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Scott Lauck (<https://molawyersmedia.com/authors/scottlauck/>) • August 16, 2021

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Missouri Attorney General Eric Schmitt already has won a preliminary victory backing up St. Louis County's decision to end its mask mandate. Now courts could determine if his office has broader authority to challenge similar mandates across the state.

In a lawsuit against the county and the neighboring city of St. Louis, and in a similar suit against the city of Kansas City, Schmitt alleges that those governmental entities "have a history of transgressing statutory and constitutional bounds in the COVID-19 orders they have issued."

On Aug. 3, St. Louis County Circuit Judge Ellen Ribaud entered a temporary restraining order enjoining the county from enforcing a mask order issued on July 26. She is scheduled to hold a hearing on Aug. 17 on Schmitt's request for a preliminary injunction.

However, Ribaud noted that her initial order dealt only with a "narrow issue"— whether a subsequent 5-2 vote by the County Council terminated the mandate. A newly passed state law requires that emergency orders that restrict access to businesses and other public places automatically expire in 30 days without approval of the political subdivision's governing body, and Ribaud held that the law likely applied to the county's mask order.

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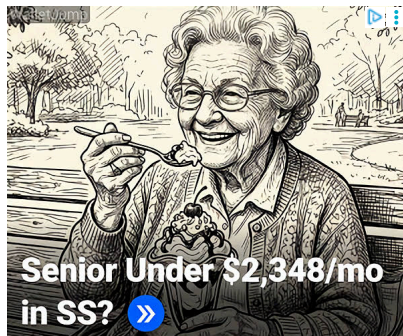
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Schmitt's suit also attacks the mandates on grounds that have nothing to do with the new law. Instead, his petition invokes a provision of the Missouri Administrative Procedure Act — a law dating to 1953 that allows “unconstitutional, unlawful, unreasonable, arbitrary, or capricious” agency decisions to be challenged in court.

In both suits, Schmitt's office argues that the administrative law applies because the mask mandates are not subject to administrative review and affect the legal rights of the cities' and county's residents. The argument appears to be an unusual use of the statute.



Chuck Hatfield, a partner with Stinson in Jefferson City and a former official under then-Attorney General Jay Nixon, said he had never heard of the attorney general acting as a plaintiff under chapter 536, which governs administrative procedure and review.

“The idea of an AG suing another governmental entity is in itself quite novel and seems to me to be a major departure from the way AGs have traditionally viewed their role,” he wrote in an email.

A judge also noted those claims in an Aug. 1 order remanding the St. Louis County case to state court after the defendants sought to remove it to federal court. U.S. District Judge Stephen R. Clark said he didn't have jurisdiction, in part because the claims under chapter 536 “raise novel applications of state law to a unique situation.”

The particular provision, section 536.150 of the Revised Statutes of Missouri, is more commonly employed by individuals and businesses facing adverse decisions by a regulatory body. For instance, a 2012 case in the Court of Appeals Southern District involved a southwestern Missouri dairy's challenge to an order by the State Milk Board that it destroy its entire inventory of cheese due to contamination. (The appellate court affirmed the board's decision.)

Schmitt, however, argues that each mask mandate “clearly fails the requirement of reasoned decision-making.” The petition points to data that Schmitt said showed that some counties that had no restrictions fared better than cities with prior mask mandates in place.

The petition also cites scientific studies and an opinion piece in the Wall Street Journal in support of the argument that schoolchildren “are generally not at risk of serious illness even if they get COVID-19” but suffer educational and social harm when forced to wear masks.

“But there is no evidence that Defendants considered the underlying data, science, and evidence that fail to justify issuing mask mandates at this time,” the suit argues.

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It is not clear if Schmitt's administrative-law arguments will come into play in St. Louis County, as the mandate already has been vetoed and could be permanently enjoined under the new state law.

But in Kansas City, Mayor Quinton Lucas proposed an ordinance on Aug. 12 that would allow the city council to formally extend the mandate until Sept. 23. If the council blesses the mask mandate, Schmitt's argument that the order is arbitrary and capricious could take front and center. Lucas said the suit was frivolous and politically motivated.

St. Louis separately argues that the attorney general's suit against it should be severed from the suit against the county and transferred to St. Louis Circuit Court. In its motion, the city also argues that its order, which remains in effect, is separate from the county's version and stems from its authority under its charter.

The cases are *State ex rel. Schmitt v. Page et al.*, 21SL-CC03334, and *State ex rel. Schmitt v. Lucas et al.*, 2116-CV16501.

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