guide the executive official's decision-making. *Ruggeri v. City of St. Louis*, 441 S.W.2d 361, 363 (Mo.1969); see also *Auto. Club of Mo.*., 334 S.W.2d at 358. Conversely, an ordinance or statute is unconstitutional when it "attempts to clothe an administrative officer with arbitrary discretion, without a definite standard or rule for his guidance." *Porporis v. City of Warson Woods*, 352 S.W.2d 605, 607 (Mo.1962) (internal quotes omitted); see also *Howe v. City of St. Louis*, 512 S.W.2d 127, 133 (Mo.1974). Regarding the delegation of law-making functions in particular, the Court has recognized that "the duty and power to define crimes and ordain punishment is exclusively vested in the legislature," *State v. Brown,* 660 S.W.2d 694, 698 (Mo.1983). The requirements that the Missouri Constitution and over a century of Missouri Supreme Court precedent place on delegations of authority applies to DHSS. DHSS is limited to a definite standard for its delegated duty, and no arbitrary discretion can be or is involved. *State v. Bridges*, 398 S.W.2d at 5.

DHSS has statutory authority to "designate those diseases which are infectious, contagious, communicable or dangerous in their nature and shall make and enforce adequate orders, findings, rules and regulations to prevent the spread of such diseases and to determine the prevalence of such diseases within the state." Mo. Rev. Stat. § 192.026. DHSS regulations delegate to the DHSS Director and local health agency directors throughout Missouri the power to implement discretionary "control measures" including the "creation and enforcement of orders" within their jurisdictions. 19 CSR 20-20.040(2)(G)-(I); 19 CSR 20-20.040(6). DHSS regulations also authorize an individual health agency director to close a school or place of public assembly if "in the opinion of the [health official] the closing is necessary to protect the public health." 19 CSR 20-20.050(3). Thus, the state delegated rulemaking power to an administrative agency, and the administrative agency, has in turn, delegated broad rulemaking power to an unelected administrative official. This type of double delegation, which results in lawmaking by an administrative entity, is an impermissible combination of legislative and administrative power. *Cavanaugh v. Gerk*, 280 S.W.2d 51 (Mo. banc 1926) (rules promulgated by a traffic council pursuant to general provisions are unauthorized by law). The DHSS regulations violate the principles of separation of powers by unlawfully placing unguided and unbridled rulemaking power in the hands of a public official.

DHSS asserts that words such as "necessary," "adequate," and "appropriate" smattered throughout the regulations provide sufficient standards to guide agency officials in developing control measures and creating and enforcing their own rules and orders. Decades of case law consistently holds otherwise. Delegations of authority that include the phrase "in accordance with *public convenience and necessity*" are insufficient due to lack of criterion or standard. *Automobile Club*, 334 S.W.2d at 359 (emphasis supplied). Also, delegations that permit

discretionary declarations that a building is a public nuisance and allow an official to take "steps as may be *necessary* for the immediate abatement of any and all such nuisances" are also insufficient due to lack of criterion or standard for abatement. *Lux*, 15 S.W.2d at 345 (emphasis supplied); *see also Clay v. City of St. Louis*, 495 S.W.2d 672, 674 (Mo. App. 1973) (a delegation that instructed an agency to "establish a fee schedule" was insufficient because it did not set forth any standards to follow when setting the fees).

Other states, like Michigan, Wisconsin, and Pennsylvania have recently come to the same conclusion regarding administrative order-creation in connection with COVID-19. "The powers conferred by [a Michigan statute granting an executive authority to take action] simply cannot be rendered constitutional by the standards 'reasonable' and 'necessary,' either separately or in tandem." *Midwest Inst. Of Health, PLLC v. Governor of Mich. (In re Certified Questions from the United States Dist. Court)*, No. 16, 506 Mich. 332 (Mich. 2020). The Wisconsin Supreme Court also addressed this issue when it struck down a statewide "Safer at Home Order" issued by a Director of Wisconsin's department of health in response to COVID-19 concerns. *Wisconsin Legislature v. Palm*, 942 N.W.2d 900 (Wisc. 2021). The order was created by a Wisconsin administrative official pursuant to a state regulation that gave her broad authority to take "all emergency measures *necessary* to control communicable diseases." *Palm*, 942 N.W.2d at 917. The term "necessary" did not provide sufficient standards for her action. *Id.* Most recently the Pennsylvania court held: "

> The purported authority cited by the Acting Secretary in the Masking Order does not convey the authority required to promulgate a new regulation without compliance with the formal rulemaking requirements of the . . .Regulatory Review Act. Therefore, because the Acting Secretary did not comply with the requirements of the [state APA], the Masking Order is void ab initio. For this Court to rule otherwise would be tantamount to giving the Acting Secretary unbridled authority to issue orders with the effect of regulations in the absence

> of. compliance with the. . . [state APA]. As this would be contrary to Pennsylvania's existing law, we decline to do so.

Corman, et.al v. Acting Secretary of the Pennsylvania Department of Health, No. 294 M.D. 2021 (Nov. 10)

Federal courts also agree. The United States Supreme Court held that a delegation authorizing an executive to take action "as he may deem necessary" is an unconstitutional delegation because it assumes positive motives with no set standards. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1934); *see also State v. Becerra*, 2021 WL 2514138 (M.D. Fla.) (holding that Center for Disease Control ("CDC") lacked authority to issue a "conditional sailing order" to the cruise industry, rejecting the CDC's argument that a federal statute authorized the Secretary to freely employ his "judgment" about restrictions "necessary" to prevent the transmission of COVID-19).

i. Regulations that delegate unfettered and unbridled rulemaking to an administrative official based on "necessity" are invalid.

The authority that the DHSS regulations purport to grant to an administrative official to implement control measures and create and enforce orders is open-ended discretion—a catch-all to permit naked lawmaking by bureaucrats throughout Missouri. The regulations codified at 19 CSR 20-20.040(2)(G) -(I), 19 CSR 20-20.040(6) fail to set forth any standards to guide the DHSS Director or the DHSS-deputized local health agency directors in their creation of orders purporting to prevent the spread of a communicable disease into the state. The state's enabling act provides no standards for the issuance of orders. Mo. Rev. Stat. § 192.026. Orders authorized by the regulations are completely within the discretion of the agency official and are limitless, standardless, and lack adequate legislative guidance for their creation. The regulations also fail to provide any procedural safeguards for those aggrieved by the orders. The regulations create a

system of statewide health governance that enables unelected officials to become accountable to no one. Authorizing necessary, or appropriate, or adequate orders does not set forth the required standard or guideline for the administrative official.

Plaintiffs produced ample evidence that health agency directors throughout Missouri have used the power granted to them by 19 CSR 20-20.040 to exercise unbridled and unfettered personal authority to in effect, legislate. Local health directors have created generally applicable orders, both in writing and verbally, requiring individuals within their jurisdictions to wear masks, limiting gathering sizes in peoples' own homes, creating capacity restrictions, limiting usage of school and business facilities including tables, desks, and even lockers, mandating spacing between people, ordering students be excluded from school via quarantine and isolation rules created by health directors based on masking or other criteria not adequately set forth in either by the state legislature or by DHSS rules, among other generally applicable orders. This impermissible power to independently create new laws is purportedly delegated to them by 19 CSR 20-20.040(2)(G) -(I), 19 CSR 20-20.040(6) but Mo. Const. art. II, § 1 simply and clearly prohibits, without question, such lawmaking.

A local health agency director is constitutionally prohibited from exercising discretion to issue generally applicable rules prohibiting or requiring certain conduct and disciplinary consequences for violations of the director's unilaterally created rules. Yet, this has been happening across the state for over 18 months, thanks to unconstitutional language buried in state regulations. DHSS regulations that permit an agency health director to create and enforce orders and take other discretionary "control measures," which are predominantly set forth in 19 CSR 20-20.040(2) (G)-(I) and (6), are unconstitutional and are therefore invalid.

ii. DHSS regulation that delegates unfettered and unbridled decision-making authority to an administrative official to close a school or assembly based on the official's "opinion" is invalid.

The DHSS regulation authorizing a health agency director's discretionary closure of a school or place of public assembly based on the director's personal opinion is invalid. 19 CSR 20-20.050(3). This regulation clothes an individual health agency director with the power to "close any public or private school or other place of public or private assembly when in the opinion of the [health agency director] the closing is necessary to protect the public health." The use of the term "in the opinion of" clearly designates complete discretion in an administrative bureaucrat to determine closure. The regulation even prohibits reopening "until permitted by whomever ordered the closure." 19 CSR 20-20.050(3).

The Missouri Supreme Court has held that a bureaucrat cannot possess such broad authority. In *Lux v. Milwaukee Mechanics Ins. Co.*, 15 S.W.2d 343 (Mo. 1929), a challenged ordinance clothed an appointed city official, the superintendent of buildings, with full discretionary power to declare any building which becomes unsafe from fire to be a public nuisance, and authorized the superintendent to take immediate steps to abate such nuisance. The challenged ordinance was held unconstitutional because it gave a city official the power to condemn a building without providing guides, tests, or standards to protect the property owner from arbitrary action.

A health agency director with the authority to shut down a school or assembly wields incredible power to coerce his subjects into submission. DHSS's permissive closure regulation effectively converts the recommendations, and even whims, of a health agency director into enforceable law. If the health agency director holds the "opinion" that a school is not doing enough, he can close it. And according to the regulation, he is the only one who can permit it to

be reopened. This incredible power cannot lawfully be placed in the hands of one bureaucrat. *Lux*, 15 S.W.2d at 345. Put simply, if "as may be *necessary* for the immediate abatement of any and all such nuisances" was insufficient according to Missouri's highest court in *Lux*, then "necessary to protect the public health" based on "opinion" is definitely insufficient.

Schools and places of public assemblies should no longer fear arbitrary closure based on the whims of public health bureaucrats. This system is entirely inconsistent with representative government and separation of powers and makes a mockery of our Missouri Constitution and the concept of separation of powers. The DHSS regulation set forth at 19 CSR 20-20.050(3) is unconstitutional and is therefore invalid.

2. DHSS regulations violate the Missouri Administrative Procedure Act, Mo. Rev. Stat. § 536.010, et seq.

The DHSS regulations are also invalid because they authorize rulemaking by state and local agency officials in violation of the Missouri Administrative Procedure Act, § 536.010, et seq. A "rule" is defined by Mo. Rev. Stat. § 536.010(6) to include "each agency statement of *general applicability* that implements, interprets, or prescribes law or policy." (emphasis supplied). "Any agency announcement of policy or interpretation of law that has future effect and acts on unnamed and unspecified facts is a 'rule.'" *Department of Social Services; Div. of Medical Services v. Little Hills Healthcare LLC*, 236 S.W.3d 637 (Mo. banc 2007), *citing NME Hospitals, Inc. v. Department of Social Servs,* 850 S.W.2d 71, 74 (Mo. banc 1993).

Rules promulgated by DHSS must comply with the procedural requirements of the Administrative Procedure Act Sections 536.021 and 536.024 prior to enactment and enforcement. Mo. Rev. Stat. § 192.006. These procedural requirements include a number of steps, including publication, notice and comment period, and approval of the Missouri Legislature prior to finality. In *Little Hills*, a state agency imposed a financial calculation related

to Medicaid reimbursement that did not proceed through the procedural safeguards set forth in Chapter 536 prior to its implementation. Because the financial calculation had general applicability to the public, it was ineffective unless and until the procedural due process set forth in Chapter 536 occurred. 236 S.W.3d at 643 ("failure to promulgate a rule as required voids the decision that should have been properly promulgated as a rule").

Although the regulations contained in 19 CSR 20-20.010 et seq. were themselves promulgated pursuant to the APA's procedural protections, the regulations specifically authorize subsequent rulemaking by administrative officers for which there are no procedural protections prior to implementation. DHSS is prohibited by the APA from giving an unelected official the power to do what DHSS itself lacks the power to do – enact rules outside the procedural protections set forth in Chapter 536, RSMo. DHSS has done *exactly that* by authorizing one person at a local agency to create and enforce orders, rules or regulations without ensuring that the procedural safeguards applicable to DHSS actions are also applicable to the bureaucrat's actions.

Plaintiffs presented evidence that these subsequent rules – those directed to prevention of COVID-19 – have been issued as "orders" by local health agency directors throughout Missouri in reliance on 19 CSR 20-20.040(2) and (6). Local health agency directors, in reliance on 19 CSR 20-20.040, have enacted rules all by themselves, with no notice, sometimes posted them on the internet by surprise, sometimes sent them by email, and sometimes provided verbal orders. They also haphazardly ordered the shutdown of businesses not in compliance with their self-imposed laws.

DHSS regulations that permit agency directors to implement discretionary control measures and create and enforce orders that fit within the definition of "rule" are invalid because

they violate the APA. Thus, regulations codified at 19 CSR 20-20.040(2)(G) -(I), (6) expressly authorize violations of the APA and are therefore invalid.

3. DHSS regulations are inconsistent with the framework established by Missouri statutes for the creation of public health law and violate Section 31 of Article I of the Constitution of Missouri.

Missouri statutes give elected legislative bodies, not individual health agency directors, authority to create county-wide laws related to communicable disease.[1] More specifically, Mo. Rev. Stat. § 192.300 provides: "County commissions [which include county councils] and the county health center boards of the several counties may make and promulgate orders, ordinances, rules or regulations, respectively as will tend to enhance the public health and prevent the entrance of infectious, contagious, communicable or dangerous diseases into such county." A "county health center board"[2] is an elected governing body established by Mo. Rev. Stat. Chapter 205.

Missouri law also provides for criminal punishment for violation of a public health law adopted by a county council or county commission. Mo. Rev. Stat. § 192.300(4) provides: "Any person, firm, corporation or association which violates any of the orders or ordinances adopted, promulgated and published by such county commission is guilty of a misdemeanor and shall be prosecuted, tried and fined as otherwise provided by law." Thus, when a county council or

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[1] No Missouri statute specifically authorizes an individual health agency official to unilaterally issue orders, rules or regulations related to communicable disease. To do so would be an unlawful delegation of authority in violation of Mo. CONST. art. II, § 1. The legislature recently placed a time limit on certain orders related to communicable disease. Mo. Rev. Stat. 67.265. A time limit does not rectify the constitutionally deficient DHSS regulations because health agency officials are constitutionally prohibited from creating generally applicable laws for any length of time, no matter how brief.

[2] It is also commonly referred to as a "county health center board of trustees."

commission enacts a law to prevent the spread of contagious disease that is generally applicable to all individuals, schools, businesses, governments and other organizations, the legislature must determine that the order or ordinance is so necessary that a violation of the law justifies applicable criminal sanctions.

Further, the Missouri Constitution provides "that no law shall delegate to any commission, bureau, board or other administrative agency authority to make any rule fixing a fine or imprisonment as punishment for its violation." MO. CONST. art. 1, § 31. Thus, DHSS regulations that authorize a county health agency director to write a law cannot possibly be considered, within the statutory framework of Section 192.300, a county-wide law. To do so would violate the creation authority set forth in Mo. Rev. Stat. § 192.300 and the prohibition on criminal punishment set forth in Section 31 of Article I of the Missouri Constitution.

4. The DHSS regulations, as implemented, violate the equal protection clause of the Missouri Constitution.

Article I, Section II of the Missouri Constitution provides that "all persons are created equal and are entitled to equal rights and opportunity under the law." MO. CONST. art I, § 2. Equal protection of the law means "equal security or burden under the laws to everyone similarly situated; and that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes of persons in the same place and under like circumstances." *Kansas City v. Webb,* 484 S.W.2d 817 (Mo. banc 1972) *citing Ex Parte Wilson,* 330 Mo. 230, 48 S.W.2d 919, 921. Equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. *Id., citing Missouri v. Lewis,* 101 U.S. 22, 31, 25 L.Ed. 989.

Throughout 2020 and 2021, Missouri's residents and businesses have been subjected to orders created and issued by bureaucratic edict outside the constitutionally mandatory legislative process. These orders substantially differ between counties even though COVID-19 is not a county-specific disease. Plaintiffs presented evidence that Missourians have been subjected to unconstitutionally created "health orders" that, for example, prohibit them from leaving their homes located in certain counties except for certain delineated reasons, permit worship services but prohibit Bible study, require churches in some counties to turn people away from their services if fire code capacity reaches 25%, require elementary students to wear masks indoors, even while playing basketball, and prohibited children from giving "high fives." Plaintiff Shannon Robinson was not permitted to have people over to her own home, even in masks, even socially distanced, because she has a large family and the number of people would exceed permitted attendance at her own dinner table. When she moved from St. Louis County to Franklin County, she could again have friends over. Restaurants have been unilaterally shut down even without any presence of infection and without inspection based on administratively issued "health orders" that violate the Constitution and have not been promulgated pursuant to the APA's procedural protections, while restaurants down the street in a neighboring county remain open. Children are removed from schools in some counties but not others, based on different masking rules issued by local health bureaucrats that are unconstitutionally created.

Plaintiffs presented evidence that these orders issued by health agency directors go into effect without public comment, and become effective once posted on the internet. These bureaucratic edicts are for an indefinite duration until they are removed or edited based on the opinion of the bureaucrat who wrote them.

Because DHSS permits discretionary orders on a county by county basis by bureaucrats in each respective county, Missourians have faced disparate treatment based on county lines. In a statewide pandemic as defined by 19 CSR 20-20.010(37), it is not fair or equitable for a business in one county to be arbitrarily closed down, when another business in another county experiencing the same exact pandemic situation is not also closed down for the same reasons. The DHSS regulations authorize arbitrary and capricious rulemaking that creates a substantial inequity among affected people and businesses. This is particularly true of those who live in a county with an overactive, unelected and unchecked bureaucrat intent on exerting power that is not similarly exerted in other counties by their unelected health bureaucrats.

Can it be said that COVID-19 knows to stop at specific county lines and does not travel over? It is completely irrational that, at this point in time, now that COVID-19 has spread across the globe, a first grader in Wildwood is not allowed to play sports, while a first grader in Jefferson County who lives less than a mile away is allowed to do so. Individual freedoms are affected in different ways throughout Missouri relating to the same COVID-19 illness thanks to the DHSS regulations that allow one person to make and enforce laws, and close things down with no standards other than a completely unappealable and unchallengeable "opinion" regarding public health protection. The DHSS regulations permit different treatment across county lines in a manner that is completely arbitrary and violates the equal protection clause of the Missouri Constitution, MO. CONST. art. II, § 1.

Missouri's local health authorities have grown accustomed to issuing edicts and coercing compliance. It is far past time for this unconstitutional conduct to stop.

For the foregoing reasons, this court issues the following orders:

1) This court declares that 19 CSR 20-20.040(2)(G) -(I), 19 CSR 20-20.040(6), including references to discretionary control measures contained in 19 CSR 20-20.010 et seq., violate the Missouri Constitution and Missouri statutes and are therefore invalid.

2) This court declares that 19 CSR 20-20.050(3) violates the Missouri Constitution and Missouri statutes and is therefore invalid.

3) The Director of the Department of Health and Senior Services, pursuant to Mo. Rev. Stat. § 536.022, shall file a notice of this court's action with the Missouri Secretary of State in accordance with the requirements of Mo. Rev. Stat. § 536.022.

4) The Missouri Secretary of State shall take action required by Mo. Rev. Stat. § 536.022(4) regarding placing a notice in the register and removing the invalid regulations from the register.

5) Consistent with Plaintiffs' request for relief that this Court deems just and proper, DHSS and local health authorities are ordered to refrain from taking actions pursuant to 19 CSR 20-20.010 et seq. that require independent discretion in a manner inconsistent with this opinion and inconsistent with the constitution's limitation on legislative delegations and the APA's limitations on rulemaking authority. This includes discretionary verbal or written orders for which the legislature has failed to provide specific standards or guidelines, and to the extent that standards or guidelines for a particular action have been provided, they must be followed.

6) Plaintiffs presented evidence that students are being excluded from schools by discretionary written or verbal order or direction of local health authorities. Consistent with Plaintiffs' request for relief that this Court deems just and proper, and to eliminate the need for additional plaintiffs to request this Court strike invalid applications of DHSS

regulations regarding communicable disease, this Court directs DHSS to instruct local health authorities to refrain from issuing verbal or written orders regarding circumstances under which children can be excluded from school. 19 CSR 20-20.030(1) specifically provides that "persons suffering from a reportable disease or who are liable to transmit a reportable disease listed in 19 CSR 20-20.020(1)-(3) shall be barred from attending school." "Liable" means in a position to incur transmission (https://www.merriam-webster.com/dictionary/liable). Without determining whether 19 CSR 20-20.030 is constitutional, it is clear that any quarantine and isolation rules, or rules that exclude students from school, created by a local health authority outside the language of 19 CSR 20-20.030, are prohibited.

7) Consistent with Plaintiffs' request for relief that this Court deems just and proper, this Court orders that any and all discretionary orders or rules, whether written or verbal, that have been issued outside the protections of the Missouri Administrative Procedure Act and constitute a statement of general applicability that implements, interprets, or prescribes law or policy, or close a business based on the opinion or discretion of an agency official without any standards or guidance, by Director of the Department of Health and Senior Services and all local health authorities as defined by 19 CSR 20-20.010(26), are null and void.

8) Consistent with Plaintiffs' request for relief that this Court deems just and proper, this Court orders the Director of the Department of Health and Senior Services to provide a copy of this order to all local health authorities throughout Missouri, and to post it with 19 CSR 20-20.010 et seq. in locations where the same is made publicly available by DHSS.

9) This court orders payment of Plaintiffs' attorney's fees and costs pursuant to Mo. Rev. Stat. § 536.050.

Dated: 11/22/21

Daniel R. Green