

3. Defendant, Robert M. Einterz, MD (“Health Officer”), is and was at all relevant times the St. Joseph County Health Officer pursuant to St. Joseph County Code of Ordinances tit. III, § 32.20(b), as provided in Ind. Code § 16-20-2-16.¹

JURISDICTION AND VENUE

4. This is an action seeking a declaratory judgment, pursuant to Indiana Rule of Trial Procedure 57 and Ind. Code §§ 34-14-1-1 to -16, establishing that St. Joseph County Public Health Order 3-2020 (“Public Health Order”) is unenforceable, enjoining Defendants from enforcing the Public Health Order and enjoining Defendants from issuing the same or substantially similar unlawful and *ultra vires* orders.

5. St. Joseph County is a preferred venue under Rule 75(A) because all parties reside or are located in St. Joseph County, the effects of the actions complained of are within St. Joseph County and the subject of this Complaint is the authority and actions of Defendants over persons within St. Joseph County.

BACKGROUND

6. On March 6, 2020, Governor Eric Holcomb declared a public health emergency in the State of Indiana for COVID-19 through Executive Order 20-02, and the declaration has been extended through November 1, 2020, pursuant to Executive Order 20-44.

7. On May 3, 2020, Defendant Health Officer issued St. Joseph County Public Health Order 1-2020, which mandated that all individuals within St. Joseph County wear a face-

¹ Indiana Code § 16-20-2-16 provides the following regarding health officers:

- (a) Each local board of health shall appoint a health officer to serve for a term of four (4) years. The health officer must be a licensed physician.
- (b) The appointment shall be certified by the county executive and sent to the state department. The state department shall maintain a record of the certification.
- (c) The health officer is eligible for reappointment.
- (d) The health officer is the executive officer of the local health department and shall serve as secretary of the local board of health.

covering or mask over the individual's nose and mouth while in an enclosed public space or place of business when physical distancing of at least six (6) feet could not be maintained. St. Joseph County Public Health Order 1-2020 expired on July 4, 2020. St. Joseph County Public Health Order 1-2020 (May 3, 2020), attached as Exhibit A.

8. On June 29, 2020, Defendant Health Officer issued COVID-19 Cases Update and St. Joseph County Public Health Order 2-2020, which extended the mask mandate until September 7, 2020. COVID-19 Cases Update and St. Joseph County Public Health Order 2-2020 (June 29, 2020), attached as Exhibit B.

9. On July 24, 2020, Governor Holcomb issued a state-wide mask mandate via Executive Order 20-37, requiring individuals to wear masks or face-coverings in public places throughout Indiana.

10. On September 4, 2020, Defendant Health Officer issued St. Joseph County Public Health Order 3-2020, which extends the St. Joseph County Health Officer's mask mandate until December 31, 2020. St. Joseph County Public Health Order 3-2020 (Sept. 4, 2020), attached as Exhibit C.

11. The Public Health Order contains the following provisions to demonstrate the need and authority for the Public Health Order:

Given that there is no vaccine or medication available to prevent or treat COVID-19, measures such as hand hygiene, physical distancing, and wearing face coverings [sic] are the most effective strategies to reduce the spread of respiratory droplets from infected persons to uninfected persons, thus reducing the spread of SARS-CoV-2 and the morbidity and mortality from COVID-19.

As the St. Joseph County Public Health Authority, pursuant to the authority granted by Indiana Codes 16-20-1 et seq. and 16-41-9 et seq., in the interest of protecting all St. Joseph County residents, and reducing the spread of communicable disease, specifically the novel Coronavirus (COVID-19), I order the following to take effect throughout St. Joseph County, Indiana, beginning September 8, 2020 through December 31, 2020:

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- A face covering that fits over one's nose and mouth and snugly against the sides of one's face shall be required for any persons entering an enclosed public space or enclosed place of business, unless such persons have a medical exception indicating that a face covering is ill-advised for health reasons, or the face covering prevents the persons from delivering or receiving goods or services. The face covering shall be worn at all times when physical distancing of at least six feet cannot be maintained.

....

This Order is, hereby, issued on September 4, 2020, pursuant to the Indiana Code provisions listed above and, in a manner, consistent with all statutory authority delegated to me as the St. Joseph County Public Health Authority. I will continue to monitor the health of St. Joseph County residents and will issue additional orders as necessary.

Ex. C.

12. Health Officer Einterz has repeatedly told the public that he intends to continue issuing mask orders well into 2021.

13. Plaintiff, John Goetz, a sole proprietor d/b/a Goetz Family Handyman, is unable to wear a mask because he has Chronic Fatigue Syndrome, which leaves him short of breath and makes it extremely difficult for him to breathe while wearing a mask. Plaintiff routinely purchases supplies from specific stores that exclusively sell certain goods and supplies, but on several occasions, businesses have disregarded his medical condition and required him to either wear a mask or leave the business. On one occasion, Plaintiff was forced to leave his intended purchase at the checkout counter because the store would not let him pay for the goods. The stores have not offered to provide any accommodations. As a result, Plaintiff has been unable to perform requested work, or he has been forced to charge customers more for the work. He has also suffered financial harm due to not being able to purchase supplies at the most competitive prices when performing handyman work for customers. As a result of the Public Health Order and the compliance of businesses in St. Joseph County, Plaintiff has suffered physical, financial and emotional harm.

AUTHORITY FOR PUBLIC HEALTH ORDER

14. The Public Health Order broadly relies upon two chapters of the Indiana Code to support the Health Officer's and/or Health Department's authority to issue the Public Health Order. *See* Ex. C (citing Ind. Code §§ 16-20-1 and Ind. Code §§ 16-41-9).

15. Ind. Code § 16-41-9-1.6 governs the powers of a “public health authority” to prevent the spread of communicable diseases:

(a) A public health authority may impose or petition a court to impose a quarantine and do the following:

(1) Distribute information to the public concerning:

(A) the risks of the disease;

(B) how the disease is transmitted;

(C) available precautions to reduce the risk of contracting the disease;

(D) the symptoms of the disease; and

(E) available medical or nonmedical treatments available for the disease.

(2) Instruct the public concerning social distancing.

(3) Request that the public inform the public health authority or a law enforcement agency if a family member contracts the disease.

(4) Instruct the public on self quarantine and provide a distinctive means of identifying a home that is self quarantined.

(5) Instruct the public on the use of masks, gloves, disinfectant, and other means of reducing exposure to the disease.

(6) Close schools, athletic events, and other nonessential situations in which people gather.

If a quarantine is imposed under section 1.5 [IC 16-41-9-1.5] of this chapter, the public health authority shall ensure that, to the extent possible, quarantined individuals have sufficient supplies to remain in their own home.

....

Ind. Code § 16-41-9-1.6.

16. A “public health authority,” for purposes of Ind. Code § 16-41-9, means: “(1) the state health commissioner of the state department; (2) a deputy or an assistant state health commissioner appointed by the state health commissioner, or an agent expressly authorized by the state health commissioner; (3) the local health officer; or (4) a health and hospital corporation established under IC 16-22-8-6.” *Id.* § 16-18-2-298.5.

17. The Public Health Order cites Ind. Code §§ 16-41-9 *et seq.* to support the Health Officer's authority to issue the Public Health Order, but Ind. Code § 16-41-9-1.6 limits the a health officer's power to distributing information to the public about the communicable disease, instructing the public on use of masks and available precautions to reduce the risk of contracting the disease, advising on social distancing, etc. This Indiana Code section establishes that the Health Officer does not have the authority to issue an order mandating mask-wearing, as the Health Officer may only "*instruct* the public on use of masks." *Id.* § 16-41-9-1.6(a)(5) (emphasis added).

18. The other Indiana Health Code provision that the Public Health Order relies upon for its authority is broadly cited as Indiana Code § 16-20-1. The powers and duties described in that chapter "apply to all local health officers and local health boards." *Id.* § 16-20-1-1. "A local health department shall operate as an agency of local government administratively responsible to the appropriate county or city executive." *Id.* § 16-20-1-2. The Health Department functions as a local administrative agency responsible to the St. Joseph County executive, which is the St. Joseph County Board of Commissioners.²

19. "Local health officers shall *enforce* the health laws, ordinances, orders, rules, and regulations of the officer's own and superior boards of health." *Id.* § 16-20-1-19 (emphasis added). The Indiana General Assembly has not enacted legislation delegating rule-making authority to the Health Department or Health Officer with sufficient standards to guide them in exercising their statutory authority.

² "The board of each local health department may adopt procedural rules for the board's guidance and to establish administrative and personnel policies of the local health department that are consistent with the administrative operating policy of the appointing authority." Ind. Code § 16-20-1-3.

20. Indeed, the Indiana General Assembly delineated the method through which the Health Department’s board or Health Officer may enforce the Health Officer’s or Health Department board’s “orders, citations, and administrative notices,” which is “by an action in the circuit or superior court.” *Id.* § 16-20-1-26.³ Indiana’s General Assembly intended to limit the power of administrative boards and officers, including local health departments and health officers, to enforcing laws, orders, notices, etc. against specific respondents, and the Indiana Supreme Court has construed Indiana Constitution article IV, section 1 to mean that “although the legislature cannot delegate the power to make a law, it can make a law delegating power to an agency ‘to determine the existence of some fact or situation upon which the law is intended to operate,’” not the public or residents generally. *City of Carmel v. Martin Marietta Materials, Inc.*, 883 N.E.2d 781, 788 (Ind. 2008) (quoting *Edwards v. Hous. Auth. of Muncie*, 19 N.E.2d 741, 746 (Ind. 1939)); *see* Ind. Const. Art. 4, § 1 (“The Legislative authority of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives. The style of every law shall be: ‘Be it enacted by the General Assembly of the State of Indiana’; and no law shall be enacted, except by bill.”). The General Assembly did not intend to delegate authority that would allow local health departments or officers to create laws mandating mask-wearing during a state of emergency, and any such delegation of authority to the St. Joseph County Health Department or Health Officer—which are agents of St. Joseph County’s

³ *See* Ind. Code § 16-20-1-26 (“The court may take any appropriate action in a proceeding under this section, including any of the following: (1) Issuing an injunction. (2) Entering a judgment. (3) Issuing an order and conditions under IC 16-41-9. (4) Ordering the suspension or revocation of a license. (5) Ordering an inspection. (6) Ordering that a property be vacated. (7) Ordering that a structure be demolished. (8) Imposing a penalty not to exceed an amount set forth in IC 36-1-3-8(a)(10). (9) Imposing court costs and fees under IC 33-37-4-2 and IC 33-37-5. (10) Ordering the respondent to take appropriate action in a specified time to comply with the order of the local board of health or local health officer. (11) Ordering a local board of health or local health officer to take appropriate action to enforce an order within a specified time.”).

executive branch—would be an unlawful delegation of legislative power to an administrative agency in violation of the Indiana Constitution.⁴

21. On July 22, 2020, Attorney General Curtis T. Hill, Jr. issued his Official Opinion 2020-6 (“AG Opinion”) in response to requests made by five Indiana Senators asking for an official opinion on “whether the governor may issue an executive order mandating masks and make it a criminal offense to not wear a mask.” Mask Mandate, 2020-6 Op. Att’y Gen. 1 (July 22, 2020), a copy of which is attached hereto as Exhibit D. The AG Opinion states that “[b]y issuing such a mandate on all Hoosiers with criminal penalties attaching if violated, the governor’s intended mandate would have the effect of a law which goes beyond the scope of his authority and violates separation of powers.” Ex. D, at 2.

22. The AG Opinion states the following in support of its conclusion that “[t]he authority to issue a mask mandate was not granted to the governor by the General Assembly, and broad authority to create a law would be unconstitutional”:

Even if the [Emergency Management and Disaster Law, Ind. Code § 10-14-3] was read to grant to the governor the authority to create laws, such authority would violate the separation of powers, and be unconstitutional. Under the “nondelegation doctrine,” the legislative branch is limited in its authority to transfer its lawmaking powers to administrative agencies in the executive branch. Throughout the years, Indiana courts have relied upon nondelegation principles to limit executive branch power. “It is elementary that the authority of the State to engage in administrative action is limited to that which is granted it by statute[.]” *Ind. State Bd. of Pub. Welfare v. Tioga Pines Living Ctr., Inc.*, 622 N.E.2d 935, 939 (Ind. 1993), *cert. denied* (1994); *see also Vehslage v. Rose Acre Farms, Inc.*, 474 N.E.2d 1029, 1033 (Ind. Ct. App. 1985) (“It is black-letter law that generally,

⁴ *See Midwest Inst. of Health, PLLC v. Governor of Mich. (In re Certified Questions from the United States Dist. Court)*, No. 161492, 2020 Mich. LEXIS 1758, at *2 (Oct. 2, 2020) (“[F]irst, the Governor did not possess the authority under the Emergency Management Act of 1976 (the EMA), MCL 30.401 et seq., to declare a ‘state of emergency’ or ‘state of disaster’ based on the COVID-19 pandemic after April 30, 2020; and second, the Governor does not possess the authority to exercise emergency powers under the Emergency Powers of the Governor Act of 1945 (the EPGA), MCL 10.31 et seq., because that act is an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution. Accordingly, the executive orders issued by the Governor in response to the COVID-19 pandemic now lack any basis under Michigan law.”). “The General Assembly may confer upon the boards doing county business in the several counties, powers of a local, administrative character.” Ind. Const. Art. VI, § 10.

administrative agencies are creatures of statute, and only the legislature has the broad power to provide for their creation. Administrative boards, agencies, and officers have no common law or inherent powers, but only such authority as is conferred upon them by statutory enactment.” “Any act of an agency in excess of its power is *ultra vires* and void.” *Howell v. Ind.-Am. Water Co.*, 668 N.E.2d 1272, 1276 (Ind. Ct. App. 1996), *trans. denied* (1997). “To maintain the proper balance between the departments of government, the courts have power to confine administrative agencies to their lawful jurisdictions. *Wilmont v. City of South Bend*, 48 N.E.2d 649, 650 (1943).

“The legislature may only delegate rule-making powers to an administrative agency if that delegation is accompanied by sufficient standards to guide the agency in the exercise of its statutory authority.” *Gunderson v. State, Indiana Department of Natural Resources*, 90 N.E.3d 1171, 1186 (Ind. 2018). . . .

The legislature cannot delegate the power to make a law. *Gunderson*, 90 N.E.3d at 1186 (quoting *City of Carmel v. Martin Marietta Materials, Inc.*, 883 N.E.2d 781, 788 (Ind. 2008)). However, the Indiana General Assembly may assign adjudicatory power to an agency to determine that a certain set of facts or circumstances exist to properly operate a certain law. *Id.* For the legislature to delegate more general and prospective rule-making powers to an agency, they must also prescribe sufficient standards to guide an agency in the exercise of statutory authority. *Healthscript Inc. v. State*, 770 N.E.2d 810, 814 (Ind. 2002). . . .

The governor has done all of this—extending the emergency and proposing a mask mandate, effectively making laws—without participation from the General Assembly and without notice and comment as through rule making. To promote transparency and out of respect for the rule of law and separation of powers, especially now that we have passed the early states of the epidemic, the governor should have the support of the General Assembly. . . .

As we continue to deal with COVID-19, there is less of a sense of immediate emergency, and we are learning to deal with the virus. We continue to learn more about the disease, and can therefore take a more thoughtful approach to policy matters as a result of the virus. If the State or localities want to enforce restrictions on people, they should go through the legislative process instead of governing by fiat. We are in the midst of what will be looked back on as perhaps the most significant event of the century, and our General Assembly is left on the sidelines while major policy prescriptions are left to one individual and branch of government. Moreover, at the local level, executives continue to operate via order as opposed to seeking input from their legislative bodies. We are at a time where governmental entities can look ahead, plan, and seek approval from people’s representatives. Prudence requires and our system of government demands that the General Assembly and local legislative bodies not be carved out of the process when making laws.

. . . .

In addition to the authority under the [Emergency Management and Disaster Law, Ind. Code ch. 10-14-3], the government has broad police power. But that power too is limited. In 1905, the United State Supreme Court held that certain restrictions may become necessary and reasonable to protect all Americans during times of public health crisis, but those restrictions must be reasonable and must not be a “plain and palpable” invasion of rights. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 29 (1905). While a mask mandate may be allowed under *Jacobson*, it is still required to be a law that is duly enacted. At issue in *Jacobson* was a statute that allowed a locality to require vaccines, not an order or decree. This is a far cry from the issue here which is a mandate on all Hoosiers by order. Under our system of government, the legislature passes laws, and it is the executive’s job to enforce laws. Here, the governor has created a law in violation of separation of powers.

Ex. D, at 2–5.

23. The General Assembly has not delegated rule-making powers to St. Joseph County’s executive branch, the Health Department—an administrative agency of St. Joseph County’s executive branch—or the Health Officer with sufficient standards to guide them in the exercise of their statutory authority.

24. The St. Joseph County Council possesses the legislative powers, duties and functions of St. Joseph County. St. Joseph County Code of Ordinances tit. III, § 30.01. The County Council has enacted legislation that establishes the procedure for the St. Joseph County executives to exercise special emergency powers. *See* St. Joseph County Code of Ordinances tit. III, § 33.40–33.51. St. Joseph County has not followed the proper procedure for performing executive or legislative functions after a declaration of local disaster or emergency. St. Joseph County Code of Ordinances tit. III, § 33.43.

25. Defendants have issued a county-wide public health order mandating mask-wearing, which has the effect of a law, without convening a special meeting. The Health Officer usurped power that is inherent in the citizens of St. Joseph County and restricted the citizens’ inalienable rights by acting outside the duties and powers that the Indiana General Assembly and

St. Joseph County legislative body delegated to local health officers and effectively exercising legislative power under the guise of protecting public health. As direct representatives of the people, it is within the purview of the legislature to decide when an exigency warrants the exercise of police power to promote the health, safety, comfort and welfare of the public. Defendants have violated Indiana Constitution article I, section 1 by acting beyond their authority and exercising power that is inherent in the people, and Defendants' violations of Plaintiff's and other similarly situated citizens' constitutional rights will cause irreparable harm pending the resolution of this action.

DECLARATORY AND INJUNCTIVE RELIEF

26. An actual controversy exists as to the Health Officer's and/or Health Department's authority to issue a county-wide public health order mandating all individuals to wear a face-covering or mask over the individual's nose and mouth while in a public place or enclosed place of business in St. Joseph County.

27. Declaratory relief will resolve the dispute between the parties and determine their respective rights. Injunctive relief will ensure St. Joseph County rescinds or does not enforce its unlawful Public Health Order and does not issue the same or a substantially similar order, for which it would also lack legal authority.

WHEREFORE, pursuant to Ind. Code § 34-14-1, *et seq.*, Plaintiff, John Goetz, a sole proprietor d/b/a Goetz Family Handyman, respectfully requests that the Court enter a judgment:

- a. declaring that St. Joseph County Public Health Order 3-2020 is unenforceable;
- b. declaring that neither Defendant, St. Joseph County Department of Health, nor Defendant, Robert M. Einterz, MD, has been delegated rule- or law-making authority to issue a public health order mandating that individuals within St.

Joseph County wear a face-covering or mask over one's nose and mouth to slow the spread of COVID-19;

- c. declaring that Defendant, Robert M. Einterz, MD, exceeded the powers devolved upon local health officers under Ind. Code § 16-41-9-1.6;
- d. declaring that St. Joseph County Public Health Order 3-2020 is void as an *ultra vires* act;
- e. declaring that the Indiana Code sections cited in St. Joseph County Public Health Order 3-2020, "Indiana Codes 16-20-1 et seq. and 16-41-9 et seq.," do not authorize Defendant, St. Joseph County Department of Health, or Defendant, Robert M. Einterz, MD, to issue a public health order mandating that individuals within St. Joseph County wear a face-covering or mask over one's nose and mouth while in a public place or enclosed place of business;
- f. declaring that Defendant, Robert M. Einterz, MD, violated Indiana Constitution article I, section 1 by issuing the Public Health Order because it usurped power that is inherent in the people of St. Joseph County;
- g. enjoining Defendants, St. Joseph County Department of Health and Robert M. Einterz, MD, from enforcing St. Joseph County Public Health Order 3-2020;
- h. enjoining Defendants from issuing the same or a substantially similar order requiring the wearing of face-coverings or masks; and
- i. for all relief just and proper in the premises.

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