IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

SHANNON ROBINSON, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No.: 20AC-CC00515
	)	
MISSOURI DEPARTMENT OF HEALTH AND SENIOR SERVICES,	)	
	)	
	)	
Defendant.	)	

ST. LOUIS COUNTY AND JACKSON COUNTY'S
MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AND STAY

In a single proceeding, this Court upended the longstanding public health framework in the State of Missouri. This Court's November 22, 2021 Judgment failed to consider relevant law, and went far beyond the relief requested by Plaintiffs in their First Amended Petition and in their Motion for Summary Judgment. Defendant's counsel, Missouri Attorney General Eric S. Schmitt, has now abdicated his duty to appeal this Court's Judgment, instead electing to embark on a campaign of litigation terror against local governments and schools throughout the State. This State's citizens deserve better.

St. Louis County and Jackson County (together, "Intervenors") seek to intervene to appeal the Judgment or to ask for a new trial in order to preserve the regulations that have enabled local public health authorities to address all matters of public health—not just COVID-19.

Chaos now reigns in the State with respect to the administration of public health. Few public health officials, local government leaders, and school boards have any idea what they are legally permitted to do or are legally prohibited from doing. Intervenors cannot sit idly by in dereliction of their statutory and regulatory duties to protect the public health by preventing the spread of diseases in their communities.

Intervenors are entitled to intervene pursuant to Missouri Supreme Court Rule 52.12(a) in order to avoid the substantial prejudice that will befall them and the public health if the Court's Judgment is not overturned. Alternatively, the Court should allow intervention pursuant to Rule 52.12(b).

BACKGROUND

A. Plaintiffs' First Amended Petition

On January 13, 2021, Plaintiffs Shannon Robinson, Twisted Tree, Satchmo's Bar & Grill, and Church of the Word ("Plaintiffs") filed their First Amended Petition for Declaratory Judgment against Defendant Missouri Department of Health and Senior Services ("DHSS"). In their First Amended Petition, Plaintiffs sought to challenge local public health measures indirectly by challenging the lawfulness of certain DHSS regulations from which the authority for the local public health measures derived. Plaintiffs named only DHSS, represented by the office of Missouri Attorney General Eric S. Schmitt, as a defendant in the case.

B. The Court's November 22, 2021 Judgment

On November 22, 2021, the Court entered its Judgment on Plaintiffs' Motion for Summary Judgment. In its Judgment, the Court invalidated numerous DHSS regulations and ordered "local health authorities . . . to refrain from taking actions . . . that require independent discretion in a manner inconsistent with this opinion and inconsistent with the constitution's limitation on legislative delegations and the APA's limitations on rulemaking authority." (November 22, 2021 Judgment, at 16.) The Court also declared "null and void" any "discretionary orders or rules" that were implemented by "all local health authorities" that would violate the Court's Judgment. (*Id.*, at 17.)

C. Missouri Attorney General Eric S. Schmitt

Intervenors understand that DHSS desires to appeal this Court's ruling, but Missouri Attorney General Eric S. Schmitt refuses to do so.[1]

Over the past several months, General Schmitt has used the resources of the State of Missouri to pursue myriad lawsuits against local governments and schools in relation to their public health measures. *See, e.g.*, Case Nos. 2116-CV16501 (Jackson Cnty. Cir. Ct.); 2116-CV17899 (Jackson Cnty. Cir. Ct.); 21SL-CC03334 (St. Louis Cnty. Cir. Ct.); 2122-CC09257 (City of St. Louis Cir. Ct.). General Schmitt also attempted to sue every school district in the State of Missouri through a reverse class action. *See* 21BA-CV02754 (Boone Cnty. Cir. Ct.).

General Schmitt has now set up a "hotline" for parents to "help identify[] school districts continuing to violate" the Court's November 22, 2021 Judgment (even though, Intervenors respectfully point out, the Court's Judgment in no way impacted school districts' public health powers, which were not even at issue in the case). (Twitter, Eric Schmitt, *available at* https://twitter.com/Eric_Schmitt/status/1468642525707587585, Exhibit C.) Having evidently received some "tips," including from children who desire their principals to be "removed," General Schmitt has evidently sent several letters to school districts threatening legal action. (Twitter, Eric Schmitt, Exhibit D.)

[1] *See* Nassim Benchaabane, *Missouri's health department asked Schmitt to appeal ruling barring COVID-19 orders*, St. Louis Post-Dispatch, (Dec. 2, 2021), https://www.stltoday.com/lifestyles/health-med-fit/coronavirus/missouri-s-health-department-asked-schmitt-to-appeal-ruling-barring-covid-19-orders/articleceffa278-7e65-5527-a37d-610ac76877c4.html ("The Missouri Department of Health and Senior Services wanted to challenge a judge's ruling against the agency that barred COVID-19 public health orders and asked Attorney General Eric Schmitt to file an appeal, officials confirmed Thursday. . . . Asked for a response, Schmitt spokesman Chris Nuelle said in a written statement that the office 'informed DHSS that we will not appeal or take any further action in this case, and that they should begin enforcement efforts immediately.'"), Exhibit A; November 30, 2021 Letter of DHSS ("Although media reports indicate that the Attorney General's Office will not seek an appeal in this case, we are still waiting for confirmation of that fact directly."), Exhibit B.

In response to General Schmitt's actions, a police officer in St. Louis County boarded a school bus and threatened to report the bus driver to General Schmitt for requiring children to wear masks on the bus.[2] This, despite the fact that a federal mandate requires that masks be worn on buses and other forms of public transportation in the United States.[3]

Most recently, General Schmitt has, citing this Court's Judgment, threatened legal action against the Jackson County Legislators for considering implementing a face covering order in response to an increase of COVID-19 cases in the area.[4]

D. Impact on Public Health

The Court's Judgment explicitly declared that 19 CSR 20-20.010(26); 19 CSR 20-20.040(2)(G)-(I); 19 CSR 20-20.040(6); 19 CSR 20-20.050(3), "including references to discretionary control measures contained in 19 CSR 20-20.010 et seq." violate the Missouri Constitution and Missouri statutes and are invalid. The control measures referenced are found in 19 CSR 20-20.040(2)(G), which provides that it is "the duty of the local health authority, the director of the department, or the director's designated representative on receiving a report of a disease which is infectious, contagious, communicable, or dangerous" to do the following:

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[2] Casey Nolan, *Police, district investigating after police officer upset school bus driver over masks*, (Dec. 10, 2021), https://www.ksdk.com/article/news/local/rockwood-school-bus-mask-incident-investigation/63-844bbae4-7fc3-4db0-b12e-4b5e01d9a94b, Exhibit E.

[3] *See* DHSS Website, "Prevention, Symptoms, Treatment and Transmission," https://health.mo.gov/living/healthcondiseases/communicable/novel-coronavirus/prevention.php (linking to CDC website), Exhibit F; CDC Website, "Mask Requirement," https://www.cdc.gov/coronavirus/2019-ncov/travelers/face-masks-public-transportation.html ("Are masks required on school buses? Yes, passengers 2 years of age and older and drivers must wear a mask on buses or vans operated by public or private school systems including early care and education/child care programs, subject to the exclusions and exemptions in CDC's Order."), Exhibit G.

[4] KCTV5, Jackson County to consider new mask mandate; Missouri Attorney General threatens legal action, https://www.kctv5.com/news/jackson-county-to-consider-new-mask-mandate-missouri-attorney-general-threatens-legal-action/article_1f291536-5a1f-11ec-9d34-b32e97f900f0.html?utm_medium=social&utm_source=twitter&utm_campaign=user-share, Exhibit H.

> Establish appropriate control measures which may include isolation, quarantine, disinfection, immunization, closure of establishment, notification to potentially exposed individuals to make them aware of the risk or potential risk of the disease and such information required to avoid or appropriately respond to the exposure, notification to the public of the risk or potential risk of the disease and such information required to avoid or appropriately respond to the exposure, the creation and enforcement of adequate orders to prevent the spread of the disease and other measures considered by the department and/or local health authority as appropriate disease control measures based upon the disease, the patient's circumstances, the type of facility available, and any other available information related to the patient and the disease or infection[.]

At the direction of General Schmitt, various counties across the State have now taken the position that public health authorities in the State have absolutely no power to order citizens who have tested positive for *any* communicable disease, whether that is COVID-19, tuberculosis, or any other of the myriad diseases, to quarantine or remain in isolation.[5]

In short, if the Court's Judgment is not set aside, community spread of *all* communicable diseases will no doubt skyrocket in this State, while the mechanisms for combatting any such spread will have been dismantled.

[5] *See* Michele Munz, *Laclede County health officials end 'all COVID-19 related work' after receiving Schmitt's warning letter*, St. Louis Post-Dispatch, (Dec. 9, 2021), https://www.stltoday.com/lifestyles/health-med-fit/coronavirus/laclede-county-health-officials-end-all-covid-19-related-work-after-receiving-schmitt-s-warning/article_9a156180-ac56-55d6-a1bf-2d017d757f5a.html (quoting a statement released by the Laclede County Health Department and stating that it "has been forced to cease all COVID-19 related work at the current time . . . This includes: case investigations, contact tracing, quarantine orders and public announcements of current cases/deaths, etc."), Exhibit I.

ANALYSIS

Intervenors seek to intervene to appeal the Judgment in order to defend and preserve the lawfulness of the DHSS regulations at issue. Intervenors also seek to stay the Court's Judgment.

A. Standard for Intervention

In relevant part, Missouri Supreme Court Rule 52.12 provides as follows:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the . . . transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> **(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common; or (3) when the validity of a statute, regulation or constitutional provision of this state, or an ordinance or regulation of a governmental subdivision thereof, affecting the public interest, is drawn in question in any action to which the state or governmental subdivision or an officer, agency or employee thereof is not a party . . . .

Mo. Sup. Ct. R. 52.12.

B. Intervenors Are Entitled to Intervene as a Matter of Right under Rule 52.12(a)

Intervenors are entitled to intervene under Rule 52.12(a).

> To intervene as a matter of right, the burden is on the movant to prove all the following requirements are met: (1) the applicant must have an interest in the subject matter; (2) a disposition of the action may impede the ability of the applicant to protect that interest; and (3) the applicant's interests are not adequately represented by the existing parties.

Ring v. Metro. St. Louis Sewer Dist., 41 S.W.3d 487, 491 (Mo. Ct. App. 2000). "If all three requirements are established, the right to intervene is *absolute*, and a trial court has *no discretion* to deny the motion to intervene." *Britt v. Otto*, 577 S.W.3d 133, 142 (Mo. Ct. App. 2019) (emphases added) (citing *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 127 (Mo. banc 2000)).

First, Intervenors have a compelling interest in the subject matter of this lawsuit. "Generally, 'interest' means a concern, more than mere curiosity, or academic or sentimental desire." *In re Liquidation of Pro. Med. Ins. Co.*, 92 S.W.3d 775, 778–79 (Mo. banc 2003) (citing *In the Matter of Trapp,* 593 S.W.2d 193, 204 (Mo. banc 1980)). "One interested in an action is one who is interested in its outcome because he or she has a legal right that will be directly affected or a legal liability that will be directly enlarged or diminished." *Id.* Here, Plaintiffs are indirectly challenging local public health orders promulgated pursuant to DHSS regulations, and the Court imposed conditions on Intervenors despite Intervenors not being parties to this case. Intervenors rely on DHSS regulations to maintain the public health in their communities. Intervenors have legal rights and obligations that flow from the challenged DHSS regulations. *See, e.g.*, Mo. Rev. Stat. § 192.280 ("It shall be the duty of the county health officers to enforce the rules and regulations of the department of health and senior services throughout their respective counties outside of incorporated cities which maintain a health officer."); Mo. Rev. Stat. § 192.290 ("Nothing herein shall limit the right of local authorities to make such further ordinances, rules and regulations not inconsistent with the rules and regulations prescribed by the department of health and senior services which may be necessary for the particular locality under the jurisdiction of such local authorities."). Intervenors have a compelling interest in preventing the spread of contagious diseases, such as COVID-19, in their communities. *See SH3 Health Consulting, LLC v. Page*, 459 F. Supp. 3d 1212, 1225 (E.D. Mo. 2020) ("The City and County adopted the Orders in this case to serve a compelling state interest – their interest in maintaining the health and safety of the public during a global pandemic, and to slow the transmission of COVID-19.").

Second, disposition of this action will impede Intervenors' interests. *See Kinney v. Schneider Nat. Carriers, Inc.*, 200 S.W.3d 607, 611 (Mo. Ct. App. 2006) (holding that the second

element is satisfied when the "interest will be impaired or impeded as a practical matter"). The Court has struck down certain DHSS regulations that empowered Intervenors to implement public health measures in response to contagious diseases.

Finally, Intervenors' interests are not adequately represented by the existing parties. A non-party is not adequately represented when a defendant, in bad faith or in an arbitrary and capricious manner, refuses to file an appeal. *See State ex rel. Dolgin's, Inc. v. Bolin*, 589 S.W.2d 106, 110 (Mo. Ct. App. 1979); *see also Wolpe v. Poretsky*, 144 F.2d 505, 508 (D.C. Cir. 1944) ("We only indicate that there is enough in the record to show that in refusing to take an appeal the Commission did not adequately represent the interveners' interests."); *Moyer v. Bd. of Cty. Comm'rs of Lyon Cty.*, 197 Kan. 23, 26–27 (1966) (finding that intervenor was adequately represented until defendant announced that he was not going to file a motion for a new trial or appeal). Here, General Schmitt has refused DHSS' request to file an appeal, thereby abdicating his duty to represent DHSS' interests, including defending the lawfulness of DHSS regulations. Furthermore, although General Schmitt lost before this Court, he now seeks to use the Judgment—before it is even final for purposes of appeal—as a sword against local public health orders. Indeed, General Schmitt has evidently written threatening letters to every local government and school in the state that dare to stop the spread of any contagious disease, even where the authority for such local measures is not derived from the DHSS regulations at issue in this case. (*See* Letter from the Missouri Attorney General, attached as Exhibit J hereto, at 2 ("Failure to follow the court's judgment may result in enforcement action against you to remove orders the court has determined are unconstitutional and illegal."); Letter from the Missouri Attorney General, attached as Exhibit K hereto, at 2 (same).) Pursuant to Rule 52.12(a), the Court must allow Intervenors to intervene.

C. Alternatively, Intervention Is Proper under Rule 52.12(b)

In the alternative, the Court should allow intervention pursuant to Rule 52.12(b). "Rule 52.12(b) permits intervention in three instances: '(1) when allowed by statute; (2) when an applicant's *claim or defense* and the main action have a question of law or fact in common; or (3) when the state is seeking intervention in a case raising constitutional or statutory challenges.'" *Britt v. Otto*, 577 S.W.3d 133, 145 (Mo. Ct. App. 2019) (quoting *Johnson v. State*, 366 S.W.3d 11, 21 (Mo. banc 2012)).

Here, Intervenors' defenses have common questions of law and fact with the main action. Intervenors desire to intervene to appeal the Judgment in order to defend the legality of the challenged DHSS regulations. Thus, in the alternative, intervention is proper under Rule 52.12(b).

D. The Request to Intervene is Timely

The instant request to intervene is timely under Missouri law. Courts consider two factors when assessing post-judgment intervention. "The first is whether substantial justice requires intervention, and the second is whether existing parties to the case will be prejudiced if intervention is permitted." *Meyer v. Meyer*, 842 S.W.2d 184, 189 (Mo. Ct. App. 1992) (citing *Frost v. Liberty Mut. Ins. Co.,* 813 S.W.2d 302, 304 (Mo. banc 1991)). "[I]n a significant number of cases intervention has been allowed even after judgment. One reason for allowing this is so that the intervenor can prosecute an appeal that the existing party has determined not to take." 7C Fed. Prac. & Proc. Civ. § 1916 (3d ed.); *see Frost v. White*, 778 S.W.2d 670, 673 (Mo. Ct. App. 1989) ("The Federal Rule 24 is essentially the same as [Missouri] Rule 52.12.") (relying on 7C Fed. Prac. & Proc. Civ. § 1916).

Substantial justice to warrant post-judgment intervention exists. The Court's November 22, 2021 Judgment would upend the existing public health framework in the State of Missouri.

To be sure, the Judgment impairs local public health authorities' ability to combat the COVID-19 pandemic. But beyond that, the Court's categorical striking of various DHSS regulations substantially impairs local public health authorities' ability to respond to other contagious diseases, including but not limited to hepatitis B, hepatitis C, tuberculosis, chickenpox/shingles, and HIV/AIDS. Great confusion presently exists throughout the State of Missouri regarding who, if anyone, is authorized to address matters of public health. Intervenors should be permitted to intervene with respect to these significant questions of public import, particularly given that General Schmitt has refused DHSS' request to appeal the Court's Judgment. *See, e.g.*, *Smuck v. Hobson*, 408 F.2d 175, 177 (D.C. Cir. 1969) ("The school board's decision not to appeal inevitably adds a quality of artificiality to any proceedings in this Court. . . . We conclude that the parents were properly allowed to intervene of right in order to appeal those provisions of the decree which curtail the freedom of the school board to exercise its discretion in deciding upon educational policy.").

In addition, the parties will not be prejudiced by intervention. DHSS wants to appeal, but General Schmitt has refused to do so. Intervenors' intervention would not itself require the taking of new evidence but rather would simply submit the November 22, 2021 Judgment to the standard rigors of an appeal or post-judgment motion. *See, e.g.*, *Peruta v. Cty. of San Diego*, 824 F.3d 919, 941 (9th Cir. 2016) (explaining that intervention for the purpose of appeal "will not create delay by injecting new issues into the litigation, but instead will ensure that our determination of an already existing issue is not insulated from review simply due to the posture of the parties" (quoting *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007))); *Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 573 (7th Cir. 2009) (explaining no prejudice in granting intervention for the purpose of appeal because the plaintiff "could not have assumed that, if it won in the district court, there would be

no appeal"). Further, Missouri courts regularly grant post-judgment intervention. *See, e.g.*, *Empire Dist. Elec. Co. v. Coverdell*, 588 S.W.3d 225, 241 (Mo. Ct. App. 2019) ("Moreover, our Supreme Court has upheld the grant of motions to intervene following both entry of judgment and remand to the trial court.") (citing *Frost*, 813 S.W.2d at 303); *Breitenfeld v. Sch. Dist. of Clayton*, 399 S.W.3d 816, 836 (Mo. banc 2013) (allowing intervention on remand despite "the underlying litigation that had been proceeding for years"); *City of Pac. v. Metro Dev. Corp.*, 922 S.W.2d 59, 62 (Mo. Ct. App. 1996) ("Because we also find that the trial court erred in entering judgment for respondent, no prejudice will exist by appellants' intervention."). Intervenors' proposed Answer and Affirmative and Additional Defenses is attached to Intervenors' Motion to Intervene and Stay as Exhibit L. If granted intervention, Intervenors intend to file their Notice of Appeal, which is attached to Intervenors' Motion to Intervene as Exhibit M. Alternatively, if the Court desires to reconsider its Judgment, Intervenors would file their Motion for New Trial, Memorandum in Support of their Motion for New Trial, and Exhibit 1 in support of said Motion, which are attached as Exhibit N to Intervenors' Motion to Intervene.

E. The Court's Judgment Should Be Stayed

As discussed, great confusion exists in the State regarding what public health powers and duties exist. Further litigation as a result of this Court's Judgment, as it currently stands, is guaranteed. In the meantime, local elected leaders and local public health authorities are handcuffed, in part by the threat of litigation by General Schmitt and in part by the dismantling of the public health framework, in their ability to fulfill the basic functions of their positions. A stay while the Court's Judgment is resolved on appeal, or while the Court reconsiders its Judgment, is warranted and also necessary. *See* 24 Mo. Prac., Appellate Practice § 6.4 (2d ed.) ("[A] court has both the power and the jurisdiction to stay any judgment—including self-executing judgments.");

Mo. Sup. Ct. R. 92.03 ("When an appeal is taken from a judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.").

CONCLUSION

Intervenors must be allowed to intervene pursuant to Rule 52.12(a), or in the alternative, should be allowed to intervene pursuant to Rule 52.12(b). This Court should stay the Judgment pending resolution of Intervenors' appeal or the Court's reconsideration of the Judgment.

Dated: December 13, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE AND
CERTIFICATE OF COMPLIANCE WITH RULE 55.03(a)

I hereby certify that a copy of the foregoing pleading was served via the Court's electronic filing system on this 13th day of December 2021, on all parties of record. In addition, the undersigned counsel certifies under Rule 55.03(a) of the Missouri Rules of Civil Procedure that he has signed the original of this Certificate and the foregoing pleading.

/s/ Beth Orwick