

In the
Supreme Court of Alabama

**Ex Parte Donald E. Williamson, as
State Health Officer, and the
Alabama Department of Public Health, Petitioners,**

In re: Donald E. Williamson, etc., et al.,

Petitioners-Appellants,

v.

Wynnwood Personal Care Home I,

Respondent-Appellee.

On Appeal from the Circuit Court of Coffee County,
Alabama (Enterprise Division), CV-2001-M-50;

On Petition for Writ of Certiorari to the
Court of Civil Appeals, No. 2020365

***Amicus Curiae* Brief of
Assisted Living
Association of Alabama, Inc.**

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STATEMENT OF THE ISSUES

I. Was the writ of certiorari granted improvidently?

II. Should the circuit court's review of the evidence be affirmed, as a check from an elected public official, to avoid the constitutional question of whether the State Health Officer possesses State "executive" power to control assisted-living-facility licenses?

SUMMARY OF ARGUMENT

This Court should quash the writ as granted improvidently. The Petitioner has not satisfied the requirements of Rule 39. First, the decision below is from a Rule 53 no-opinion affirmance of no precedential significance, and therefore cannot have widespread effect. Second, no class of state officers is affected, as none of the enforcement officials involved are agents of the State Executive Department. See *State v. Sanders*, 187 Ala. 79, 65 So. 378, 378-79 (1914). Third, the Petitioner did not draw to the Court's attention any decision involving the State Board of Health in conflict with the court decisions below.

If the writ is not quashed, the circuit court's decision should be affirmed. The circuit court, as an elected public body, provides a valuable check against improper administrative decisions of the State Health Officer and its agents. Affirming the court here provides a solution to the problem of his exercising power to revoke licenses though not subject to appointment or removal by an elected member of the State Executive Department. As several justices suggested in the case of *Ex parte Weaver*, 570 So. 2d 675 (1990), under the structure of Alabama government, those who exercise executive power are best checked by the supreme executive. Rather than confront this potentially weighty issue of constitutional law, *amicus* urges the Court to validate the role played by a vigorous judicial review from the circuit court, and issue an order that affirms the decisions below.

ARGUMENT

This *amicus curiae* brief is submitted by the Assisted Living Association of Alabama, Inc. ("ALAA" or "*amicus*"). The Court of Civil Appeals should be affirmed, or the writ of certiorari quashed as improvidently granted. The court acted properly in accepting the circuit court's decision to

reverse the State Health Officer's revocation of Wynnwood's license for an assisted-living facility, as provided in Ala. Code §§ 22-21-22 and -25. Hereafter, *amicus* uses the acronym "SHO" to refer to the State Health Officer, and also to refer to the Alabama Department of Public Health, which he directs pursuant to Ala. Code § 22-2-8.

I. The Petition Was Granted Improvidently.

Amicus believes that the petition for writ of certiorari did not meet the standards for review previously set out by this Court. The claim of widespread impact arising from the no-opinion decision of the Court of Civil Appeals is belied by Rule 53 of the Alabama Rules of Appellate Procedure. Under Rule 53(d), a no-opinion affirmance "shall have no precedential value, . . . and shall not be used by any court within this state"

Amicus does not understand, despite the claims of the Petitioner, that the decision affects "a class of . . . state officers . . . , " as contemplated by Rule 39(a)(1)(B). The SHO is not a state officer. As explained by this Court in 1914:

No part of the sovereign power of the state is by the statute delegated to appellee, although he is named in the statute as the

"state health officer." The delegation of such authority and power is to the "state board of health," which is appellee's creator and master, whom he serves. He does not serve the state; he serves the board which elects him. That statute expressly provides that whatever he does he shall do "under the direction of the state board of health."

State v. Sanders, 187 Ala. 79, 65 So. 378, 378-79 (1914) (construing constitutional restriction on changing salary of officer during term).

Furthermore, it is difficult to understand how the decision will impact other officials of state boards with responsibility "to enforce standards for other regulated industries and professions," especially given the Rule 53 designation by the Court of Civil Appeals. The argument of the Petitioner is mostly that the facts are too specific for a circuit court to be able to conclude that the SHO erred. In effect, as the argument goes, the circuit court must have substituted its judgment for that of the SHO. And, as explained below, *amicus* believes that the circuit court is an important check, by an official accountable to an electorate, against persons who misuse the authority of the SHO to execute the law of the State, without being subject to appointment or removal by the Governor. These questions have not been developed fully below, but it is certainly a

question to be faced in the future by others. As presently constituted, the enforcement of the health laws is not sufficiently accountable to the Governor or any other member of the constitutionally-designated Executive Department, especially given the import of any decision to revoke a license and prevent a person from earning a livelihood.

Similarly, Rule 39(a)(1)(D) does not supply a basis for certiorari. Despite claims of a conflict with decisions of this Court, the Petitioner has cited no decision of this Court involving the SHO, the Department of Public Health, or his supervising State Committee on Public Health (also known as the State Department of Health). The only Court of Civil Appeals decision cited by the Petitioner is *Department of Public Health v. Perkins*, 469 So. 2d 651 (Ala. Civ. App. 1985), and that hardly represents a conflict, as it involves review of the groundwater standards for the installation of a septic tank. By contrast, this case involves merely the residents of a licensed assisted-living facility and their location not being monitored as desired by the SHO.

In the view of this *amicus*, it would be much more problematic to reverse the decision of the Court of Civil Appeals, and write an opinion which accorded judicial deference to the actions of the SHO, who is not appointed by,

and not accountable to, an elected Executive Department official. There are serious questions of Alabama constitutional law raised by allowing the SHO to block assisted-living facilities from doing business by revoking licenses. *Amicus* believes that, assuming the SHO to have represented a true state of facts in his Petition, the SHO should not have brought proceedings to revoke Wynnwood's license. Lesser sanctions such as fines are less likely to be objectionable, as a practical matter.

The Assisted Living Association of Alabama is committed to responsible regulatory standards and even-handed public oversight. Agents of the ALAA have urged the Legislature to provide the Department additional statutory protection from lawsuit, provide additional budgetary funding, and lobbied to raise provider licensure fees to support such funding. ALAA supports fair and reasonable regulation and believes the public interest is served by proper oversight from a responsible Executive Department agency.

Amicus is especially troubled by the prospect of long-term regulatory oversight by persons not accountable to an identifiable elected member of the Executive Department. More troubling still would be a ruling that the SHO or his agents, acting alone, properly possesses the power to execute

the laws of Alabama. Such a ruling may be necessary to resolve whether the SHO is a proper executor of the law in revoking Wynnwood's license to provide assisted-living services.

For these reasons, *amicus* recommends that the Court quash the writ as granted improvidently.

II. The Circuit Court's Review of the Evidence Should Be Affirmed, As It Provides A Valuable Check By An Elected Public Official.

In the event this Court's does not quash the writ as improvidently granted, it should affirm the circuit court. The circuit court acts as an important check, by an identifiable public official accountable to an electorate, to protect against errors in administration of the public health laws by its agents. Because the SHO is appointed by a private group, and not by an Executive Department official, there is a need for some "check and balance" that the circuit court is positioned to provide. Rather than confront the constitutional issues raised by the status of the SHO, this Court could avoid them by affirming and respecting the circuit court's review of the evidence here.

The SHO is not listed as a member of the State's Executive Department, which is otherwise elected by the

citizens. See Ala. Const. art. IV, §§ 112, 114, 115. The Constitution confers "supreme executive power" on the Governor. *Id.* § 113. It is his responsibility to "take care that the laws be faithfully executed." *Id.* § 120. Unfortunately, the legislature's designation of responsibility for the licensing of a "hospital," gives the Governor no executive responsibility. No statute confers authority on the Governor to appoint or remove the SHO from office.

Rather, the SHO is appointed by the Medical Association of the State of Alabama, acting originally as the State Board of Health, and then as the State Committee on Public Health. It has done so since 1875. This organization is a private organization. Thus, the legislature has conferred authority on a private group to appoint its own agent to execute the legislature's command, and dispense authority on other private groups to engage in business activity. *Amicus* does not now urge the Court to conclude that such a conferral of power on such a group is itself an improper reassignment of "legislative" power. Indeed, in *Parke v. Bradley*, 204 Ala. 455, 86 So. 28 (1920), this Court concluded that the private character of the group failed to establish that the legislative authorization of regulatory responsibility

implied a delegation of the legislature's power. 86 So. at 30-31. Similarly, in *DeCarlo v. Jefferson County Bd. of Health*, 274 Ala. 506, 150 So. 2d 374 (1963), this Court reaffirmed that its authority to adopt regulations is not an unlawful delegation of legislative authority, as noted in the *Parke* decision. In 1987, in *Evers v. Board of Medical Examiners*, 516 So. 2d 650 (Ala. Civ. App. 1987), the Alabama Court of Civil Appeals refused to find that the delegation of authority to the Medical Association of the State of Alabama to determine the membership of the State Board of Medical Examiners to be an unconstitutional delegation of legislative authority. This decision drew support from the decision in *Yielding v. State ex rel Wilkinson*, 232 Ala. 292, 167 So. 580 (1936), where this Court held that the legislature could provide for appointment of a county personnel board via a group of private citizens, as well as the decision in *Parke v. Bradley, supra*.

However, *amicus* suggests that a different, equally fundamental, question lurks in the case at bar. In none of these cases is the effect of §§ 112, 113, 114, and 120 of the Alabama Constitution mentioned. This Court has never confronted the question of whether the SHO exercises the "executive power" of the State without the protections

implied by the Alabama Constitution: supervision by an officer elected by the citizens to possess State "executive" power. Absent such supervision, the SHO is merely an agent of the legislature executing its statutes outside the constitutional structure for the exercise of "executive power." In that respect, the SHO's revocation of the Wynnwood license reflects an exercise of State "executive" power, and the legislature's provision for appointment of the SHO by persons not members of the Executive Department should be a violation of § 43 of the Constitution.¹

This problem is suggested in this Court's decision in *Ex parte Weaver*, 570 So. 2d 675 (1990), though it was not required to be resolved. As several justices noted there: "'Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or to appoint the agents charged with the duty to make such enforcement. The latter are executive functions.'" *Ex parte Weaver*, 570 So. 2d at 685 (Houston, J., dissenting) (quoting

¹To the best of our knowledge, no decision of this Court has addressed the question. In 1980, in *State Bd. of Health v. Atnip Design and Supply Center, Inc.*, 385 So. 2d 1307 (Ala. 1980), this Court ruled that action outside normal Board practice is sufficient to justify mandamus relief by the circuit court for the refusal to issue septic tank permits.

Martindale v. Anderson, 581 P.2d 1022, 1027 (Utah 1978)).²

This description of the limit of legislative power from the dissent in *Ex parte Weaver* is a verbatim recital, without attribution, of the language used in *Springer v. Govt. of Philippine Islands*, 277 U.S. 189, 202 (1928). In *Springer*, the U.S. Supreme Court held that the provision for separation of powers in the Organic Act of the Philippine Islands was violated by acts of the territorial legislature. These acts provided for the stock of certain corporations to be voted by not only the Governor, but also the President of the Senate and the Speaker of the House. See 277 U.S. at 198. The same passage is quoted again in *Buckley v. Valeo*, 424 U.S. 1, 139-40 (1976), where the Court held the Federal Election Commission was appointed unconstitutionally by allowing congressional personnel the authority to do so. Following the principles set out in *Springer*, the Supreme

²In *Ex parte Weaver*, 570 So. 2d 675 (1990), this Court ruled that § 137 of the Constitution provided a basis for the legislature to confer on the Attorney General the authority, over the objection of the Governor, to end litigation pursued by the commissioner of insurance. However, this Court did not leave the Governor powerless to insist that litigation be pursued. It also ruled that he might intervene in the litigation and pursue the action himself, as part of his § 113 power as "chief magistrate." *Id.* at 684. Moreover, in the *Weaver* case, the majority did not address the effect of §§ 112, 113, and 120 on the authority of the legislature to assign appointment power to a private group.

Court found that U.S. Const. art. II, § 2, which specifies the role of the Congress in appointment of officers of the United States, was violated.

The Governor's power in § 120, to "take care that the laws be faithfully executed" implies authority over the persons needed to do so. "By executing his power to appoint and to remove, the Governor ensures that the executive departments and agencies implement his decisions and adhere to his policies and his interpretations of the laws so that his decisions may be faithfully executed. The act of any of these subordinate executives is the act of the Governor himself." *Weaver*, 570 So. 2d at 686 (Houston, J., dissenting).

Generally, this kind of "take care" clause thus serves to assign accountability for executive decisions in the executive in whom it resides. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 728-29 (1988) (Scalia, J., dissenting) (discussing *Federalist Papers*, No. 70); *Myers v. United States*, 272 U.S. 52 (1926). Further, along with § 43, the "take care" clause should prevent the legislature from reassigning control over the execution of law to others. By reassigning executive responsibility to persons not subject to the Governor's removal power, the legislature obscures the

accountability necessary for the electorate to evaluate the supreme executive. See generally, *Ex parte Jenkins*, 723 So. 2d 649, 653-55 (Ala. 1998) (discussing separation of powers doctrine, citing *Buckley v. Valeo*).

It is of no consequence that county and municipal officials are not subject to removal by the Governor. Section 175 of the Constitution impliedly takes the appointive features implicit in executive power by assigning removal power in the "circuit or other court of like jurisdiction . . . under such regulations as may be provided by law." See *Nolen v. State ex rel. Moore*, 118 Ala. 154, 24 So. 251 (1898) (finding Governor's authority to suspend county tax assessors implicitly unavailable pursuant to predecessor to § 175); *Fox v. McDonald*, 101 Ala. 51, 13 So. 416 (1893) (filling municipal corporation vacancy not inherently executive). By contrast, one would not assume that the State Executive Department should lack an implicit appointment and removal authority over the State officials who will execute the law.³

³By contrast, the Constitution has made explicit provision for the Governor to fill vacancies in judicial offices. See Ala. Const. art. VI, § 158; Ala. Const. amend. 328, § 6.14.

By so obscuring accountability to an elected State Executive Department official, and by conferring on the Board of Health the authority to control the right to operate as an assisted-living facility, the legislature may have acted in conflict with the requirements of §§ 43, 113 and 120 of the Alabama Constitution. *Amicus* urges this Court to avoid this constitutional question by concluding that the oversight provided by the circuit court here is sufficient, as the circuit court is accountable to an electorate. See Ala. Const., art. vi, sec. 6.13. Such accountability should be the basis for concluding that an official action is due deference.

CONCLUSION

For these reasons, *amicus* Assisted Living Association of Alabama urges that the Court not reverse the decision of the Alabama Court of Civil Appeals. This Court should quash the writ of certiorari as having been granted improvidently, or otherwise find that the circuit court's decision reflects a legitimate oversight of officials otherwise unaccountable to an electorate, and not subject to control by the State's "executive."

Respectfully submitted this ___ day of March 2004.

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CERTIFICATE OF SERVICE

I certify that I have on this ____ day of March 2004, served a copy of the foregoing *Amicus Curiae* Brief of Assisted Living Association of Alabama, Inc. on all counsel of record by mailing the same by United States Mail, postage prepaid and properly addressed as follows:

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