IN THE SUPREME COURT OF MISSOURI

No. SC99864

SHANNON ROBINSON; B&R STL;
and CHURCH OF THE WORD,

Plaintiffs-Respondents,

v.

MISSOURI DEPARTMENT OF
HEALTH AND SENIOR SERVICES,

Defendant-Respondent,

and

ST. LOUIS COUNTY; JACKSON COUNTY; MELANIE HUTTON, ADMINISTRATOR, COOPER COUNTY PUBLIC HEALTH CENTER, in her official capacity; LIVINGSTON COUNTY HEALTH CENTER BOARD OF TRUSTEES,

Putative Intervenors-Appellants.

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
CASE NUMBER 20AC-CC00515
THE HONORABLE DANIEL R. GREEN

PLAINTIFFS-RESPONDENTS' SUBSTITUTE BRIEF

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STATEMENT OF THE CASE

This appeal should be dismissed because it was filed by post-judgment intervenors who never became a party to the case. Their post-judgment intervention was unsuccessful, and the judgment was therefore never modified, vacated, or otherwise amended. Thus, the post-judgment intervenors lack standing to appeal the judgement, lack standing to appeal from the post-judgment order denying the post-judgment intervention, and the appeal should be dismissed.

The underlying case struck state regulations issued by the Missouri Department of Health and Senior Services ("DHSS") that expanded the DHSS enabling act by authorizing DHSS's bureaucratic designees to promulgate rules outside the statutory rulemaking process, and clothed bureaucrats with arbitrary discretion regarding closures. When the Attorney General announced that DHSS would not appeal, Putative Intervenors (who were not DHSS's designees) applied to intervene post-judgment for the sole purpose of appealing the judgment and resurrecting the DHSS regulation. Their untimely application was denied by the trial court. The denial was affirmed by the Missouri Court of Appeals prior to transfer, noting that in light of its decision that the trial court did not abuse its discretion, they need not address whether the Putative Intervenors lacked standing to appeal because the outcome would be the same.

JURISDICTIONAL STATEMENT

This Court lacks jurisdiction over this appeal due to the Putative Intervenors' lack of standing to appeal the judgment. None of Putative Intervenors, including St. Louis County, Jackson County, Livingston County Health Center Board of Trustees ("LCHB"),

and Melanie Hutton ("Putative Intervenors")[1] have ever become parties to the case and none of them are aggrieved by the judgment. Standing to appeal is purely statutory pursuant to section 512.020, RSMo (2016), and no statute gives Putative Intervenors a right to appeal the order denying post-judgment intervention. No parties to the case below filed a post-trial motion. No parties have filed an appeal, so this case should be dismissed.

STATEMENT OF FACTS RELEVANT TO DISMISSAL

On November 22, 2021, the trial court issued an opinion denominated "Judgment" that disposed of all issues in the case and was a final, appealable judgment according to Rule 74.01. D35. On December 13, 14, and 17, 2021, Putative Intervenors filed motions to intervene, leaving only a few business days prior to the expiration of the 30-day post-trial period during which the trial court retains jurisdiction over the judgment pursuant to Rule 75.01. D36, D52, D56, D60.

After the final motion was filed on December 17, the parties had less than two business days to respond to the motions to intervene by the court's December 21, 2021 deadline. Putative Intervenors filed additional briefing and exhibits consisting primarily of newspaper articles on December 21, 2021. D63, D65-71. In the last few hours of the 30-day post-trial period, on December 22, 2021, the trial court issued an order, denominated as "order," as follows: ALL PENDING MOTIONS TO INTERVENE DENIED. D87. During the 30-day period beginning November 22 and ending on

[1] Jefferson County Health Board of Trustees ("JCHB") did not apply for transfer and is no longer involved in this lawsuit according to comments made at publicly available JCHB meeting minutes. R-A190-197. It is unclear why there is no motion to dismiss on file.

December 22, 2021, within which a trial court may vacate, reopen, correct, amend, or modify its judgment pursuant to Rule 75.01,[2] no party filed a post-trial motion. Accordingly, the trial court never ruled on a post-trial motion or modified, vacated, or otherwise changed its November 22, 2021 judgment. D35. This appeal followed.

STATEMENT OF FACTS RELEVANT TO APPEAL IF NOT DISMISSED

A. The General Assembly authorized the Missouri Department of Health and Senior Services ("DHSS") to issue rules subject to the procedural protections of the Missouri Administrative Procedure Act ("MAPA"), articulating that rules created outside of MAPA are "null and void."

The General Assembly created DHSS to "supervise and manage all public health functions and programs." § 192.005.[3] R-A12.[4] The enabling act provides:

> [DHSS] may adopt, appeal and amend rules necessary to carry out the duties assigned to it. All rules shall be promulgated pursuant to the provisions of this section and chapter 536. *No rule or portion of a rule promulgated under the authority of this chapter shall become effective unless it has been promulgated pursuant to the provisions of section 536.024*.

§ 192.006 (emphasis supplied); R-A14. DHSS is authorized by the General Assembly to "have power and authority, with approval of the director of the department, to make such orders, findings, rules and regulations as will prevent the entrance of infectious, contagious and communicable diseases into the state.§ 192.020; A24.[5]

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[2] All citations to "Rule __" are to the Missouri Rules of Civil Procedure.

[3] All statutory citations are to RSMo (2016) unless otherwise noted.

[4] All citations to R-A__ are to the Plaintiffs'-Respondents' Appendix.

[5] All citations to A__ are to the Putative Intervenors'-Appellants' Appendix.

A "rule" is defined as "each agency statement of *general applicability* that implements, interprets, or prescribes law or policy." § 536.010.6 (emphasis supplied). R-A29-31. "When the general assembly authorizes any state agency to adopt administrative rules or regulations, the granting of such rulemaking authority and the validity of such rules and regulations is contingent upon the agency complying with the provisions of [536.024] in promulgating such rules." § 536.024.1 R-A36. The General Assembly also requires that all rules issued by DHSS or DHSS agents stemming from an enabling act are contingent on the General Assembly's opportunity to disapprove or annul any agency rule or portion thereof that "has the effect of substantive law." § 536.028.2.; R-A38 All agency rules that have the effect of substantive law must first be provided to the joint rules committee of the general assembly so that hearings may be held as desired by the committee, and the committee has at least 30 days to make recommendations to disapprove the rule § § 536.024.2 and 536.028.3.5; R-A36-41. Rules are "null, void and unenforceable," unless and until MAPA's procedural steps are taken. § 536.021.5, .7; R-A32-35.

B. DHSS issued regulations that authorized rulemaking by a single bureaucrat and clothed a single bureaucrat with unfettered discretion to close businesses and assemblies based on the same bureaucrat's personal opinion with no due process.

DHSS regulations governing communicable/transmissible viruses (pre-judgment) are set forth in 19 CSR 20-20.010 et seq. A29. Buried in 14 pages of these regulations in 9-point font were a few sentences in which DHSS deputized "local health authorities" with *state* authority over "*creation* and enforcement of adequate orders" and with *state*

authority to "*make* and enforce orders" considered by the "local health authority as adequate *control measures*" to prevent the spread of disease. 19 CSR 20-20.040(2)(G)(H)(I), (6) A35-36.

"Local health authority" is defined by DHSS regulations as the "city or county health officer, director of an organized health department or of a local board of health within a given jurisdiction." 19 CSR 20-20.010(26); A31. Thus, for purposes of DHSS regulations and this lawsuit, a "local health authority" is a PERSON – an unelected bureaucrat who is an employee of a health department. A "local health authority" is never a County Health Board, County Council or County Commission. A31. Putative Intervenors including St. Louis County, Jackson County, and the county health board(s) are therefore not "local health authorities" referred to by the regulations and the trial court's judgment and are irrelevant to this case. A "local health authority" is also not a "local health agency." A "local health agency" is separately defined in 19 CSR 20-20.010(27) and the terms are not interchangeable, despite Putative Intervenors' attempt to repeatedly refer to themselves (counties and health boards) as "local health authorities," which they are not.[6] A31.

The regulations permitted DHSS designees to circumvent MAPA's procedural rulemaking process to promulgate rules affecting city and county jurisdictions. 19 CSR 20-20.040(2)(G)(H)(I), (6); A35-36. Subsection (3) of 19 CSR 20-20.050 allowed these

[6] City and county health centers and their boards typically refer to themselves as "LPHAs," or "local public health agencies." The "local health authorities" in this lawsuit were individual DHSS designees, not "LPHAs."

same "local health authorities" to close businesses, schools and assemblies for an indefinite timeframe, with no right to a hearing or appeal. A37. The only person with authority to end the closure was the unelected bureaucrat who closed it. A37.

C. Most Counties and County Health Boards have always followed state and local law for the issuance of "public health orders," but a few local county health directors relied solely on the DHSS regulations for authority to create substantive laws, apply those laws county-wide, and close businesses, contrary to local ordinances and usurping local legislative authority.

In late March 2020, local political subdivisions began to issue "public health orders."[7] A few health bureaucrats in various counties and cities took advantage of the power given to them by the DHSS regulations to bypass MAPA's rulemaking procedures, and they began to individually promulgate rules that had the effect of substantive law in their capacities as state DHSS agents – but not in their capacities as employees of a local health department. For example, St. Louis County's acting county medical director, Emily Doucette, unilaterally promulgated hundreds of pages of county-wide laws that frequently appeared without warning or notice on the St. Louis County website, citing the authority she derived as a DHSS agent from the DHSS regulations.[8] D3, D4, D5, D6. As soon as the orders/laws would appear by surprise on the internet, schools, businesses, and individuals

[7] This term was undefined by Missouri statute or regulation at the time the case was filed. In June 2021, the legislature defined "order" as used in section 67.265, RSMo (2021 Supp.) as a "public health order, ordinance, rule, or regulation. . ." § 67.265(1).

[8] Within five months, Doucette's individually-created laws included a ban on gatherings with friends on the playground (D3 pp. 4, 15); a ban on more than 10 people gathering in one family's home unless they were all related or members of the same "support bubble" (a defined term) (D4 pp. 17-25); the illegalization of child high-fives at 1st grade t-ball practice (D14 p. 6); a ban on co-workers taking breaks with other co-workers (D4 p. 50);

scrambled to comply with hundreds of pages of restrictions that had never been presented to or approved by the St. Louis County Council and that were not issued pursuant to any local laws permitting the issuance of executive orders. D7, D14. When, in Doucette's opinion, a business did not follow her individually created laws, she ordered the business to close for an indefinite timeframe. D4, D5, D6, D32 p. 9-10, D33, D44.

St. Louis County Ordinances provide as follows:

> The Department of Health under the supervision of the Director of Health, shall have general supervision over the public health and Director is authorized and empowered, *with the approval of the County Council, to make such rules and regulations consistent with the Charter, laws and ordinances* as will tend to promote or preserve the health of the County and carry out the intents and purposes of this chapter.

SLCO § 602.020(3) (O. No. 21518, 8-23-03); R-A75.

On December 1, 2020, the County Council took up the issue itself, and voted 5-2 to end all public health orders/laws issued by Doucette (with the exception of a mask mandate, which the County Council approved). D118 pp. 8-9; D123; D2 10-11. Executive Page announced that the vote by the County's governing body was only "symbolic" and "did not have the force of law." He stated that his appointed health director is "empowered to issue the orders necessary to protect people from COVID-19. Unfortunately, it seems like some members of the Council did not fully understand what

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a requirement that drive-in movie theaters leave an empty space between parked cars (D4 p. 58); a requirement that bowling alleys disinfect balls between use (D4 p. 16); a ban on parents entering school buildings (D4 p. 87); a ban on poolside chairs (D4 p. 95); a requirement that all K-12 children wear masks even when outside (D1 pp. 59-65); a ban on high school sporting events (then when sports programs were re-allowed to happen, they were required to submit plans to the medical director for pre-approval to play) (D4 p. 7) and more.

the resolution would do if it were legally effective." *See* Video of Sam Page speaking at his December 2, 2020, press conference: https://www.facebook.com/CountyExecutiveSamPage/videos/2717388248514547. Doucette's restrictions that she issued as an agent of DHSS bypassed rulemaking procedures required by MAPA and trumped St. Louis County ordinance 602.020(3). R-A75.

By way of further example of the DHSS regulations in action, in Franklin County, the Administrator of the Franklin County Health Department issued rules applicable to every constituent and student that were not contained in any published order, rule or regulation. The Franklin County Commissioners and the Washington School District were powerless to override the generally applicable rules. D32; D34 pp. 4-11. Commissioner Tim Brinker and Superintendent John Freitag made it clear that although they wanted local control over their own political subdivisions, the DHSS placed all rulemaking authority regarding contagious illness into the hands of the Franklin County medical director, who was an unelected bureaucrat. D32; D34 pp. 4-11.

Not every local director of a city or county health department purported to have the rulemaking authority derived from DHSS regulations. For example, on January 27, 2021 (shortly after this lawsuit was filed), the Jefferson County Health Board ("JCHB") issued a resolution and order, citing its authority under sections 192.300 and 192.290 to issue orders, rules or regulations as will tend to enhance the public health and prevent the entrance of contagious disease into Jefferson County. JCHB Resolution No. 22-01-27-01; R-A68-74; A27, A26. JCHB recognized itself as having legislative authority over the

Health Center in Jefferson County, as well as the authority of the Health Center's Executive Director "to *enforce* municipal, state and federal laws, policies and regulations of the Board," and to "make recommendations of any changes of policy or regulation." R-A68-74. "Public health orders" issued in Jefferson County were issued in accordance with the JCHB by-laws. R-A68-74.

In Cole County, all "public health orders" issued after April 1, 2020, were made and promulgated by the Cole County Commission in accordance with section 192.300. *See* "Stay at Home Order" and "No Door-to-Door Sales." R-A57-67; A27. At that time, Kristi Campbell, Director of the Cole County Health Department, did not issue rules or "public health orders" as the *sole* state-appointed legislator in her county. When this Court issued rules governing practice before this Court, Campbell never issued any "public health orders" that trumped this Court's authority to do so. D50 p. 23. Indeed, this Court recognized that it possessed authority to supervise the administration of the state judicial system that was derived from the Missouri Constitution, art. II, § 4.1, 8. *See* Operational Directives Order, March 26, 2021. R-A81-82.

D. Plaintiffs-Respondents sought a declaratory judgment regarding the interpretation of or validity of the DHSS regulations.

Plaintiffs-Respondents include a Missouri resident, church, and business that were aggrieved by the authority set forth in the DHSS regulations. D118, D2, D32, D34. The church and business suffered closure ordered by St. Louis County's medical director based on her self-enacted "orders" – not in reliance on any DHSS regulations requiring

closure, or any state law setting forth any standards for closure, or any county ordinance or regulation. D118, D2, D3 p. 1-5, D9.

Pursuant to section 536.050, Plaintiffs-Respondents filed a petition challenging the validity of sections of DHSS regulations to the extent they deputized a single county bureaucrat as a DHSS agent with power to promulgate county-wide rules and close schools and assemblies without restriction. D2. D2, D118; A28. They cited, for purposes of standing, the rules and regulations created by the DHSS designees in both St. Louis County and Franklin County, as well as certain citations and closure directives stemming from the regulations. D2-D10, D32-34, D118. DHSS responded to Plaintiffs' Motion for Summary Judgment asserting that its regulations did, indeed, direct county medical directors to bypass MAPA's required rulemaking process by authorizing them as DHSS designees to *create* new, blanket, generally applicable rules or orders that had the effect of substantive laws. D20 pp. 2-4. They took this position despite the fact that subsection (2)(G) of 19 CSR 20-20.040 referenced such activities with respect to a single "patient" or "facility," but not an entire political subdivision. A36. There have never been any parties to the case other than the named Plaintiffs-Respondents and DHSS.

E. This case gained statewide attention and became the subject of a major Law School's CLE Seminar.

The lawsuit immediately gained public attention in early 2021. In April 2021, two St. Louis University law professors filed an amicus brief with the trial court opposing Plaintiffs' Motion for Summary Judgment and supporting DHSS in its effort to designate local bureaucrats as DHSS agents for rulemaking purposes. D21, D22. When the amicus

brief was filed, SLU's College for Public Health and Social Justice had a contract to advise the St. Louis County Department of Health and its medical director, Doucette, regarding recommended public health orders. D24. Additionally, Saint Louis University Law School held an online CLE seminar in June 2021 with a section focused on the instant case. D73. The speaker, Professor Robert Gatter, predicted that this case could easily result in the termination of regulations deputizing county health directors with authority to issue discretionary blanket "public health orders," or rules, affecting an entire county. D82. Prof. Gatter posted a slide titled "HB 271 and Robinson Reflect National Trend," identifying cases in states across the country that had been decided in favor of the plaintiffs in similar litigation and predicting that Judge Green's opinion would hold as it did. D82. He also stated that the General Assembly's passage of HB 271 (section 67.265) would render this case moot. R-A3.

F. The Missouri legislature passed, and Governor Parson signed into law, HB 271, which curtailed the unlimited and unfettered public health orders, regardless of origin or authority.

On June 15, 2021, while this lawsuit was pending but after the motion for summary judgment had been filed, Governor Parson signed into law HB 271, which subjected all public health orders, ordinances, rules and regulations issued by Counties and County Health Boards on their own authority to immediate termination by the political subdivision's legislative body. § 67.265.1 and .2. R-A3-4. In addition, it also limited the duration to 30 days or less during a state of emergency, and for 21 days or less when there is no state of emergency, unless extended by a majority of the political subdivision's governing body. § 67.265.1.1-2; R-A3-4. It also restricted political

subdivisions to one order per 180-day period if not extended by the legislative body. Section 67.265 specifically prohibits DHSS from authorizing any local health officials, health officer, local public health agency or public health authority from creating or enforcing any order issued by a County or County Health Board in a manner inconsistent with the restrictions therein, which essentially abrogates the stricken regulations. § 67.265.6; R-A4.

In August 2021, the Attorney General filed suit against St. Louis County alleging, among other things, that multiple, consecutive mask mandates issued by the County medical director and terminated by the St. Louis County Council violated Section 67.265.1.1. R-A3. *See* Petition, Case No. 21-SL-CC03334. R-A83. The Attorney General also filed suit against Jackson County to strike certain public health orders on substantive grounds. *See* Petition, Case No. 2116-CV17899. R-A137. This lawsuit was pending at the time.

G. The trial court granted summary judgment in the underlying case.

On November 22, 2021, the trial court granted summary judgment for Plaintiffs-Respondents. D35. The trial court determined (1) that DHSS had unlawfully expanded the General Assembly's enabling act by authorizing rulemaking by bureaucratic edict outside MAPA's procedural protections for the creation of "rules" as defined by section 536.010.6; and (2) that the DHSS regulations at issue violated the separation of powers provisions of the Missouri Constitution by authorizing DHSS agents/designees to both legislate and to indefinitely close businesses, schools and assemblies based on their

personal opinion with no hearing or appeal rights.[9] D35 pp. 2-10. The trial court did not strike down any local orders, rules or regulations issued pursuant to Chapter 192.300 or any other state or local law. Rather, Judge Green stated that any hypothetical public health orders that constitute "rules" as defined by section 536.010, issued by "local health authorities" as defined by 19 CSR 2020.010(26) (i.e. individual bureaucrats in their capacities as DHSS designees), from authority derived from 19 CSR 20-20.040, were null and void as a consequence of the judgment striking the DHSS regulations. D35 p. 17.

H. Putative Intervenors were aware of this case long before the entry of judgment on November 22, 2021.

Putative Intervenor St. Louis County, the leader of the pack, was aware of the underlying case for many months. St. Louis County's attorneys repeatedly mentioned this case in pleadings and at oral argument in Case No. 21SL-CC03334. St. Louis County pointed out in footnote 18 on page 15 of its suggestions filed on August 3, 2021:

> There can be no dispute that the authority of the Director of the St. Louis County Department of Public Health, Dr. Khan, is found ***elsewhere***, i.e., not in Mo. Rev. Stat. § 67.265. *See Shannon Robinson, et al. v. Mo. Dep't of Health and Senior Services*, Case No. 20AC-CC00515, Brief of the Missouri Department of Health and Senior Services in Opposition to Plaintiffs' Motion for Summary Judgment (recognizing that ***a local health director*** has authority to issue public health orders under 19 CSR 20-20.040(2)(G), which empowers a local health authority to "[e]stablish appropriate control measures which may include . . . the creation and enforcement of adequate orders to prevent the spread of the disease").

[9] The trial court also found there to be an equal protection problem, but that portion of the opinion is superfluous, as the regulations were stricken primarily for other reasons.

D72 p. 3; R-A109, 123. (emphasis supplied). Even Putative Intervenors recognized that "elsewhere" included only the DHSS's defensive position regarding its own state regulations, not state law or local law.

At oral argument before the Court of Appeals, Judge Gabbert posed a question to "all appellants in the case," inquiring why they "waited until the case played out in the trial court to file a motion to intervene" on a "well-known, publicized issue." Counsel speaking for all Putative Intervenors admitted:

> This case was filed in December 2020. We were well aware of it. I had been litigating with Mr. Sauer [then Solicitor General] for many months. I had lawsuits the attorney general had brought against St. Louis County. We watched the case.

Audio recording of Oral Argument, August 30, 2022, beginning at 2:22 – 3:31; https://drive.google.com/file/d/1IoiCXuyLSpeW4B60qY1ILhgb8A_0ckjY/view?usp=share_link.[10] Yet no Putative Intervenor ever intervened to try to become a defendant while the case was pending.

I. DHSS decided, and the Attorney General announced, that his office would not appeal the trial court's judgment.

On December 2, 2021, the Attorney General publicly announced that his office would not appeal the trial court's judgment. D65 p. 2.

The Director of DHSS made post-judgment statements to the Senate Gubernatorial Appointments Committee that the agency would not pursue an appeal:

[10] The Western District Court of Appeals provided this audio recording to counsel for Plaintiffs-Respondents.

> "[W]e took more time to review [the judgment]. . .I think we understand the extent of the ruling now much better than we did that first day we received it. . .and we didn't pursue the appeal after that."

Acting Director of DHSS, Don Kaueroff, January 31, 2022.

https://media.senate.mo.gov/Video/2022%20Video/Moon/Moon%20Gubs.mp4. 31:00.

J. Putative Intervenors' executives, in response to the November 22, 2021, judgment, first called Plaintiffs names, criticized Judge Green's county, his political affiliation, and his status as an elected officeholder, and then tried unsuccessfully to get the public health orders they wanted by following local ordinances.

St. Louis County Executive Sam Page was very disappointed by the judgment. He did not immediately intervene. Instead, one week after the decision, on November 29, 2021, Executive Page publicly stated at a press conference:

> What has been inconsistent over the last year is what we're supposed to do legally in order to implement strong mask policies. Radical ideologues who still don't think COVID is real have moved the goalposts so many times I've lost count. . . .The COVID-deniers are proud that they have set up strong legal obstacles to making it hard to implement strong COVID policies. The latest challenge came last week when an elected Republican judge – a politician – who has to run for reelection in a rural Trump-loving county entered a ruling about masks in a friendly-fire lawsuit between radical anti-maskers and the Attorney General.

Executive Page also admitted in his press conference that his "path forward" was *to convince the County Council to issue mask mandates* in accordance with St. Louis County Ordinance 602.020(3). D74; https://www.youtube.com/watch?v=pqzVnM57X7g.

The next day, the Democrat-controlled County Council refused to approve Page's proposed mask mandate, and it failed. D75, D76.

At the December 7 County Council meeting, Executive Page *again* attempted to have the County Council approve a masking order. D75. At a press conference on

December 6, Executive Page was asked, "What happens if the [County] Council rejects a mask mandate [tomorrow]?" He admitted that he would attempt to follow the local County ordinance:

> "First of all, we are still in a legal quagmire with the Cole County Court and we'll follow that legal pathway to wherever it ends. . .There is another pathway to masks through an existing ordinance in St. Louis County and that's a simple vote by the County Council to support that."

D74; https://www.youtube.com/watch?v=VWOHO8_PsKE. Executive Page recognized that the correct pathway to mandatory masks was a health department recommendation subject to approval by the St. Louis County Council. But, on December 7, 2021, a bipartisan majority of the County Council again refused to approve his suggested mask mandate. D75.

On December 12, 2021, Jackson County Executive Frank White, Jr. sought the Jackson County Legislature's approval of a county-wide mask mandate. D77. On December 13, 2021, the Jackson County legislature considered the mask mandate and, like St. Louis County, defeated it. D78.

At that point, the only remaining Missouri county with a mask mandate was St. Louis City, where the City's Health Department and medical director followed local City laws, as well as State laws, in enacting the public health order pursuant to 192.300 requiring masking in all indoor public places, businesses, and schools. The judgment had no impact on the validity and effect of the City's lawfully issued public health order which had been approved by its Board of Aldermen.

K. After political disagreements between the executive and legislative branches did not result in the mandatory masking orders desired by Executives Page and White, they attempted to intervene.

After they were unable to achieve their desired results through their county legislatures, and after the Attorney General sent letters to schools and health departments, the Page and White administrations filed motions to permit St. Louis County and Jackson County to intervene in the case on December 14, 2021. D36. The grounds for intervention were to "uphold their public health orders promulgated pursuant to DHSS regulations (and therefore the regulations themselves)." D36 p. 2. They also alleged that the judgment "hinders" their ability to implement public health orders, and that the Attorney General refused to appeal "in bad faith." D36 p. 2.

L. Two County Health Boards of Trustees organized under Chapter 205, RSMo, and one county health administrator, attempted to intervene.

On December 14 and December 17, 2021, two county health center boards (Livingston and Jefferson) and Melanie Hutton, administrator of the Cooper County Health Department, filed motions to intervene. D52, D56. Hutton and LCHB stated:

> Despite the apparent limited applicability of Paragraphs 5 and 7 in the Judgment only to county health orders deriving their authority from 19 CSR 20-20.010 et seq., the Attorney General sent letters dated December 7, 2021 to all local county health agencies. . .and while a guest on *This Week in Missouri Politics*, the Attorney General stated 'you can't be delegating that kind of authority to these county health bureaucrats' and 'we've sent correspondence out letting these folks know, including school boards, know what the ruling is and they're expected to follow the law because we will be enforcing it.'

D52 pp. 2-3; D56 pp. 2-3. Hutton asserted that her intervention was necessary for the following reason:

> Based on the apparent misinterpretation of the scope and applicability of the Judgment by the Attorney General, as well as his statements that the judgment will not be appealed by the State, the confusion and significant uncertainty which have been created will continue to persist regarding: (a) the lawful authority of the Cooper County Public Health Center to enact county health orders and regulations under § 192.300; (b) whether its prior health regulations are lawful; and (c) whether the Court intended for the judgment to render null and void all county health orders."

D52 p. 4. LCHB made nearly identical assertions. D56 p. 4. JCHD alleged in its motion to intervene that its current health regulations enacted under § 192.300 "are drawn into question by" the Attorney General's December 7, 2021 letter. D60 p. 3. They were concerned about his letter, not the judgment, which they believed had "limited applicability." D52 pp. 2-3; D56 pp. 2-3.

M. The trial court denied the motions to intervene on the last day of the 30-day post-trial period set by Rule 75.01, and this appeal followed.

On December 22, 2021, the trial court denied the motions to intervene. D87. The five Putative Intervenors appealed the judgment to the Western District Court of Appeals, which refused to overturn the trial court's decision, noting that Putative Intervenors' assertions that they had timely filed their motions was "disingenuous." *Robinson v. DHSS*, WD85070 (Mo. App. Sept. 13, 2022); R-A167. This transfer followed.

In late 2022, Plaintiff/Respondent Shannon Robinson sought legal bills pursuant to the Missouri Sunshine Act, Chapter 610, RSMo for expenditures on this case from all Putative Intervenors. Only St. Louis County produced any legal bills, which described the matter as "COVID-19" through 2021, and beginning January 2022, the bills described the matter as "ARPA Litigation," or "American Recovery Plan Act." R-A175-188. Pursuant to St. Louis County Ordinances, the County is not authorized to hire outside counsel

except for certain reasons, including "COVID." SLCO § 110.040 (O. No. 27973, 1-5-21); R-A80. The St. Louis County Council has never voted to intervene in this case.

STANDARD OF REVIEW

This appeal should be dismissed because the intervention was filed post-judgment and Putative Intervenors never became parties to the case, they are not aggrieved, and have no standing to appeal. *State ex re. AJKJ, Inc. v. Hellmann*, 574 S.W.3d 239 (Mo. 2019); *Yuncker v. Dodds Logistics*, *LLC*, 649 S.W.3d 141 (Mo. App. 2022). If the appeal is not dismissed for lack of jurisdiction due to Putative Intervenors' lack of standing, the trial court's decision to reject the post-judgment intervention should be affirmed.

Rule 52.12(a) prohibits ANY intervention application that is untimely, whether permissive or as of right. *City of Bridgeton v. Norfolk & W. Ry. Co.*, 535 S.W.2d 99 (Mo. banc 1976); *Corson v. Corson*, 640 S.W.3d 785 (Mo.App. 2022); Rule 52.12(a); *Model Hous. & Dev. Corp. v. Collector of Revenue*, 583 S.W.2d 574, 576 (Mo. App. 1979).

It is within the trial court's discretion to determine whether a motion to intervene is timely, and a trial court's decision on timeliness will be reviewed for an abuse of discretion. *Corson,* 640 S.W.3d at 787; *F.W. Disposal South v. St. Louis City*, 266 S.W.3d 334, 339 (Mo. App. 2008); *State ex. rel Strohm v. Bd. Of Zoning Adjustment of Kansas City*, 869 S.W.2d 302, 304 (Mo. App. 2000). This review is "confined to considering whether the trial court's ruling was clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable to shock the sense of justice and indicate a lack of careful consideration." *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 131 (Mo. banc 2009); *Myers v. City of Springfield*, 445 S.W.3d 608, 615 (Mo. App. 2014). "[I]f reasonable people can differ

about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *American Tobacco Co., Inc.*, 34 S.W.3d at 141.

Putative Intervenors request a lower standard of review – one that only considers whether the trial court's decision is "against the weight of the evidence, it is unsupported by sufficient evidence, or it erroneously declares or misapplies the law." *Mack*, 349 S.W.3d at 476; *see also Johnson v. State*, 366 S.W.3d 11, 20 (Mo. banc 2012). That is not the correct standard for review of an unsuccessful post-judgment intervention. *Mercantile Bank of Lake of the Ozarks v. Jones,* 890 S.W.2d 392 (Mo. App. 1995); *Corson*, 640 S.W.3d at 788 ("Even if a party has demonstrated a right to intervene, Rule 52.12 (a) gives the circuit court the discretion to deny the motion if the application is untimely..."); *see also Frost v. Liberty Mut. Ins. Co*., 813 S.W.2d 302, 304 (Mo. banc 1991) ("there was never any dispute that Liberty Mutual had a right to intervene under Rule 52.12(a); the question on appeal in Frost I was whether the application, filed after entry of judgment, was timely. . . .). Moreover, even if the intervention had been timely, an intervention would be, at best, permissive. Rule 52.12(b)(4); § 507.090.3.4 and .5. A23; R-A24. Rulings on timely permissive intervention are reviewed for abuse of discretion. *Johnson,* 366 S.W.3d at 20.

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE PUTATIVE INTERVENORS' LACK STANDING TO APPEAL.

This court should dismiss this appeal because Putative Intervenors never became parties and therefore lack standing to appeal the case. This Court has an obligation, acting sua sponte if necessary, to determine its authority to hear the appeals that come

before it. *Gibson v. Brewer*, 952 S.W.2d 239, 244 (Mo. banc 1997) "The right to appeal is purely statutory and, where a statute does not give a right to appeal, no right exists." *First Nat'l Bank of Dieterich v. Pointe Royale Prop. Owners' Ass'n, Inc.*, 515 S.W.3d 219, 221 (Mo. 2017). The right to appeal within the meaning of section 512.020 is jurisdictional. *Stichler v. Jesiolowski*, 547 S.W.3d 789, 793 (Mo. App. 2018).

Missouri courts have recently repeatedly dismissed appeals filed by proposed intervenors who applied to intervene after a Rule 74.01 judgment was entered, but failed to successfully intervene before the expiration of the Rule 75.01 30-day post-trial period over which the trial court retains jurisdiction over the judgment. *Hellmann*, 574 S.W.3d at 244 (issuing permanent writ preventing exercise of jurisdiction where the trial court issued a Rule 74.01 judgment on July 19, 2018, a proposed intervenor filed a motion to intervene on August 14, 2018, and the trial court did not grant motion to intervene within 30 days of judgment); *Yuncker,* 649 S.W.3d at 149 (dismissing an appeal by a proposed intervenor where a Rule 74.01 judgment was entered on May 26, 2021, the proposed intervenor applied to intervene on May 26, 2021, which included a motion to vacate and set aside the judgment, and the trial court did not permit the intervention or vacate and set aside the judgment within the 30-day post-trial period); *Williston v. Missouri Dept. of Health and Senior Svcs*., 461 S.W.3d 867 (Mo. App. 2015) (dismissing appeal by proposed intervenor where rule 74.01 judgment was entered on July 21, 2014, motion to intervene was filed on August 19, 2014, and trial court did not grant the motion to intervene or vacate the judgement by August 20, 2021, 30 days after judgment).

There is substantial precedent supporting a dismissal of an appeal brought by *unsuccessful* post-judgment proposed intervenors. "The rule that only parties to a lawsuit,

or those that properly become parties, may appeal an adverse judgment, is well settled." *Underwood v. St. Joseph Bd. Of Zoning Adjustment*, 368 S.W.3d 204, 209 (Mo. App. 2012); *Dieterich*, 515 S.W.3d at 221; section 512.020, RSMo (2016). To be a party, a person must "either be named as a party in the original proceedings or be later added as a party by appropriate trial orders." *MILA Homes, LLC v. Scott*, 608 S.W.3d 658 (Mo. App. 2020); *see also Allen v. Bryers*, 512 S.W.3d 17 (Mo. banc 2016) (proposed intervenor was not a "party" entitled to move to set aside a judgment due to the proposed intervenor's failure to secure intervention in the underlying action). A motion to intervene is not an approved post-trial motion. Rule 75.01. An unsuccessful post-judgment intervenor does not become a party and therefore has no standing to appeal.

Also, this Court has previously recognized, "Intervention as contemplated by Rule 52.12 is intervention *in a pending case*." *Frost v. Liberty Mut. Ins. Co*., 813 S.W.2d at 304 (emphasis supplied), *citing In re Chain Yacht Club, Inc. v. St. Louis Boating Ass'n*, 225 S.W.2d 476, 479 (Mo.App.1949); *Alamo Credit Corp. v. Smallwood*, 459 S.W.2d 731 (Mo. App. 1970) ("Intervention is thus ancillary to and contemporaneous with adjudication of the original action."). Post-judgment interventions are untimely because they are not interventions in a pending case.

Moreover, a judgment issued *prior to* an application to intervene does not "incorporate" a trial court's later order denying a motion to intervene. *State ex rel. Koster v. ConocoPhilips Co*., 493 S.W.3d 397 (Mo. 2016) (interlocutory orders issued *before* judgment are incorporated into final judgment); *Yuncker,* 649 S.W.3d at 148 (where trial court took no action to open or amend the Rule 74.01 judgment before the expiration of

the 30-day period following May 26, 2021, the proposed intervenor did not become a party to the suit by the mere filing of a post-judgment motion to intervene). Further, "nothing in section 512.020 (or any other statute) grants the right of immediate appeal to one whose motion to intervene as a matter of right is denied in an interlocutory order." *ConocoPhilips*, 493 S.W.3d at 400. Therefore, unsuccessful post-judgment intervenors cannot establish that they are aggrieved by a final judgment and lack standing to appeal it. Based on the reasoning in *ConocoPhilips*, they also lack standing to directly appeal the post-judgement order denying their post-judgment intervention.

Here, the trial court entered a Rule 74.01 judgment on November 22, 2021. D35. It was denominated as a "judgment," signed by the judge, and disposed of all issues in the case. Rule 74.01; D35. Putative Intervenors' applications were filed during the 30-day period during which the judge has authority to modify the judgment. Rule 75.01; R-A52; D36, D52, D56, D60. During this 30-day time frame, the trial court retained jurisdiction over the case for the purpose of deciding any post-trial motions, including a motion for new trial, to vacate, reopen, correct, amend or set aside judgment, filed only by the parties. *Id*., Rule 78.04; 75.01, 74.06(b); R-A52-54; *Hellmann*, 574 S.W.3d at 243. No parties filed a post-trial motion. No rule or statute granted the trial court authority to even rule on the post-judgment motion to intervene by non-parties because a motion to intervene is not an approved post-trial motion. *D.R. v. T.J.B. (In re E.R.S.)*, 584 S.W.3d 363, 367 (Mo. Ct. App. 2019) ("In the absence of an applicable Supreme Court rule, the trial court did not have authority to entertain [proposed intervenor's] motion to set aside.").

The trial court denied the post-judgment interventions on the very last day of the 30-day post-trial period – only a few hours before the judgment would become final for purposes of appeal. D87. The final, appealable judgment that was issued on November 22, 2021, was not reconsidered, vacated, or modified. Based on *ConocoPhilips*, that November 22, 2021 judgment does not incorporate Judge Green's subsequent order denying the intervention. Thus, Putative Intervenors were unsuccessful in their attempt to intervene, never became parties, and lack standing to appeal the trial court's judgment or the order denying intervention. This appeal should be dismissed.

It is worth noting that according to clear and unambiguous precedent, if the trial court had ruled on the motions after the 30th post-trial day, or if the trial court had never ruled at all, or even if the trial court had granted the intervention after the 30th post-trial day, this appeal would unquestionably be dismissed based on *Hellmann*, *Williston* and *Yuncker*. In fact, Plaintiffs-Respondents filed a motion to dismiss on these same grounds before the Court of Appeals, and the court noted in footnote 2 of its opinion:

> Because we find no error in the trial court's denial of Intervenors' post-judgment motion to intervene, we need not and do not address whether Intervenors had a right to appeal the denial, which could not have operated to delay the finality of the judgment, or whether denial of the post-judgment motion to intervene, even if erroneous, would have permitted this Court to afford any practical relief in light of the finality of the judgment.

Robinson v. DHSS, WD85070 (Mo. Ct. App. Sep. 13, 2022). R-A174.

This Court should make no distinction between proposed intervenors whose post judgment motions are denied, and those whose post-judgment motions are ignored or granted on the 31st day. Neither intervention scenario results in an aggrieved party entitled to appeal. Therefore, even though the trial court ruled on the last day of the 30-

day post-trial period, the holdings in *Hellmann*, *Williston* and *Yuncker*, should be controlling and mandate dismissal here.

Dismissal under these circumstances would not dramatically change Missouri jurisprudence on post-judgment interventions. Nearly 50 years ago or more, this Court considered all post-judgment interventions untimely with limited exception in special cases where "substantial justice" mandated an untimely intervention. In two reported cases in which a proposed intervenor's motion was denied by a trial court during the 30-day post-trial period, this Court upheld the trial court's denial of the application to intervene both times, resulting in the same outcome as *Hellman*, *Williston*, and *Yuncker*. *See City of Bridgeton,* 535 S.W.2d 99 and *Eakins v. Burton*, 423 S.W.2d 787, 790-791 (Mo.1968). Putative Intervenors have not cited to a single case where this Court overturned the denial of a post-judgment intervention on the grounds that "substantial justice mandated intervention." *Compare City of Bridgeton* and *Eakins* (denying post-judgment intervention after issuance of Rule 74.01 judgment where substantial justice did not mandate an intervention) with *Dunivan v. State*, 466 S.W.3d 514 (Mo. 2015) (permitting intervention by Attorney General where a state statute provided the state an unconditional right to intervene and the circuit court had not denominated its ruling as a "judgment" until several months after the Attorney General sought to intervene). In *Dunivan*, this Court did not even need to consider whether "substantial justice" mandated intervention because the Attorney General timely filed a motion following an adverse interlocutory ruling, but before a Rule 74.01 judgment was issued by the trial court. 466 S.W.3d at 517-518.

Intervenors who unsuccessfully attempt an untimely post-judgment intervention lack standing to appeal the judgment regardless of whether the trial court denies their intervention before the 30-day period. *American Tobacco Co., Inc.*, 34 S.W.3d at 127 (Mo. banc 2000) ("[i]n the absence of a statute conferring an unconditional right of intervention, an applicant seeking intervention must file a timely motion..."). [11] Failure to so hold would produce an absurd result: rulings granting intervention after the 30-day trial period are void and leave the proposed intervenor with no right to appeal (*Hellmann*), but orders denying intervention issued during the 30-day post-trial period would be appealable. This Court should apply the holdings in *Hellmann*, *Williston*, and *Yuncker*, and the reasoning in *ConocoPhilips*, and dismiss this appeal where Putative Intervenors' lack standing to directly appeal the trial court's order.

II. IF THIS APPEAL IS NOT DISMISSED FOR LACK OF JURISDICTION, THE TRIAL COURT'S DECISION SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PUTATIVE INTERVENORS' UNTIMELY INTERVENTION.

If this appeal is not dismissed, the trial court's decision to reject the post-judgment intervention should be affirmed. The trial court did not abuse its discretion in denying the post-judgment intervention because Putative Intervenors' intervention was untimely. Judge Green's decision is not "clearly against the logic of the circumstances then before the court" and was not "so arbitrary and unreasonable to shock the sense of justice and indicate a lack of careful consideration." *American Tobacco*, 34 S.W.3d at 131.

[11] No statute confers on Putative Intervenors an unconditional right to intervene.

"Preliminarily, it is important to note that an application for leave to intervene subsequent to trial is unusual and seldom granted." *Frost v. Liberty Mutual,,* 813 S.W.2d at 304 (Mo. banc 1991). There is considerable reluctance on the part of the courts to allow intervention after the action has gone to judgment and a strong showing – an especially heavy burden - will be required of the applicant. *F.W. Disposal South, LLC*, 266 S.W.3d at 339; *Frost v. White*, 778 S.W.2d 670 (Mo. App. 1989); *City of Bridgeton*, 535 S.W.3d. 100 ("post-judgment motions are rare and at this stage of the proceedings and [rules permitting interventions of right] should generally be applied less liberally"), *citing Hobson v. Hansen*, 44 F.R.D. 18, 22 (D.C. 1968). The burden of proving all elements of a right to intervene – including timeliness – is on the moving party. *Mack v. Mack*, 349 S.W.3d 475 (Mo. App. 2011) (a proposed intervenor must have presented affidavits or verification relied upon to support intervention); *Mercantile Bank of Lake of the Ozarks*, 890 S.W.2d at 394.

A. The trial court properly denied the untimely post-judgment intervention application because it was brought only to change the purportedly disappointing outcome of the underlying case, an argument that this Court has repeatedly rejected. (Responds to Points I and II).

Post-judgment interventions for the purpose of changing a disappointing outcome of a case have been repeatedly rejected as untimely. *City of Bridgeton*, 535 S.W.3d. 99; *Eakins v. Burton*, 423 S.W.2d at 790-791; *State ex rel. Ashcroft v. American Triad Land Co., Inc*., 712 S.W.2d 62 (Mo. App. 1986); *F.W. Disposal South LLC*, 266 S.W.3d at 340; *Strohm*, 869 S.W.2d at 304.

This Court's decision in *City of Bridgeton*, 535 S.W.3d. 99, is dispositive. In *City of Bridgeton*, the city had rezoned certain property from residential to industrial, and the

proposed intervenor successfully organized a referendum to force the city to rezone it back to residential via ordinance. *Id*. at 99-100. A railroad sued the city to overturn the zoning ordinance and return the property to industrial. *Id*. The city defended its ordinance throughout the litigation, but the trial court entered judgment against the city, holding that the only reasonable use of the land was for industrial purposes. *Id*. at 100. The city decided not to appeal the adverse judgment. *Id*. at 100. The plaintiff attempted to intervene for the sole purpose of appealing a judgment. *Id*. This Court held that the plaintiff's post-judgment intervention was not timely made, that her protest amounted only to a "dissent" from the decision not to appeal, and that she failed to show that her interests were not represented by the city *prior to* judgment in the trial court. *Id*. at 101-102. This Court held that under these circumstances, a "furtherance of justice" did not require her intervention. This Court also noted that the trial court could have found she gambled on the outcome of the case and "now seeks a retrial of the original issues." *Id*. at 102; *see also Strohm*, 869 S.W.2d at 304 (affirming the trial court's denial of a motion to intervene, in part because the applicants only moved to intervene after they became unhappy with the handling of the case).

Likewise, in *F.W. Disposal South,* 236 S.W.3d at 337*,* the parties to litigation entered into a consent judgment. The putative intervenors disliked the outcome and applied to intervene for the purpose of appealing the consent judgment. *Id*. The court affirmed the trial court's denial of the intervention application, reasoning that the decision reached by the parties would be "jeopardized by an appeal," and they would be prejudiced if forced to continue the case. *Id*. The court recognized that the parties to that case (including, ironically, St. Louis County) "decided it was in the public's best interests

to forego appeal rights in exchange for [a dismissal of the claims]" and recognized that all parties have an interest in "avoiding continuing litigation and its attendant expenses." *Id*.

Here, Putative Intervenors attempt intervention because they were displeased with the outcome of the case. Their intervention attempt was merely a "protest" of the decision to not appeal – a strategy previously rejected by this Court in *City of Bridgton* and *Eakins*. In *Eakins*, this Court denied a post-judgment intervention filed three days after judgment was entered, stating:

> We also have the view that the motion of Western was not timely. It had notice concerning all the proceedings, including the fact that judgments were to be taken. Western apparently assumed that defendant would make a vigorous defense and that it could safely refuse to defend under the circumstances. As we view the situation Western took a calculated risk that defendant would contest the claims of plaintiffs and, when he did not do so, sought to have the court give it another chance to defend. We think it is obvious, under these circumstances, that to be timely the motion to intervene should have been filed before the judgments were entered.

Eakins v. Burton, 423 S.W.2d at 790-791.

The underlying case was pending for almost a full year prior to judgment. It was well-known. A major law school – one that had a contract to consult on public health matters with at least one Putative Intervenor – held a CLE to discuss it in June 2021. Putative Intervenors referenced it in legal briefs filed months before the judgment was issued. After the judgment, Executive Page held a press conference criticizing Judge Green, accusing him of being a Republican judge up for reelection in a rural "Trump-loving" county, calling the Plaintiffs names, interjecting partisan opinion, and spreading doom and gloom. D74. The attorney representing all Putative Intervenors at oral

argument told the Appellate Court that they were aware of the case while it was pending and that they had watched it.[12]

Only after judgment was entered, and only after elected legislators in St. Louis County and Jackson County refused to do what their executives wanted, and only after the Attorney General announced that DHSS would not appeal, did Putative Intervenors, led by Executive Page's administration in St. Louis County, make a 13th hour attempt to enter the case. D36. They state that they assumed the Attorney General would appeal it, but they now ask this court to give them a chance to relitigate the case after it was already decided.

Allowing an intervention for the purpose of appealing a judgment after the parties in interest made a decision to no longer pursue the case on appeal is prejudicial to the parties in interest. *F.W. Disposal South LLC*, 266 S.W.3d at 340. Like the city's decision not to appeal in *City of Bridgeton,* 535 S.W.3d. 99, the decision to not appeal this case is akin to a settlement or compromise – the decision will discontinue litigation against a government agency. Allowing Putative Intervenors to join so their attorneys can step into the shoes of the Attorney General, post-judgment, solely to appeal a judgment against the state that the state has decided to leave in place, would prejudice DHSS, the state, and Plaintiffs who have an interest in avoiding continuing litigation and its attendant

[12] In their brief, Putative Intervenors assert that there is no evidence in the record that all of them were aware of the case pre-judgment, but the burden of proving a right to intervene belongs to the intervenors. Putative Intervenors produced no evidence establishing that they were unaware of the lawsuit, and their attorney admitted during oral argument before the Court of Appeals that they were all well aware of it and watched it. https://drive.google.com/file/d/1IoiCXuyLSpeW4B60qY1ILhgb8A_0ckjY/view?usp=share_link, beginning at 2:22 – 3:31.

expenses. *See Strohm*, 869 S.W.2d at 305 (denying post-judgment intervention as untimely where parties worked a compromise, and the intervention attempt would prejudice the party that had achieved the desired outcome in the case). The Court of Appeals found this argument particularly compelling, citing with approval *State ex rel. Ashcroft v. American Triad Land Co., Inc*., 712 S.W.2d 62 (Mo. App. 1986) (rejecting an intervention attempt after the Attorney General filed a consent judgment).

Like the proposed intervenors in *City of Bridgton, Eakins, F.W. Disposal South LLC*, and *American Triad Land Co.,* Putative Intervenors cannot establish that under the current circumstances, a "furtherance of justice" or "substantial justice" requires their untimely intervention solely to change the outcome of a case that the parties – in this case a state agency, represented by the Attorney General - decided not to appeal. This Court should affirm the trial court's decision that is consistent with existing precedent.

B. Putative Intervenors cannot escape untimeliness of their intervention by mischaracterizing the holding and exaggerating the impact of the trial court's judgment. (Responds to Points I, II, III, and V)

Putative Intervenors have not submitted any evidence establishing that substantial justice demands a post-judgment intervention here - no affidavits, testimony, or other verified evidence. Instead, Putative Intervenors mischaracterize both state law and the impact of the trial court's judgment in an attempt to justify their 13th-hour intervention. They accuse Judge Green of issuing a bad opinion and argue that it really must be appealed so if the Attorney General will not do it, this Court should allow them to do so. That was the crux of the Putative Intervenors' oral argument before the Court of Appeals, during which their attorney stated, "We just think this judgment needs to be reviewed." Audio Recording of Oral Argument, August 30, 2022, beginning at 11:18.

https://drive.google.com/file/d/1IoiCXuyLSpeW4B60qY1ILhgb8A_0ckjY/view?usp=share_link.

A summary of the law and effect of the judgment seems necessary. As set forth in the statement of facts, DHSS (and therefore DHSS's designees) is specifically forbidden from making, creating or promulgating rules and regulations that have the effect of substantive law outside of MAPA's procedural protections. §§ 536.021, 536.024, 536.028. "Any agency announcement of policy or interpretation of law that has future effect and acts on unnamed and unspecified facts is a 'rule'" subject to MAPA. *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). The General Assembly delineated the remedy in the event that any rules are created by agencies or their designees outside procedural safeguards of MAPA: they are "null" and "void." Section 536.021.5, .7; R-A32-35.

The trial court struck DHSS regulations that subdelegated DHSS's rulemaking power (or power to create, or write, or make, generally applicable orders, rules, or laws) to a "local health authority," a.k.a. a county health officer or director of a city or county health department, and authorized that same employee with unfettered discretion to close assemblies based on his/her personal opinion about public health. 20 CSR 20-20.040(2)(G)(H)(I), (6); 20 CSR 20-20.050(3). He concluded that the regulations delegating rulemaking authority unlawfully expanded the enabling act by circumventing MAPA, and regulations that permitted legislating as well as unfettered and indefinite closures based on a bureaucrat's personal opinion clothed an administrative official with arbitrary and unlimited discretion in violation of Mo. Const. art. II, §1.

When Judge Green used the term "local health authority," he was never referring to a local health department or to St. Louis County, Jackson County, or any elected county health board organized under Chapter 205, RSMo, as Putative Intervenors would have this Court believe. He referred to "local health authorities *as defined by 19 CSR 20-20.010(26),*" which are individual bureaucratic employees acting as DHSS agents. D35 p. 17, par. 7. The trial court also declared that consequentially, any hypothetical rules that may have been independently created by DHSS designees ("local health authorities") without the procedural protections required by MAPA were "null and void," consistent with Section 536.021.5, .7. R-A32-35. It is really that simple.

Putative Intervenors have no legitimate interest in this case and cannot be defendants because there is nothing for them to defend. The judgment had no impact whatsoever on the authority of a county or county health board with respect to the creation of county-wide, city-wide, or town or village-wide public health orders or laws tissued by any political subdivision of the state, including county health center Boards of Trustees. The trial court even recognized that Missouri statutes give wide latitude to counties and county health boards – not unelected county health officers or unelected medical directors - to make or promulgate orders, rules and regulations in their own jurisdictions pursuant to their charters, and bylaws and state and local laws in their respective jurisdictions. Section 192.300; A27; D35 p. 12; *see also Cedar County Commission v. Governor Michael Parson*, No. SC 99488 (March 21, 2023) (the legislature "saw fit to delegate to county commissions power to promulgate public-health rules and ordinances"), *citing Vimont v. Christian County Health Dep't*, 502 S.W.3d 718, 720 (Mo. App. 2016). A city council and its mayor have authority to enact ordinances

related to public health as outlined in Chapter 77, RSMo. § 77.260; R-A5. Likewise, the General Assembly authorized the boards of trustees of towns and villages to enact ordinances to "prevent the introduction and spreading of contagious disease." § 80.090; R-A7. Further, the authority of local and state health authorities to "enforce" local and state rules and regulations does not "limit the right of local authorities to make such further ordinances, rules and regulations. . .which may be necessary for the particular locality *under the jurisdiction of such local authorities*." § 192.290. A26. Clearly, local authorities, like cities, townships, villages, counties, county health boards, or local health agencies are permitted to create rules and laws "under the jurisdiction of such local authorities." A26.

The judgment *increased* and *preserved* the power of *counties* and *county health boards,* including Putative Intervenors, by specifically invalidating the only source of authority that gave individual DHSS-appointed bureaucrats an administrative veto over them.[13] This increase in the power of counties and county health boards is evidenced by the inability of Executives Page and White to achieve the results they personally desired – a mandatory countywide masking order – over the objection of the duly elected legislative bodies in St. Louis County and Jackson County. Even Judge Gabbert noted, at oral argument, that with respect to the DHSS regulations, the "trial court is saying that delegating [rulemaking] to an individual director was a problem," and noting that a local

[13] Even Putative Intervenors admitted in their brief to the 21st judicial circuit that the source of this individual bureaucrat authority to write laws was the DHSS regulations challenged by Plaintiffs/Respondents.

department of health "could vote to implement some of these same restrictions." Counsel for Putative Intervenors replied, "I think that's true. . ." Oral Argument, August 30, 2022, beginning at 9:19; https://drive.google.com/file/d/1IoiCXuyLSpeW4B60qY1ILhgb8A_0ckjY/view?usp=share_link. Judge Gabbert was correct about the limited effect of the trial court's judgment.

Putative Intervenors spend an inordinate portion of their brief attempting to convince this court that 192.290 authorized individual bureaucrats to engage in rulemaking, which it does not do. Missouri statutes clearly authorize licensed physicians working as "county health officers[14]" to "*enforce*" DHSS rules and regulations. *See* §§192.260, 192.280. R-A16; A25. Local and state health authorities are also authorized by state law to *enforce* local ordinances, rules and regulations and DHSS rules and regulations throughout the state. § 192.290. A26. This Court has definitively distinguished the administrative discretion required to *enforce* a law from discretion to *create* law – the latter of which cannot be done. "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." *State ex rel. Orr v. Kearns,* 304 Mo. 685, 264 S.W. 775, 781 (Mo. 1924).

[14] Incidentally, neither Hutton nor any of Putative Intervenors' medical directors are "county health officers" because they are not licensed physicians. Hutton, for example, is a registered nurse serving as an administrator of a health center.

If Putative Intervenors disagree with this interpretation and believe that section 192.290 gives their health department employees the authority to enact rules and regulations on their own, they can file a declaratory judgment action asking a court to so interpret it. The availability of such an alternate action necessarily bars their intervention here. *American Tobacco Company*, 34 S.W.3d at 122 (rejecting a pre-judgment intervention where the proposed intervenor could protect its interest by bringing a separate action); *Mercantile Bank*, 890 S.W. 2d at 394-395 (where appellant had the option of suing the underlying plaintiff, the appellant failed to show that his interest would be impaired if he was not allowed to intervene, and substantial justice did not mandate that appellant be allowed to intervene.).

Further, all orders, rules, ordinances and regulations issued by Putative Intervenors are now subject to the procedural limitations set forth in section 67.265, including oversight by the political subdivision's legislative branch as well as time limitations. R-A3. Thus, the only branch of government that actually curtailed the enactment of orders, ordinances, rules and regulations by counties and county health boards was the General Assembly when it enacted section 67.265, not the trial court when it struck DHSS regulations.

Putative Intervenors did not meet their heavy burden to warrant an exception to the rule that an application must be timely. Their mischaracterization of state law and exaggeration of the impact of the trial court's judgment does not help them meet their burden.

C. Putative Intervenors' disagreement with the Attorney General's litigation strategy and their support for the pre-judgment status quo does excuse their untimeliness. (Responds to Points I and II).

Putative Intervenors ask this court to create an exception to the rule that an intervention must be timely so that they can step into the Attorney General's shoes and defend the state because they disagree with how he managed the litigation. They want this Court to let them represent the state for the Attorney General and litigate the case the way they would litigate it as if they had won his election in order to continue to defend the pre-judgment status quo.

This Court has refused to allow even a pre-judgment intervention by non-state parties to assert a defense in support of the validity of a state law, let alone a post-judgment intervention to defy Missouri's Attorney General. In *Comm. For Educ. v. State*, 294 S.W.3d 477 (Mo. 2009), the plaintiffs challenged the validity of Missouri's school funding formula. The state was the only defendant. Prior to trial, three taxpayers sought to intervene and join the state in defending the formula based on Rule 52.12(b). 294 S.W. 3d at 486. The taxpayers argued that they had a defense in common with the state and therefore should be allowed to permissively intervene to defend the formula, "the very position the state took below." *Id*. at 487. The trial court granted the intervention, which was opposed by the parties: both Attorney General Jay Nixon and Plaintiffs (which included other taxpayers). *Id*. at 486. This Court held that granting the intervention was an abuse of discretion, reasoning that the provision allowing intervention when an applicant's defense and the main action have a question of law or fact in common was

inapplicable to the taxpayers because they "merely reasserted the State's defenses." *Id*. at 487. This Court stated:

> Here, Defendant-Intervenors, as defendants, neither challenged the State's expenditures nor sought to restrain the State in any manner. Instead, they sought to defend the status quo funding formula, the very position the State took below. Applying taxpayer standing to Defendant-Intervenors would open the floodgates to allow all Missouri taxpayers to seek intervention in the State's defense of constitutional and statutory challenges. No public policy is served by allowing intervention premised on a taxpayer's mere interest in the subject matter of a suit.

Id. This Court also noted that "Defendant-Intervenors could have sought leave to express their views in an amicus brief rather than through intervention." *Id*.

In another watershed case, Attorney General Nixon decided to dismiss an appeal, and this Court protected Attorney General Nixon's decision and even denied an interested amicus leave to file an amicus brief supporting an appeal that would have defied Attorney General Nixon's litigation decision. *Missouri Department of Health and Senior Services v. Peter Busalacchi*, SC73677 (January 26, 1993); R-A157-161. In that matter, DHSS, initially represented by Attorney General William Webster, filed a motion for injunctive relief to prevent Peter Busalacchi from removing his daughter's feeding tubes. Attorney General Webster appealed the trial court's decision in favor of the father and the case eventually reached this Court. Attorney General Nixon won election in November 1992 to succeed Attorney General Webster. One hour after Attorney General Nixon was sworn into office, and after over two years of state-sponsored litigation, he filed, on behalf of DHSS, a motion to dismiss the appeal. He also filed suggestions stating that, "There is no longer an adversarial relationship between the appellants and respondents. . .[and] the

motion to dismiss should be granted." R-A159. Attorney General Nixon's policy decision placed DHSS on the same side as the respondent in the appeal, even though that position was the polar opposite of the position taken by outgoing Attorney General Webster mere hours earlier.

Ten days later, before the motion to dismiss was granted by this Court, the Association of Disabled Persons sought leave to file an amicus brief supporting DHSS's former position, arguing that the "state's interest in the protection and preservation of human life" should not be defined by the "subjective and arbitrary decision" of Attorney General Nixon. R-A163-166. This Court denied the Association's motion for leave one day before it granted Attorney General Nixon's motion to dismiss. R-A162.

The Missouri Attorney General possesses the authority to decide whether the state will litigate a matter. "It is for the attorney general to decide where and how to litigate issues involving public rights and duties and to prevent injury to the public welfare." *State ex rel. Igoe v. Bradford*, 611 S.W.2d 343 (Mo. 1980); *State ex rel. Taylor v. Wade*, 231 S.W.2d 179 (Mo. banc 1950). The Missouri Attorney General derives his power to represent the state from both statutory and common law. *Clark Oil & Refining Corp. v. Ashcroft*, 639 S.W.2d 594, 596 (Mo. banc 1982). Section 27.050 directs the Attorney General to "have the management of and represent the state in all appeals to which the state is a party." § 27.050; R-A1; *see also Dunivan,* 466 S.W.3d at 518 (the Attorney General has a right to appear in all proceedings when the state's interests are at stake).

The Attorney General is responsible for "managing" the instant litigation against the state. § 27.050, R-A1. Like the proposed intervenors who wanted to defend the

funding formula in *Comm for Educ*., 294 S.W.3d at 487, Putative Intervenors want to defend state regulations, like the Attorney General did below. Putative Intervenors admit that the interest at issue in the underlying case was purely a state interest, stating "local health authorities act, in effect, as DHSS' deputies in preventing the spread of infectious diseases." The "public health orders" issued by Doucette and the Franklin County Medical Director (submitted to the trial court as evidence of Plaintiffs-Respondents' standing) were not "local" public health orders, they were ***state*** rules because they were made by state agents within county boundaries derived from state, not local, authority. As further evidence that Putative Intervenors purport to represent the state's interests, not their own personal interests, they purport to represent the interests of others who have never requested intervention, including Sedalia School District (D40), a Rockwood School District Bus Driver (D41), and Laclede County (based on a newspaper article derived from a Facebook post) (D45, D72 p. 13). Putative Intervenors assert, without support, that DHSS wanted to appeal the case and that the Attorney General failed to do so in "bad faith." Non-verified articles and correspondence submitted by Putative Intervenors do not even support their claims. D37, D38.

The decision whether to appeal this case therefore belongs to the Attorney General and certainly does not belong to attorneys retained by a politically motivated County Executive with excess federal ARPA funds and an unlimited budget. The Attorney General has authority over whether the state's interest in resurrecting stricken regulations is worth fighting for. In light of the restrictions placed on all public health orders by section 67.265, it clearly was not. No Missouri Court has ever held that substantial justice

requires an untimely, post-judgment intervention to overturn litigation decisions made by an Attorney General.

D. Neither Putative Intervenors' offense at the Attorney General's post-judgment statements, nor the content of post-judgment newspaper articles misstating the judgement's effect, can help Putative Intervenors establish that substantial justice mandates intervention. (Responds to Points I and II).

Since Putative Intervenors cannot refute the Attorney General's clear authority to manage this case, Putative Intervenors assert that their purported "rights" were impeded by the Attorney General – not by the judgment itself or by the litigation – but by his post-judgment statements and conduct that Putative Intervenors describe as a "campaign of litigation terror against local governments and schools." D51 p. 1. They further accuse him of using the judgment as a "sword against public health orders." D51 p. 1, 8, D52, D56. As clearly articulated in their brief and in their proposed responsive pleadings, Putative Intervenors really, really don't like what Attorney General said and did AFTER the judgment and they think that justice requires that they prove him wrong.

The truth is helpful. Putative Intervenors submitted non-verified letters to health agencies and school districts, in which the Attorney General reiterated the judgment and wrote:

> "all . . .public health orders *that are based on any of the invalidated regulations or issued outside the protections of the Missouri Administrative Procedure Act* are null and void. You should stop enforcing and publicizing any such orders immediately."

D46, D47 (emphasis supplied). The Attorney General purportedly tweeted his interest in investigating "violations of mask mandates or other public health orders that are null and void under the judgment." D39.

To further support their claims of reigning "chaos," Putative Intervenors did not submit a single affidavit to the trial court. Instead, they submitted a slew of news articles reporting on the judgment. D37; D63, D65-71. Newspaper articles are not evidence of anything. Moreover, they were predominantly inaccurate – note the woefully inaccurate headline that described the judgment as a "ruling barring COVID-19 orders." D37. This Court has more pressing matters than educating reporters and a couple of counties and county health boards about the judgment, while the rest of Missouri's 111 counties, 89 county health boards, and thousands of cities and towns go about their regular business.

Further, Putative Intervenors' argument that the Attorney General improperly "weaponized" the judgment, and used it as a "sword" in a "campaign of terror" surely begs this question: If the Attorney General improperly "weaponized" the judgment, isn't this an admission by Putative Intervenors that the judgment did not outlaw public health orders by local political subdivisions, cities, counties, and county health boards? Putative Intervenors are more interested in attacking the Attorney General and using this proceeding to attempt to prove that his statements were misleading, than overturning the judgment to protect their purported interests. This case has been brought at massive cost to St. Louis County taxpayers, and it seems that politics is really driving it – the desire for a black eye on a political foe. This dispute may be fair game on Twitter, Facebook or on a campaign blog – but not in this tribunal.

Putative Intervenors have several alternative options they could pursue to prove that the Attorney General mischaracterized the effect of the judgment in his post-judgment letters. They could sue the Attorney General via a declaratory judgment action to clarify whether his letters constitute legitimate "orders." Again, where a separate lawsuit is available to putative intervenors to resolve their concerns about post-judgment statements, they cannot establish that substantial justice mandates intervention. *State ex rel. Nixon, Att. General v. American Tobacco Company*, 34 S.W.3d 122 (Mo. 2000); *Mercantile Bank*, 890 S.W.2d at 394-395.

Executive Page could also follow the "pathway" he identified in his press conference – adhere to local law and ask the County Council to approve his restrictions. Or he could inform schools, cities and towns inside his county that they are entitled to issue whatever public health orders they want, consistent with local procedures, rather than attempt, at taxpayer expense, to get state authority back into the hands of his own unconfirmed appointee so that he can once again usurp their authority. This would have achieved his purported goals. "Substantial justice" does not require that any of the late Putative Intervenors become a defendant after judgment was issued based on what the Attorney General or anyone else reportedly said about the judgment after the fact.

E. Even if the intervention had preceded judgment, granting the intervention would have been an abuse of the trial court's discretion (Responds to Points II and VIII).

Even if the intervention had preceded judgment, granting the intervention would have been an abuse of the trial court's discretion because Putative Intervenors have no claims that justify a permissive intervention.

Only the state may seek intervention in this matter. Section 507.090.3.3, the controlling provision in this matter, provides:

> In all cases and proceedings wherein the validity of a statute, regulation or constitutional provision of this state affecting the public interest is drawn in question, and the state or an officer, agency or employee thereof is not a party, the *state of Missouri* may in the discretion of the court be permitted to intervene, upon proper application.

§ 507.090.3.3 (emphasis supplied); R-A24; Rule 52.12(b)(3); A24 (designating governmental subdivisions as permissive intervenors in cases challenging the regulations issued by the political subdivisions).

The instant case challenged the validity of DHSS regulations. DHSS is already a party. Pursuant to Section 507.090.3.3, only the State of Missouri was authorized by state law to request intervention. R-A24. Missouri statutes do not grant any other parties the same permissive opportunity to intervene at the trial court's discretion.

This case did not directly challenge or strike as invalid any local orders, rules or regulations issued by Putative Intervenors, who were not sued. Rather, the trial court simply articulated the remedy in section 536.021.5, .7 should DHSS or any of DHSS's designees issue rules outside of MAPA protections – such rules would be null and void. R-A32-35. Putative Intervenors assert in Section VIII of their brief that in so articulating this consequential effect, the judgment "purported to bind" parties not before the court. Putative Intervenors, including the counties and the health boards, are not local health authorities, so the judgment did not even mention them. They were not parties and cannot be and were not bound by the judgment. Putative Intervenors suggest that the trial court is prohibited from striking DHSS regulations deputizing "local health authorities" with

certain power unless every director of every city or county health department was a defendant in the case. Moreover, the judgment was directed to DHSS and its designees, with specific instructions to DHSS to inform its designees of the judgment. No county or health board could be held in contempt. *State ex rel. Chevra Kadisha Cemetery Ass'n v. Reno*, 525 S.W.3d 201, 204 (Mo. App. 2017). This argument is very far-fetched and irrelevant.

Even if it had directly stricken some public health orders (evidence of which Putative Intervenors have never submitted, and, in fact, specifically dispute), Missouri law clearly establishes that interventions by political bodies to protect the validity of statutes, rules and regulations are necessarily permissive and not as of right. § 507.090.3.4; Rule 52.12 (b)(3). R-A24; A23.

A ruling on a timely permissive intervention is reviewed for an abuse of discretion. *Johnson,* 366 S.W.3d at 20. Intervening to defend a state law's status quo has been repeatedly rejected. *Comm. For Educ.*, 294 S.W.3d at 487 (finding an abuse of discretion when the trial court granted an intervention to proposed intervenors whose interest was in upholding challenged state law); *Myers v. City of Springfield,* 445 S.W.3d 608, 615 (Mo. App. 2014) (upholding trial court's denial of proposed intervenors' permissive intervention where they claimed that the validity of city regulation was at issue, and they were not the city, which was already a party to the case); *City of Bridgeton*, 535 S.W.2d at 102 (affirming denial of intervention to protect the status quo of a zoning ordinance after the city chose to abandon its defense by not appealing an adverse judgment).

In the instant case, if the trial court had granted the intervention, it would have been an abuse of the trial court's discretion. The trial court's decision to deny the intervention certainly was not clearly against the logic of the circumstances and was not so "arbitrary and unreasonable to shock the sense of justice and indicate a lack of careful consideration." *American Tobacco Co., Inc.*, 34 S.W.3d at 131.

F. Putative Intervenors never submitted any evidence to the trial court of a legitimate "interest" in the litigation (Responds to Points I and II)

An "interest" in litigation can be relevant to whether substantial justice mandates a post-judgment intervention, although it is not dispositive. *City of Bridgeton*, 535 S.W.2d at 100-102 (even though proposed intervenor had significant interests in the outcome of litigation, substantial justice did not mandate her intervention to appeal a judgment against the city that it had decided not to appeal). An "interest" in litigation is also relevant to a right to intervene, which is not applicable here, where the intervention at issue was untimely and, at best, permissive.

Even a timely proposed intervenor must have submitted evidence in the form of affidavits or other reliable testimony or exhibits to the trial court establishing an *interest* relating to the to the property or transaction that is the subject of the action. Rule 52.12(a) (emphasis supplied); *Mack v. Mack*, 349 S.W.3d 475 (Mo. App. 2011). "The type of 'interest' required to intervene as a matter of right in an action must be a direct and immediate claim to, and have its origin in, the demand made or the proceeds sought or prayed by one of the parties to the original action." *LeChien v. St. Louis Concessions, Inc.*, 33 S.W.3d 602, 604 (Mo. App. 2000) (rejecting an attorney's intervention request

where the threat of a subsequent malpractice action was conjectural and there was no immediate and direct claim by the attorney upon the subject of the litigation). The interest must also be so immediate and direct that the proposed intervenors will either "gain or lose by direct operation of the judgment." *American Tobacco Co., Inc*., 34 S.W.3d at 128; *The Hertz Corporation v. State Tax Commission*, 528 S.W.2d 952 (Mo. banc 1975).

A "mere, consequential, remote or conjectural possibility of being affected as a result of the action" is always insufficient to prove interest. *Myers*, 445 S.W.3d at 611; *see also and State ex rel. Koster v. ConocoPhillips Co*., 493 S.W.3d 397 (Mo. banc 2016) (putative intervenor failed to establish an interest in litigation where he might have a future claim against a party dependent on outside factors); *see also In re Clarkson Kehrs Mill Transp. Dev. Dist*., 308 S.W.3d 748 (Mo. App. 2010) (rejecting a pre-judgment intervention request by taxpayers who would consequently be required to pay for the transportation projects challenged in the litigation). Where a putative intervenor fails to establish that an action would either impose a legal liability on the intervenor or directly impact the intervenor's legal interests, the putative intervenor has no direct or immediate claim. *Prentzler v. Carnahan*, 366 S.W. 2d 557, 564 (Mo. App. 2012).

Putative Intervenors have never submitted any verified evidence establishing that they have a real, legal and direct interest in the underlying litigation. Putative Intervenors loosely identify and very briefly assert, without any reliable evidence to back up their assertions, two non-specific, vaguely consequential interests on Pages 30-31 of their substitute brief: (1) that they have legal rights that "flow" from the stricken DHSS

regulations, and (2) that they have a "direct and compelling interest in preventing the spread of contagious disease in the communities they serve."[15]

As for the first purported interest, Putative Intervenors do not have "rights" that "flow" from the regulations. DHSS cannot give Putative Intervenors any rights. DHSS only has the authority given to it by the General Assembly, and DHSS can only subdelegate powers given to it by the General Assembly. *State ex Rel. Rouveyrol v. Donnelly*, 365 Mo. 686, 694, 285 S.W.2d 669 (Mo. banc 1956). Counties and County Health Boards do not possess any protectible due process "rights." The Missouri Supreme Court addressed this issue when it analyzed whether a municipality's "rights" were impaired by passage of a retrospective law. *Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys. of Mo*., 950 S.W.2d 854, 858 (Mo. banc 1997) ("the legislature may constitutionally pass retrospective laws that waive the rights of the state" and by extension, the legislature may also waive or impair the vested rights of political subdivisions); *see also City of Chesterfield v. Dir. of Revenue*, 811 S.W.2d 375, 377 (Mo. banc 1991) (holding municipalities are not "persons" and do not have due process rights). The alleged power to promulgate rules on behalf of DHSS is not a "right" belonging to Putative Intervenors, it is merely authority. *State ex Rel. County of St. Charles v. Mehan*,

[15] In their brief to the Court of Appeals, Putative Intervenors asserted a third interest: an alleged interest in not having "conditions" imposed on them when it comes to rulemaking. It appears they have now dropped this argument, possibly because it is crazy. Their logic would invalidate MAPA altogether. A political desire to avoid state and local law that place "conditions" on rulemaking clearly does not create a legally cognizable interest in the lawsuit challenging DHSS regulations.

854 S.W.2d 531, 533 (Mo. App. 1993) (the "right" of eminent domain is not inherent in municipalities and cannot be exercised without authority from the state). They also have no "right" to rely on the existence of DHSS regulations, the substance and existence of which are not within their control. *Id.*

Regarding Putative Intervenors' second purported interest, preventing the spread of contagious disease, they have never offered any evidence or even explained to this Court how the underlying litigation affects whether they can prevent the spread of disease. It does not. The underlying litigation and the trial court's judgment had *no impact whatsoever* on rules or regulations issued by charter counties (like St. Louis County and Jackson County) *in their capacities as counties*, or rules or regulations issued by county health center boards of trustees (like Livingston) *in their capacities as county health boards*. Putative Intervenors have never identified a single order/rule issued by them – the counties, county health boards, or Melanie Hutton – affected by the judgment. In St. Louis County's and Jackson County's suggestions in support of their motion to intervene, they make bald assertions that the judgment "impairs local public health authorities' ability to combat the COVID-19 pandemic" and to "respond to other contagious diseases" like "HIV/AIDS" and others. D51, p. 10. They told the trial court that "great confusion" exists throughout the State of Missouri regarding who, if anyone, is authorized to address matters of public health" and that "chaos now reigns." D 51, p. 10. Yet Putative Intervenors never explained why or how striking the regulations would cause St. Louis County and Jackson County to suffer so much. They certainly never submitted an iota of verified or reliable evidence that they would be unable to prevent the

spread of contagious disease. On the contrary, Plaintiffs-Respondents submitted evidence that following the judgment, local authorities (political subdivisions) had no trouble deciphering their authority. D80. School districts informed their constituents, "The responsibility for these decisions lies with us as district leaders and school board members." D80 p. 2.

Putative Intervenors' complaints are also not grounded in reality. An individual "local health authority" remains authorized to perform a litany of health measures in his/her capacity as a DHSS agent: inspect facilities in a condition to spread communicable disease, confer with reporting entities like physicians and hospital staff, establish appropriate locations for quarantine if needed, collect samples and specimens for laboratory analysis, investigate and record findings of communicable disease, offer immunization clinics, examine or cause to be examined any person or animal suspected of having a contagious disease and identify and isolate those who are suspected of or who test positive for a contagious disease, notify or ensure adequate notice is given to potentially exposed individuals regarding an outbreak, exclude infectious children from school, require entities to report contagious disease to either the DHSS or a local health authority and require the publication of results of these reports on a quarterly schedule, investigate dog bites, test and quarantine people, facilitate public health initiatives, coordinate health services between medical facilities, and several more DHSS-regulated activities too numerous to include here, which continue unaffected by the trial court's judgment. See 19 CSR 20-20.020(7); 19 CSR 20-20.030; 19 CSR 20-20.040(1), (2)(A-F, J), (3-7); 19 CSR 20-20.050(1), (2); 19 CSR 20-20.060; 19 CSR 20-20.070, 19 CSR 20-

20.075; 19 CSR 20-20.080; 19 CSR 20-20.090, 19 CSR 20-20.091, 19 CSR 20-20.091, 19 CSR 20-20.100, 19 CSR 20-20.200. A43.

Moreover, the DHSS website shows substantial public health initiatives: https://health.mo.gov/. DHSS activities continue uninterrupted, and local governments continue to enact whatever county-wide local laws they determine are appropriate.

Indeed, Putative Intervenors explicitly admit that they do not have any interest in the litigation. Executive Page agrees that St. Louis County was unaffected by the judgment as evidenced by his campaign tweet denying that any of St. Louis County's health orders have ever been invalidated. R-A189.

Melanie Hutton, administrator of the Cooper County Public Health Center, admits that the judgment did not have any impact on public health orders issued by Cooper County Public Health Center. D52 p. 1. Hutton has not presented any evidence that she ever issued a public health order on her own, or that the judgment had any impact on what her employer – the Cooper County Health Center – has authorized her to do on her own. Even if, hypothetically, she has an affinity for state authorized power, this preference does not translate to a need to insert herself in place of DHSS as a defendant in the lawsuit. Her purported "interest" in this case is clearly not a "direct claim" to the subject matter of the litigation for purpose of intervention as of right.

LCHB agrees with Ms. Hutton that the judgment did not impact its public health orders. D56. Both Hutton and LCHB admit that that all public health orders in Cooper County and Livingston County were issued pursuant to the Cooper County Health Board and LCHB's "express statutory authority under § 192.300." D52 p. 1. Hutton and LCHB

further admit that they understand the scope of the judgment, and that it does not impact their ability to enact public health orders in the future:

> "Despite the apparent limited applicability of ¶¶ 5 and 7 in the Judgment *only to county health orders deriving their authority from 19 CSR 20-20.010 et seq.*, the Attorney General sent letters. . . ."

D52 p. 2. Their honest admissions establish that none of the Putative Intervenors have an interest in intervention. Instead of blaming the trial court for the alleged public confusion, Hutton and LCHB blame the Attorney General and his post-judgment remarks. D52, D56.

The proposed intervenor in *City of Bridgeton* established far more substantial an interest in the underlying litigation than what Putative Intervenors have established here. 535 S.W.3d 99. She offered evidence that she was a Councilwoman representing the ward where property that had been rezoned by the judgment was located, she was a resident of the community and sought to protect herself, her home, her family and her life from the multifarious consequences of proposed development of the property in question, and the value of her property and that of other class members would be diminished. *Id*. at 101. She stood to lose far more than the average Missouri resident by operation of the judgment that rezoned her property, yet she was still prohibited from intervening post-judgment, even when the City of Bridgeton decided not to appeal the case that it lost in court. *Id.* at 100. Likewise, the trial court properly rejected an intervention here because Putative Intervenors clearly did not make the "strong showing" that is required to warrant a post-judgment intervention. *F.W. Disposal South, LLC*, 266 S.W.3d at 339; *Frost v. White,* 778 S.W.2d at 673.

Putative Intervenors primarily rely on one case[16] in seeking to overturn the trial court's denial of their intervention request: *State ex rel. Mayberry v. City of Rolla*, 970 S.W.2d 901 (Mo. App. 1998). In *Mayberry*, the Court of Appeals for the Southern District was not asked to review a trial court's decision; rather, an intervention was first requested at the appellate stage. The *Mayberry* plaintiff, a part-time judge, had sued the City of Rolla for unpaid pension benefits. State law established a pension system for local government, known as the Missouri Local Government Employees' Retirement System ("LAGERS") (the entity required to pay the pension). *Id*. The LAGERS Board of Trustees had promulgated a regulation defining "employee" which clearly established that the plaintiff - a part-time judge - was not entitled to a pension because he did not work 1500 hours or more in a year. *Id*. The trial court entered judgment in favor of the plaintiff, and the City appealed. LAGERS intervened at the appellate level, joining the city's appeal, asserting that the regulation issued by its Board prohibited the pension payments, yet the judgment required LAGERS to pay a pension to an employee in violation of its own regulation. *Id*. LAGERS had a direct financial stake in the outcome because it was required by the judgment to pay an employee – who was ineligible by

[16] Putative Intervenors also attempt to rely on other cases where intervention was not challenged. In *Breitenfeld v. Sch. Dist. of Clayton*, 399 S.W.3d 816, 836 (Mo. banc 2013), the trial court, in its discretion, permitted certain plaintiffs to intervene after judgment. The Court mentioned it as background, but the intervention decision was not challenged and its appropriateness was not considered. It is not even clear from the case whether the defendants opposed the intervention. *Breitenfeld* is not relevant. In another case cited by Putative Intervenors, *City of Pac. v. Metro Dev. Corp*, 922 S.W.2d 59, 62 (Mo. banc 2013), a defendant in a property annexation case was voluntarily dismissed by the plaintiffs during the litigation. The defendant was permitted to re-enter when the judgment created a monetary burden for defendants and altered the defendants' property rights. *City of Pac* is not pertinent to the instant matter.

LAGERS' own regulation - a pension, even though the City for which the plaintiff worked had not contributed to the LAGERS system.

Mayberry did not involve a review of a trial court's decision. The appeals court's sua sponte approval of the intervention application was never reviewed for error. It is also not clear what factors were considered by the appeals court, or whether the plaintiff even opposed the intervention at all. It was also not brought for the purpose of protesting the defendant city's litigation decisions, as the city had already appealed the case.

Counties, County Health Boards and their employees do not stand to become liable as a result of the judgment. Counties and County Health Boards can still issue all rules and regulations that they could issue pre-judgment by following their local charters, ordinances and state law. The underlying litigation did not make it illegal to issue mask mandates, mandate business and school shutdowns, place gathering restrictions, ban dinner parties and family dinners. Local political subdivisions, including counties and county health boards, can still adopt mask mandates, shut everything down, ban family dinners for large families, and force children to refuse high-fives. St. Louis County can utilize Ordinance 602.020 to completely decimate every County business and restrict every child from playing soccer if it wishes. R-A75; A27. The only issue facing Executives Page and White was that in their respective counties, they could not convince the elected legislative bodies of the effectiveness of the executives' preferred policies. That does not translate to an inability of St. Louis County or any other County or County Health Board to prevent contagious disease. The Counties are not impeded by the judgment, they are impeded by their political disagreements with their legislative bodies.

Putative Intervenors do not suffer economically as a result of the judgment.[17] They are not bound by the judgment. They have no direct interests or direct claims upon the subject of the litigation. They do not stand to lose anything and have no unique interests beyond those interests shared by any other Missouri resident who became unhappy with a decision of an elected governing body, or any other Missouri resident who would have preferred to live under the rule of a county or health board employee. *State ex rel. Schneider v. Stewart*, 575 S.W.2d 904 (Mo.App.1978) (to show interest in litigation, the claim must act directly on an interest of the person who claims the right of review in a manner distinct from the effect on the general public); *see also State ex rel. Farmers Mutuals Auto. Ins. Co. v. Weber*, 273 S.W.2d 318, 364 Mo. 1159 (Mo. banc 1954) (finding no abuse of discretion where a trial court denied an intervention by a proposed intervenor that lacked sufficient direct interest in the outcome).

The Missouri General Assembly already changed the law to give legislative bodies veto rights over local generally applicable public health orders, ordinances, rules and regulations, as well as time limits, no matter who or what entity made them. § 67.265. This Court should uphold the trial court's denial of intervention application because these post-judgment intervenors not only filed too late, they sought the opportunity to substitute their management of this case for the authority of the Attorney General, they

[17] Putative Intervenors' reliance on *Meyer v. Meyer*, 842 S.W.2d 184 (Mo. App. 1992) is also misplaced. The trial court had taxed guardian ad litem costs against the appellant, who was a non-party. *Id*. at 188. When costs are assessed against a party, the party has the right to contest the assessment and appeal if necessary. *Id*. The court held that the non-party had no right to intervene and become a party, but the court determined that because the intervenor had an *economic* interest in the outcome, substantial justice required a *very limited* intervention solely to raise the issue of taxing the fees as costs to be paid by the non-party. *Id*. at 189.

filed for the sole purpose of protesting the judgment based on unhappiness with the outcome, and they failed to articulate to the trial court, and still cannot articulate to this Court, a specific, legally protectable interest in the subject matter of the underlying suit. *ConocoPhilips*, 493 S.W.3d at 404. The trial court's decision was proper.

G. DHSS agents designated by DHSS to act with DHSS authority have the same interests in litigation as DHSS, and those interests are represented by the Attorney General, who did not appeal the case.

Putative Intervenors also ask this Court to excuse their untimeliness by alleging that the Attorney General's office used to represent their purported interests and no longer does. Their argument is improper.

Courts consider whether a proposed intervenor's interests were adequately represented at the trial stage – not at the appellate stage of a proceeding. *City of Bridgeton*, 535 S.W.2d 102 (where the proposed intervenor's interests were represented at the trial court level, the decision by the City not to appeal did not lend any merit to her claim that her interests were unrepresented). Putative Intervenors' allegation that the decision not to appeal suddenly rendered their purported interests unrepresented is directly in conflict with this Court's holding in *City of Bridgeton*.

Putative Intervenors have been inconsistent in their attempt to show that the Attorney General's office did not represent their interests at the trial court level. In their first request to transfer to this Court, they made the galling accusation that their own attorneys' expertise was required to appeal the judgment since the attorney general "abdicated his duty to represent DHSS's interests" by not properly defending the

lawfulness of the DHSS regulations at the trial court level. *See* Case No. SC99478, Brief in Support of Application for Transfer, page 6.

They switched theories at the Court of Appeals, arguing that the Attorney General "vigorously" defended the DHSS regulations that they held in high favor, and therefore they could have had no idea he would decide not to appeal, and it was instead the refusal to appeal that triggered their right to intervene. The Court of Appeals noted that the Attorney General had sued multiple Putative Intervenors for blatantly ignoring the procedural requirements of Section 67.265 in enacting public health orders before the judgement in this case was ever issued, and that their purported shock that the Attorney General decided not to appeal was disingenuous. *Robinson v. DHSS*, WD85070 (Mo. App. Sept. 13, 2022). The attorney for Putative Intervenors even admitted at oral argument that there was always a risk the Attorney General would not appeal the case. Audio recording of Oral Argument, August 30, 2022, beginning at 10:40. https://drive.google.com/file/d/1IoiCXuyLSpeW4B60qY1ILhgb8A_0ckjY/view?usp=share_link.

Putative Intervenors include local political subdivisions with no interests in this litigation beyond a political preference by their Executives for DHSS regulations that deputized their local bureaucrats with DHSS's rulemaking power. The Attorney General represents DHSS's interests, and Putative Intervenors' employees are DHSS agents for purposes of this matter. All interests were aligned at the trial court level and the Attorney General and DHSS did not appeal. Thus, this case should be over.

III. TWO OF THE PUTATIVE INTERVENORS ARE PROCEDURALLY BARRED FROM INTERVENING BECAUSE THEY FAILED TO FILE AN ANSWER REQUIRED BY MISSOURI RULE OF CIVIL PROCEDURE 52.12 (C).

LCHB and Hutton failed to comply with the procedural requirements of Missouri requiring an intervenor to file a motion to intervene accompanied by a "pleading setting forth the claim or defense for which intervention is sought." Rule 52.12 (c). Neither of these Putative Intervenors filed the required pleading with the trial court setting forth a claim or defense in the litigation. D52, D56. Thus, even if this Court determines that the trial court abused its discretion to deny the intervention, LCHB and Hutton are procedurally barred from pursuing an intervention.

IV. EVEN IF THIS COURT ALLOWS INTERVENTION, PUTATIVE INTERVENORS HAVE NO STANDING TO APPEAL THE MERITS OF THE UNDERLYING CASE BECAUSE THEY WERE NOT PARTIES TO THE UNDERLYING LITIGATION AND WERE NOT AGGRIEVED BY THE DECISION (Responds to Putative Intervenors' Point IIIA)

Putative Intervenors do not have a statutory right to appeal the merits of this case. They are not parties. *Underwood*, 368 S.W.3d at 209 ; *First Nat'l Bank of Dieterich,* 515 S.W.3d at 221. They cannot appeal a decision striking state regulations where they were not parties. Even if this Court were to overturn the trial court's decision to deny the post-judgement application to intervene, the trial court will need to have an opportunity to decide the outcome of whatever portion of the case they allege is against them. The trial court, if forced to include Putative Intervenors as defendants, could determine that Putative Intervenors are not aggrieved by the stricken regulations and therefore lack

standing. Only if they are allowed to become parties to this case, and only after they are aggrieved by a final judgment on the merits, will they have a right to appeal it.

V. IF THIS COURT DETERMINES THAT PUTATIVE INTERVENORS WERE AN AGGRIEVED PARTY ENTITLED TO APPEAL THE UNDERLYING CASE, THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS BECAUSE THE STRICKEN REGULATIONS UNLAWFULLY EXPANDED MISSOURI STATUTES AND VIOLATED THE NONDELEGATION PROVISIONS OF THE MISSOURI CONSTITUTION (Responds to Putative Intervenors' Points III, IV, V, VI)

The legal question involved in this case is quite simple: Can the Missouri Department of Health and Senior Services authorize an employee of a county health department to independently promulgate generally applicable rules that have the effect of substantive law governing the conduct of residents and businesses? And can DHSS, without any legislative standards, authorize individual bureaucrats to indefinitely close schools and places of public and private assembly based on the bureaucrat's personal opinion with no appeal rights? The answer is clearly no. The trial court properly granted summary judgment.

A. DHSS regulations that clothed one bureaucratic employee as a DHSS agent with the power to close schools and places of public and private assembly based on the bureaucrat's personal opinion with no due process rights were unconstitutional. (Responds to Putative Intervenors' Points III, IV and V)

Perhaps the most egregious of the DHSS regulations was contained at 19 CSR 20-20.050(3), which provided as follows:

> The local health authority. . . is empowered to close any public or private school or other place of public or private assembly when, in the opinion of the local health authority, the director of the Department of Health and Senior Services or the director's designated representative, the closing is necessary to protect the public health. . . Any school or other place of public or private assembly that is ordered closed shall not reopen until permitted by whomever ordered the closure.

19 CSR 20-20.050(3); A37-38.

Putative Intervenors have barely addressed, and then only in passing, this section of the regulations that was properly stricken by the trial court.

If constitutional rights, like freedom of assembly or receipt of an education, are eliminated or closed by an administrative official, a law must contain "narrow, objective, and definite standards" to guide the official. *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). In *Shuttlesworth*, a city ordinance required a permit from the City Commissioner to participate in a "parade or procession or other public demonstration." To secure the permit, the ordinance required a written application setting forth anticipated attendance, the purpose for which it was to be held, and the streets along which the parade will go. The ordinance further stated that:

> The commission shall grant a written permit for such parade ... unless *in its judgment* the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused.

Shuttlesworth, 89 S.Ct. at 938. The Supreme Court invalidated the ordinance as unconstitutionally vague because it conferred upon the City Commission virtually unbridled and absolute power to prohibit *any* parade since the individual decisionmakers

were to be guided only by their own ideas of "public welfare, peace, safety, health, decency, good order, morals or convenience." *Id.* The U.S. Supreme Court stated:

> "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official — as by requiring a permit or license which may be granted or withheld in the discretion of such official — is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."

Shuttlesworth, 89 S.Ct. at 938-39 *quoting Staub v. City of Baxley,* 355 U.S. 313, 322, 78 S.Ct. 277, 282, 2 L.Ed.2d 302 (1958), *cited with approval by City of St. Louis v. Kiely*, 652 S.W.2d 694, 698 (Mo. App. 1983).

This Court adopted the same analysis in *Lux v. Milwaukee Mechanics Ins. Co.*, 15 S.W.2d 343 (Mo. 1929). There, a challenged ordinance clothed an appointed city official, the superintendent of buildings, with full discretionary power to declare any buildings which become unsafe from fire to be a public nuisance, and authorized him to take immediate steps to abate such nuisance. *Id.* at 344. This Court held that the ordinance was 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. *Id*. This Court reasoned that 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." *Id*.; *see also Porporis v. City of Warson Woods*, 352 S.W.2d 605, 607 (Mo.1962); *City of St. Louis v. Kiely*, 652 S.W.2d at 698-700 (holding that application of ordinance giving a commission uncontrolled discretion to deny a permit

violated adult bookstore owner's free speech rights); see also *Howe v. City of St. Louis*, 512 S.W.2d 127, 133 (Mo.1974). A definite standard or rule is one that "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 Behnke v. City of Moberly*, 243 S.W.2d 549 (Mo. App. 1951).

In the instant case, Plaintiffs/Respondents did not specifically challenge the enabling act which authorized DHSS to make and enforce orders, rules and regulations. However, a regulation issued by DHSS is subject to the same constitutional restrictions as a state statute or local ordinance enacted by a legislative body.

In *Brown-Forman Distillers Corporation v. Stewart*, 520 S.W.2d 1, 9 (Mo. 1975), a State Liquor Control Board regulation designed to protect public safety and health required as follows:

> No distiller, rectifier, out-of-state solicitor, importer or other person shall be permitted, after the effective date of this regulation, to transfer a brand from one spirituous liquor and wine wholesaler to another or to create dual distributorships on the same items without reasonable cause, which cause must be submitted to the Supervisor of Liquor Control in writing. If any spirituous liquor and wine wholesaler affected objects to the transfer, the objection must be submitted to the Supervisor of Liquor Control in writing. After due examination the Supervisor of Liquor Control shall either approve or disapprove the transfer. If the Supervisor of Liquor Control disapproves the transfer the brand shall remain in status quo...

Regulation 28, *Brown-Forman Distillers,* 520 S.W.2d at 3 (Mo. 1975). This Court declared the regulation "invalid and void because the language used is so sweeping and broad that it clothes [an administrative officer] with arbitrary power." *Brown-Forman Distillers Corp.,* 520 S.W.2d at 9. In striking the offending regulation, the Court stated:

> A trend exists to turn the judicial back when the encroachment is upon the exercise of privileges in areas subject to exercise of the police power. Nevertheless, there exists an outer perimeter in this state, beyond which such encroachment may not go.

Id. This Court rejected "reasonableness" as a sufficient standard or rule for the official's guidance, stating "unbridled bureaucracy is the subtle destroyer of representative government." *Id*. This Court further explained:

> Vagueness and uncertainty in both statutes and rules are phantoms of injustice since they lend themselves, depending upon the inclination of the individual empowered with their enforcement, to variable application, and therein lies their pervasive vice because they empower arbitrary action. "Reasonable cause" as used in regulation 28 is so lacking in certainty and definiteness as to repose arbitrary power in the Supervisor of Liquor Control, and . . . thereby constitutes an unlawful usurpation of legislative power.

Brown-Forman Distillers Corp., 520 S.W.2d at 9.

19 CSR 20-20.050(3) contained no standards for a county health director to follow when deciding what school or assembly should be closed. It was nearly identical to the ordinances that failed to survive constitutional muster in *Lux*, 15 S.W.2d 343, 344 and *Shuttlesworth,* 89 S.Ct. at 938, and the regulation that "clothed [an administrative officer] with arbitrary power" in *Brown-Forman Distillers*, 520 S.W.2d at 9. The trial court properly struck 19 CSR 20-20.050(3) because it clothed an unelected bureaucrat with carte blanche authority to close assemblies, schools and businesses indefinitely, based on the bureaucrat's personal "opinion."

Notably, this Court has struck unlawful ordinances, statutes, rules and regulations clothing administrative officials with unbridled power *even when* the closure or denial relates to issues of public health and safety. The ordinance deemed unconstitutional in

Lux permitted unfettered closure that was designed to keep people safe from compromised buildings. The regulation deemed unconstitutional in *Brown-Forman* was designed to protect public safety and health by placing limitations on distribution of alcohol beverages. Putative Intervenors' insistence that the Missouri Constitution can be ignored as long as the bureaucrat has "public health" in mind flies in the face of this Court's well-settled precedent.

Putative Intervenors cannot refute the clear precedent set by this Court in *Lux* and *Brown-Forman*, so they attempt to salvage this unconstitutional provision by asserting that 19 CSR 20-20.050(3) provided that if the Director of DHSS had chosen to declare a statewide pandemic,[18] then the Director would have been the only person authorized to close places of public or private assembly based on his own opinion. This is irrelevant as it is hypothetical – the DHSS director never declared a statewide pandemic. D2 p. 7, D118. Even if he had, however, the alternative suggested by Putative Intervenors still places the unfettered decision regarding closure into the hands of one administrative official to order a closure – the Director of DHSS - which is clearly prohibited based on *Shuttleworth* and *Lux*. Accordingly, the trial court properly struck the unconstitutional regulations at 19 CSR 20-20.050(3).

[18] A "statewide pandemic" is defined as "an outbreak of a particularly dangerous disease affecting a high proportion of the population, appearing in three (3) or more counties, *as declared by the director of the Department of Health and Senior Services*." 19 CSR 20-20.010 (37). P-App. p. A23 (emphasis supplied).

B. The trial court properly struck DHSS regulations that unlawfully expanded Missouri statutes to allow rulemaking by individual bureaucrats. (Responds to Putative Intervenors' Point IV)

The trial court properly struck 19 CSR 20-20.040(3)(G)-(I), (6) and 19 CSR 20-20.050(3) because DHSS unlawfully expanded state statutes. Rules may be promulgated by DHSS (and DHSS agents) only to the extent of and within the authority of an enabling statute. *Osage Outdoor Advertising v. State Highway Commission,* 624 S.W.2d 535, 537 (Mo. App. 1981). When interpreting the enabling act, the court must "ascertain the intent of the General Assembly from the language used in the statutes and to give effect to that intent." *Id.*, *citing Goldberg v. Administrative Hearing Commission*, 609 S.W.2d 140, 144 (Mo. banc 1980). But the enabling act "cannot be read in isolation in determining legislative intent." *Id.* (striking rules of the Board of Pharmacy that exceeded the jurisdiction and authority given to the Board).

"[I]t is for the General Assembly to say to what extent the police power shall be exercised . . . and in what manner and by whom it shall be used. A person, official or private, can have no greater part in the exercise of the police power than is accorded him by law.". *Rouveyrol*, 285 S.W.2d at 694 (holding that a delegation of a duty by the General Assembly to a state agency is subject to the limitations set forth in the statute, and does not extend to any individual officials); *see also Brown Grp., Inc. v. Admin. Hearing Comm'n*, 649 S.W.2d 874, 878 (Mo. banc 1983) (ministerial acts can be delegated to subordinates only when a statute specifically gives an official certain administrative duties); *contrast Jackson v. Board of Directors*, 9 S.W.3d 68 (Mo. Ct. App. 2000) (allowing subdelegation of ministerial acts where the enabling act *expressly* allowed the

agency Director to designate an agent or representative to do so). An agency is only permitted to delegate discretionary duties to a designee if a statute *expressly authorizes* an individual to designate a duty to a designee. *Schumer v. Lee*, 404 S.W.3d 443, 453 (Mo. App. 2013). Agency-issued rules and regulations "are void if they are beyond the scope of the legislative authority conferred upon the state agency or if they attempt to expand or modify the statutes." *Missouri Hospital Ass'n. v. Missouri Dept. of Consumer Affairs,* 731 S.W.2d 262, 264 (Mo. App. 1987).

When the General Assembly gives an individual agency employee authority to create rules, it does so very clearly. *See* § 43.509 (authorizing the Director of the Department of Public Safety to issue rules pursuant to Chapter 536); § 311.660 (authorizing the Supervisor of Liquor Control to create regulations, and providing very specific standards); § 144.705 (authorizing the Director of Revenue to make rules); § 276.626 (authorizing the Director of Agriculture to make rules); § 285.540, § 407.1101, (authorizing the Attorney General to make rules), § 701.317 (authorizing the Director of DHSS to make rules regarding administrative penalties for failure to obtain a license to inspect or abate lead). R-A2, R-A19; R-A11, R-A17, R-A18, R-A21, R-A46.

The General Assembly did not give DHSS the authority to pass along to any individual agency director or employee the authority to create generally applicable public health orders that have the effect of substantive law. § § 192.006; 192.020. Thus, based on clear precedent, individuals defined by DHSS as "local health authorities" are strictly prohibited from exercising the rulemaking powers given to DHSS. *Rouveyrol*, 365 Mo. at

694. DHSS did not abide by this principle when it enacted 19 CSR 20-20.040(2)(G)(H)(I) and (6). A35-36.

Putative Intervenors improperly rely on *Cade v. Dept. of Social Services*, 41 S.W.3d 31 (Mo. App. 2001) for their proposition that DHSS properly "subdelegated" its duties to individual local bureaucrats. In *Cade*, the plaintiff was an agency employee fired for not adhering to the dress code established by the Director of the Department of Family Services (a division director) when he refused to wear a necktie as required by his division director. *Id.* at 33-34. The plaintiff did not dispute that the Director of the Department of Social Services had authority by state statute to develop a dress code, or that the Director was permitted to delegate that authority to division directors pursuant to 590.010(2), but he disputed whether a division director had authority to decide what type of dress to permit. Id. at 36-38. The appellate court rejected the plaintiff's argument and affirmed the plaintiff's suspension from employment by his division director. Id. at 40. *Cade* has no bearing on the instant case because it involved an internal human resources policy of a local agency and did not involve the creation of "rules" as defined by 536.010.6. R-A29.

The trial court properly held that the DHSS regulations at issue unlawfully expanded the scope of the enabling act by designating individuals as DHSS agents with authority to create generally applicable "public health orders" that have the effect of substantive law.

C. The trial court properly struck DHSS regulations because they unlawfully circumvented MAPA. (Responds to Putative Intervenors' Point V)

DHSS regulations unlawfully expanded the power of DHSS to create rules via local DHSS agents in violation of MAPA's procedural safeguards as well as certain additional safeguards contained in Chapter 192, RSMo. DHSS's rulemaking authorized by section 192.020 is subject to the following procedural protections: all rule(s) promulgated by DHSS must be filed with the office of the Secretary of State for 60 days prior to becoming effective (§ 192.014.1 and .2); they must be submitted to the joint committee on administrative rules to conduct hearings upon any proposed rule or portion thereof at any time (§ 536.024.2 and .4); a 30-day period during which a final order of rulemaking is filed with the committee during which hearings may be held must pass, and the General Assembly must be given an opportunity to disapprove them. (§ 192.014(1), § 536.024.2 and .4, § 536.028). R-A15, R-A36, R-A38.

The Pennsylvania Supreme Court recently addressed a nearly identical question as the one presented in the instant case in *Corman v. Acting Sec'y of Pa. Dep't of Health*, 83 MAP 2021 (Pa. Dec. 23, 2021). The statutory duty ascribed to the Pennsylvania Department of Health was broad - "to protect the health of the people of the State, and to determine and employ the most efficient and practical means for the prevention and suppression of disease." *Id.* at 23 (quoting 71 Pa. Stat. § 1403 (a)). R-A48. Relying on this authority, the Secretary of the Department of Health independently issued a rule requiring statewide masking of all schoolchildren without following procedural safeguards. The Court held that the Secretary "was obligated to follow the procedures set

forth in the Regulatory Review Act [and other state statutes] before promulgating a new disease control measure with the force of law. Because the Secretary circumvented that process, her Order was void *ab initio*." *Corman*, 83 MAP 2021, at *55-56.; see also *Tavern League of Wis., Inc. v. Palm*, 2021 WI 33, 10 (Wis. 2021) (striking public health "orders" issued by an unelected health bureaucrat because they were "rules" essentially enacted, or published on the internet for all to follow, without being subjected to required administrative procedural safeguards). The *Tavern League* court stated, "Rulemaking ensure[s] that . . . controlling, subjective judgment asserted by one unelected official is not imposed by agencies through the abandonment of rulemaking procedures." 2021 WI at 10.

Likewise, DHSS circumvented 192.020 by authorizing local county medical directors and administrators to "create orders" and enact "control measures" as agents of DHSS that have the force of substantive law, without any regard for MAPA procedural protections. *See* 19 CSR 20-20.040(2)(G)-(I), (6). The enabling act does not give DHSS authority to authorize rulemaking power to any bureaucrat without the required procedural safeguards. Putative Intervenors' argument that "because public health orders issued by local health authorities are not subject to MAPA's rulemaking procedures, they cannot violate MAPA" is completely off base. It is *because* these public health orders issued by local health authorities were delegated by DHSS to these local health authorities that they *should have been* subject to MAPA. The trial court properly held that DHSS could not delegate, or "subdelegate" rulemaking power to local agents that it did not itself possess and, by doing so, effectively bypass or circumvent MAPA and other

procedural protections set forth in Section 192.014. This argument is dispositive on the merits of the trial court's decision with respect to the validity of 19 CSR 20-20.040(2)(G)-(J).

VI. The trial court properly held that DHSS regulations deputizing an administrative official with authority to exercise discretion to create new law violates art. II, §1 of the Missouri Constitution. (Responds to Putative Intervenors' Point IV)

Consistent with the separation of powers provision of the Missouri Constitution, art. II, § 1, local legislative bodies in Missouri counties are responsible for creating county-wide rules, orders, regulations, and ordinances that are generally applicable to all residents and businesses in the county. As the trial court recognized, it is well-established in the United States that lawmaking functions belong to elected legislative bodies, not individual bureaucrats. Even when legislative entities have attempted to authorize a non-legislative body to write laws, such laws have been held unconstitutional. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1934). In Missouri, 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). 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).

In *State v. Cushman*, 451 S.W.2d 17, 20 (Mo.1970), this Court upheld a state law that required protective headgear for motorcyclists but delegated the authority to develop standards and specifications for the protective headgear to the Director of Revenue. The Court specifically addressed the scope of administrative power as follows:

> While an executive officer may not be delegated the power to make and promulgate rules and regulations of a strictly and exclusively legislative nature the General Assembly, *having established a sufficiently definite policy*, may authorize an administrative officer to make rules, regulations or orders *relating to the administration of enforcement of the law*. In other words, *administrative power, as distinguished from legislative power, constitutionally may be delegated by the General Assembly*.

Cushman, 412 S.W.2d at 20 (emphasis supplied). The Court further described administrative power as the "administrative duty of filling in the details of the policy in implementation of the law." *Cushman*, 412 S.W.2d at 21, *citing with approval Lux*, 15 S.W.2d 343.

In the instant matter, the General Assembly never authorized an individual agency employee or designee to develop rules and regulations. The General Assembly authorized certain enforcement in the first sentence of Section 192.290 with regard to properly promulgated local ordinances, rules and regulations. But that authority to enforce lawfully enacted law is very different from exercising purely legislative functions, which is what the DHSS regulations did. The regulations clothed bureaucrats with massive power to legislate in a manner specifically prohibited by *Cushman*.

If, hypothetically, the General Assembly had enacted a law requiring a face covering for every member of the public, with standards for face coverings and with

scenarios under which they could be required (like it did protective headgear for motorcyclists in *Cushman*), and if the General Assembly had delegated to DHSS the authority to issue regulations specifying the type and style of covering, such a regulation may pass muster. But DHSS cannot constitutionally authorize individual bureaucrats to mandate undetermined restrictions on a class of people whose identities are not yet known, particularly when it is done outside of MAPA and Chapter 192 procedural safeguards. *Clay v. City of St. Louis*, 495 S.W.2d 672, 677 (Mo. App. 1973) (where city ordinance was very specific with respect to licensing but did not contain standards to guide the agency in the exercise of its discretion, the ordinances and the resulting regulations were "void" even though they both involved public safety and welfare).

Putative Intervenors suggest it would be overly burdensome for DHSS to issue public health orders for all jurisdictions across Missouri, particularly given that there can be outbreaks of certain diseases in some places but not others. Local control over creation of generally applicable and substantive local health laws by local political subdivisions is what is required by art. II, §1 of the Missouri Constitution, no matter how "burdensome" Putative Intervenors believe it may be for DHSS to comply. Their suggestion also completely ignores the authority that counties and county health boards have to legislate, relieving DHSS of any alleged burden. Further, DHSS did not even appeal the case, so Putative Intervenors' assertion that DHSS is too awfully burdened is mere conjecture.

Cases relied upon by Putative Intervenors as support for the stricken DHSS regulations do not involve orders, rules or regulations issued by individual bureaucrats and therefore are inapplicable. In *City of St. Louis v. Brune*, 520 S.W.2d 12, 16 (Mo.

1975), the city's legislative body adopted an ordinance that specifically permitted a health commissioner to inspect dwellings and dwelling units for lead paint, and if found, provide notice that the surfaces be treated in a manner provided by the Commissioner within 14 days. The ordinance necessarily left some discretion to the Commissioner to determine whether the lead paint was adequately treated to remove the offending substance. The court upheld this delegation because there were sufficient standards provided by the ordinance and the role of the Commissioner was solely to enforce the ordinance, not write new and original laws, like the DHSS regulations at issue here. Putative Intervenors gloss over the different and distinguishable facts of *Brune* and pull only self-serving dicta from the opinion. Appellants' Brief, p. 49.

In *K-Mart Corp. v. St. Louis County*, 672 S.W.2d 127, 130 (Mo. App. 1984), the court upheld an ordinance giving an administrative agency power to regulate security guards, which is also unlike the DHSS regulations in the instant case. In *ABC Security Service, Inc. v. Miller*, 514 S.W.2d 521 (1974), the General Assembly delegated to the State Board of Police Commissioners the authority to establish regulations regarding licensing of watchmen – this delegation from the General Assembly specifically provided that a state-level administrative body would create rules subject to MAPA, which is wholly different from the instant facts. *See also Coop. Home Care, Inc. v. City of St. Louis*, 514 S.W.2d 571 (Mo. 2017) (upholding a minimum wage ordinance that provided definitions for the term "employee" and "wage," reasoning that the small amount of discretion necessary to *implement* the ordinance did not render it void); *Milgram Food Stores, Inc. v. Ketchum*, 384 S.W.2d 510 (Mo. 1964) (a valid regulation properly adopted

by the State Liquor Control Board prohibiting advertising freebies for the purpose of inducing the purchase of liquor did not violate the Missouri Constitution, art. II, § 1 because it was consistent with the statutory authority provided to the state agency to establish definitive rules for the conduct of businesses that sell liquor). These cases are not similar to the instant matter because none of them leave law creation up to the unfettered discretion of local bureaucrats to circumvent MAPA. Putative Intervenors' reliance on them is misplaced.

Further, contrary to Putative Intervenors' assertions, DHSS regulations that permitted a DHSS official to either cancel or modify rules issued by county medical directors do not salvage the unconstitutional regulations. There is no principle of law that permits rule by bureaucratic fiat as long as one unelected bureaucrat can overrule another unelected bureaucrat. Thus, this notion is ill-conceived.

Based on clear precedent, the DHSS regulations gave unelected bureaucrats the power to make the law, rather than merely the discretion to enforce a law, and were therefore appropriately stricken as unconstitutional by the trial court.

VII. AUTHORIZING ADMINISTRATIVE OFFICIALS TO CREATE LAWS ON BEHALF OF ENTIRE COUNTIES IS INCONSISTENT WITH ART. I, § 31 OF THE MISSOURI CONSTITUTION. (RESPONDS TO PUTATIVE INTERVENORS' POINT VI)

The Missouri Constitution, art. I § 31 provides that "no law shall delegate to any [agency] authority to make any rule fixing a fine or imprisonment as punishment for its violation." Section 192.300.4 prescribes a criminal infraction for violation of a county order, rule or regulation. A27-28. Specifically, if a person is found guilty of violating

provisions of Chapter 192, it is a misdemeanor, which is punishable with fines and/or imprisonment. *Id*.

Doucette's independently issued orders referenced §192.300 twenty times as authority for their creation, and also referenced criminal penalties for violations thereof even though she is not a county or county health board. D3, D4, D5. In addition, the Jackson County Department of Health issued criminal citations, including fines, to a business in Jackson County when the county medical director believed the business had violated her independently enacted order authorized by the stricken regulations. *See* Citation issued by Jackson County; R-A198. The trial court properly concluded that DHSS rules authorizing county-wide laws to be created by bureaucrats conflict with MO. CONST. art. I, §31 in their application, which is an appropriate challenge under Mo. Rev. Stat. §536.050. R-A42.

VIII. DHSS REGULATIONS THAT PERMIT UNFETTERED CLOSURES OF SCHOOLS AND PUBLIC AND PRIVATE ASSEMBLIES VIOLATES THE EQUAL PROTECTION CLAUSE OF THE MISSOURI CONSTITUTION, ART. I, §2. (RESPONDS TO PUTATIVE INTERVENORS' POINT VII)

Putative Intervenors sharply criticize the trial court for its discussion of Equal Protection, claiming that the claim was not pled, and asserting that based on this error, they must be permitted to intervene post judgment. This argument, if entertained by this Court, would allow attorneys with too much time on their hands to pick apart court rulings for procedural deficiencies and move in to challenge them. The whole notion is ridiculous.

Plaintiffs/Respondents brought a section 536.050 challenge as to the validity of certain DHSS regulations. D2; D118; R-A42. The trial court considered the Missouri Constitution and noted that equal protection analysis requires the court to initially determine whether a classification impinges upon a "fundamental right." MO. CONST. art. 1 §2; *Mahoney v. Doerhoff Surgical Services*, 807 S.W.2d 503 (Mo. 1991).

A *fundamental right* is a right "explicitly or implicitly guaranteed by the Constitution." *San Antonio School Dist. v. Rodriguez,*411 U.S. 1, 33-34, 93 S.Ct. 1278, 1296-97, 36 L.Ed.2d 16 (1972). They include the rights to free speech and assembly. MO. CONST. art. I, §9; *Mahoney*, 807 S.W.2d at 512. If a law impinges upon a fundamental right explicitly or implicitly protected by the Constitution, the classification is subject to strict scrutiny. *Weinschenk v. State*, 203 S.W.3d 201, 210-11 (Mo. 2006). To survive strict scrutiny, "the restriction must be necessary to serve a compelling state interest, and may not go beyond what the state's interest actually requires." *Id.* at 211.

19 CSR 20-20.050(3) affects a fundamental constitutional right to free speech and assembly because it allows unfettered bureaucratic closures of public and private assemblies based on the opinions of one bureaucrat. The result is the closure of restaurants, churches and other gatherings in one county that experienced the same exact pandemic as other counties, and around the world. In addition, authorized closures were based on the personal opinion of one, unelected bureaucrat. One county employee's opinion cannot lawfully result in differential denial of free speech rights of Missouri residents based on location or any other factor. Thus, the trial court properly noted that the DHSS regulations violate art. I, § 2 of the Missouri Constitution.

IX. PLAINTIFFS HAD STANDING TO CHALLENGE THE DHSS REGULATIONS BECAUSE THEY WERE OR MAY BE AGGRIEVED BY THE INVALID REGULATIONS (RESPONDS TO PUTATIVE INTERVENORS' POINT IX)

Putative Intervenors improperly allege that Plaintiffs lacked standing. The cases Putative Intervenors cite as support for their argument are irrelevant because they did not involve challenges to the validity of a state regulation under Mo. Rev. Stat. § 536.050. R-A42. Plaintiffs have standing pursuant to § 536.053, which provides:

> Any person who is or may be aggrieved by any rule promulgated by a state agency shall have standing to challenge any rule promulgated by a state agency and may bring such an action pursuant to the provisions of section 536.050. Such person shall not be required to exhaust any administrative remedy and shall be considered a nonstate party.

§ 536.053; Mercy Hospitals East Communities v. Missouri Health Facilities Review Comm., 362 S.W.3d 415 (Mo. 2012). R-A45. There is no question that Plaintiffs, who include a business, church and resident of the State of Missouri are each among the many parties who "is or may be aggrieved" by the DHSS regulations that authorized one-person rule by bureaucratic edict. In addition, Rule 87.02(c) identifies who may obtain a declaratory judgment respecting the validity of agency rules, and it does not require that a person be aggrieved by an agency rule. R-A55. Rule 87.02(c) provides that such suits can be maintained against agencies even where there is merely a threatened application of an agency rule, and whether or not the plaintiff has first requested the agency to pass upon the question presented. R-A55.

Although specific evidence is not required to establish standing pursuant to Section 536.053 and Rule 87.02(c), B&R STL and Shannon Robinson submitted multiple

verified affidavits establishing that they were personally aggrieved by the rules issued by the mini-DHSS directors deputized in their respective counties who wrote laws on their own in reliance on authority established by the stricken DHSS regulations. D2, D32, D33, D34, D118. Church of the Word was forced to restrict its worship services to 25% of its community due to the purported authority designated to county bureaucrats by the DHSS regulations. D2. Put simply, if the instant Plaintiffs do not have standing to bring a claim pursuant to section 536.050 to challenge the validity of the DHSS regulations at issue, no one would have standing and the regulations would never be subject to challenge at all, and section 536.050 would be meaningless.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed. If it is not dismissed, the trial court's decision to deny Putative Intervenors' post-judgment intervention request should be affirmed. The merits of the underlying case are not ripe for appeal because no party below has filed a notice of appeal.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 84.06(c)

A copy of this document and the Plaintiffs' Appendix were served on counsel of record through the Court's electronic notice system on May 12, 2023. This brief complies with the requirements and limitations contained in Supreme Court Rule 84.06. Relying on the word count of the Microsoft Word software program, the undersigned certifies that the total number of words contained in this brief is 24,484 excluding the cover, signature block, appendix, and this certificate. The font is Times New Roman, 13 point. Pursuant to Rule 55.03, the undersigned further certifies the original of this brief has been signed by the undersigned. Pursuant to Rule 103.08, this brief has been properly served.

/s/ *Kimberley J. Mathis*
Attorney for Plaintiffs-Respondents