

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS

VERONICA McCLANE,
as parent and next friend of
her minor children,
Walter and Beckett McClane; and
ASHLEY SIMMONS,
as parent and next friend of
her minor children,
August and Henry Simmons

PLAINTIFFS

vs. Case No. _____

THE STATE OF ARKANSAS,
acting through the 93rd General Assembly;
JIMMY HICKEY, JR., in his official capacity
as President Pro Tempore of the Arkansas Senate;
MATTHEW SHEPHERD; in his official capacity
as Speaker of the Arkansas House of Representatives;
and ASA HUTCHINSON; in his official capacity
as the Governor of Arkansas

DEFENDANTS

**COMPLAINT SEEKING A TEMPORARY RESTRAINING ORDER
PREVENTING THE ENFORCEMENT OF ACT 1002, A PERMANENT INJUNCTION,
AND A DECLARATORY JUDGMENT THAT ACT 1002 IS UNCONSTITUTIONAL**

INTRODUCTION

1. Plaintiffs are the parents of K-12 public school children from across Arkansas who are representative of thousands of similarly situated parents whose children's health is threatened by a legislative ban on mask mandates that removes from local officials the authority to decide what measures are needed to protect K-12 school children.

2. Pursuant to Ark. R. Civ. P. 57 and 65(a), Plaintiffs bring this action *in loco parentis* against the above-named Defendants seeking a Temporary Restraining Order ("TRO") preventing the Defendants from enforcing, or encouraging other public officials, to enforce Act 1002 of 2021 ("Act 1002"). Plaintiffs also seek a permanent injunction to the same effect and a declaratory judgment that Act 1002 is facially unconstitutional or, in the alternative, that Act 1002 is unconstitutional as applied to K-12 public schools.

3. Given that Arkansas public schools will begin classes in approximately two weeks, Plaintiffs cannot afford to wait any longer to see if the executive and legislative branches of government will fulfill their duty to protect the people of Arkansas and the health and welfare of children who attend public schools. Knowing that many more children will get infected with COVID and that more will likely die if the ban on mask mandates is not lifted, Plaintiffs respectfully turn to the Arkansas judiciary for protection from an irrational act of legislative madness that threatens K-12 public school children with irreparable harm.

4. As alleged below, and further explained in the Brief in Support of Plaintiffs' Motion for a Temporary Restraining Order, Act 1002 is constitutionally defective on several grounds, each of which supports a finding by this Court that Act 1002 is null and void. More specifically:

- a. Act 1002 violates the separation of powers doctrine established in Article 4, § 2 of the Arkansas Constitution. Consistent with the Kentucky Supreme Court’s interpretation of language in its Constitution that is identical to the language in the Arkansas Constitution, Act 1002 is in direct conflict with Ark. Const. Art. 6, § 19, which gives the Governor exclusive authority to respond to emergencies that arise from “contagious diseases.”¹ Act 1002 must therefore be declared unconstitutionally null and void.
- b. Act 1002 violates the guarantees of due process and equal protection, as established by Article 2 of the Arkansas Constitution. On its face and as applied, Act 1002 advances no conceivable legitimate government interest, fails to satisfy the “rational basis” standard of constitutional scrutiny, is facially overbroad, and creates nonsensical and irrational exemptions that deprive certain classes of citizens and organizations of the health and safety measures provided to others.
- c. Act 1002 violates the rights of K-12 public school children, as guaranteed by Article 14, § 1 of the Arkansas Constitution, by preventing the State of Arkansas and local school districts from “maintain[ing] a general, suitable and efficient system of free public schools” and “adopt[ing] all suitable means to secure the people the advantages and opportunities of education.”

¹ No hearing or findings of fact are necessary for the Court to address the unquestionable conflict between Act 1002 and Ark. Const. Art. 6, § 19, which makes Act 1002 facially unconstitutional. On this basis alone, the Court may grant an injunction and issue a declaratory judgment in favor of the Plaintiffs as a matter of law.

5. Most, if not all, of the adjudicative facts alleged in this verified Complaint are virtually indisputable. Many of the adjudicative facts alleged in this Complaint are not subject to reasonable dispute in that they are either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. As such, this Court may take judicial notice of those facts pursuant to Ark. R. Evid. 201(b).

6. Attached to this Complaint are the affidavits of (a) Dr. William G. Jones, M.D. (Chief Medical Officer of CHI St. Vincent Infirmiry); (b) Veronica McClane; and (c) Ashley Simmons, as well as various Exhibits, all of which are incorporated herein by reference.

7. Upon receiving notice from the Clerk of the Court that this Complaint has been accepted for filing, assigned a case number, and assigned to one of the Divisions of the Pulaski County Circuit Court, Plaintiffs' counsel will file a Motion for a TRO and supporting Brief. Together with this Complaint, Plaintiffs' Motion for a TRO and supporting Brief provide ample verified facts and legal authority for the Court to conclude that Plaintiffs have satisfied all the requirements of Arkansas law for obtaining a TRO and that there are compelling reasons for the Court to do so without delay.

8. Accordingly, Plaintiffs have prepared a proposed Order granting Plaintiffs' Motion for a TRO, which Plaintiffs will e-file following the filing of Plaintiffs' Motion for a TRO and supporting Brief. The undersigned counsel will be available at the Court's convenience to address any questions the Court may have regarding Plaintiffs' Motion for a TRO or the proposed Order.

9. On Tuesday, July 27, 2021, Plaintiffs' counsel delivered to the Defendants via e-mail a 14-page letter informing Defendants of Plaintiffs' intentions to seek an injunction and explaining

in detail the legal and factual grounds for doing so. (Ex. A) Plaintiffs' counsel received no response to that letter from any of the Defendants.

10. On Wednesday, July 28, 2021, Plaintiffs' counsel delivered to the Attorney General of Arkansas ("AG") and two Deputy AGs via e-mail a letter informing them of Plaintiffs' intentions to seek a TRO, attaching the above-referenced 14-page letter and a second letter further explaining the grounds for obtaining a TRO. (Ex. B) Plaintiffs' counsel asked that the recipients of the e-mail confirm receipt of the e-mail via a reply. Neither the AG nor her Deputy AGs ever replied.

11. Immediately prior to the filing of Plaintiffs' Complaint, Plaintiffs' counsel sent the AG and a Deputy AG a copy of this Complaint via e-mail.

PARTIES

12. Plaintiff Veronica McClane is a resident of Pulaski County, Arkansas and is the mother of Walter and Beckett McClane, both of whom are less than 12 years old and are enrolled in public schools that would impose a face mask mandate but for the prohibitions in Act 1002.

13. Plaintiff Ashley Simmons is a resident of Pulaski County, Arkansas and is the mother of August and Henry Simmons, both of whom are less than 12 years old and are enrolled in public schools that would impose a face mask mandate but for the prohibitions in Act 1002.

14. Defendant State of Arkansas was admitted to the Union as the 25th state on June 15, 1836. The State of Arkansas enacts legislation through the Arkansas General Assembly whose elected members serve in the House of Representatives and the Senate. The authority of the Arkansas General Assembly is limited by various provisions in the Arkansas Constitution of 1874 and its amendments ("Arkansas Constitution").

15. Defendant Jimmy Hickey, Jr. is the President Pro Tempore of the Arkansas Senate.

16. Defendant Matthew Shepherd is the Speaker of the Arkansas House of Representatives.

17. Defendant Asa Hutchinson is the Governor of Arkansas (“Governor Hutchinson”) and is named as a Defendant because his joinder is required by Ark. R. Civ. P. 19 (a) as a person who claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may, as a practical matter, impair or impede his ability to protect that interest.

VENUE AND JURISDICTION

18. The Circuit Court of Pulaski County, Arkansas is the proper venue for this action.

19. The Circuit Court of Pulaski County, Arkansas has jurisdiction of the subject matter of this Complaint, and the Defendants are subject to the personal jurisdiction of this Court.

FACTUAL ALLEGATIONS

20. More than 100 years have passed since Arkansas experienced a state of emergency arising from a contagious disease. In response to a deadly pandemic in the early 1900’s, state governments resorted to quarantines and mandatory vaccinations to protect their citizens – a response which infringed upon personal freedom to a much greater degree than being required to wear a face mask. Not everyone was happy about those intrusive government measures, and a Massachusetts man who objected to the state’s “big government” vaccine mandate filed a lawsuit that eventually made its way to the United States Supreme Court in 1905. In upholding the state’s right to compel vaccinations during a pandemic, the Supreme Court noted that under our system of government, liberty and freedom are not a license to do what one wants:

“The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty

itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law. In the constitution of Massachusetts adopted in 1780, it was laid down as a fundamental principle of the social compact that the whole people covenant with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for "the common good," and that government is instituted "for the common good, for the protection, safety, prosperity and happiness of the people, and not for the profit, honor or private interests of any one man, family or class of men." ²

21. That same year, a raging pandemic in Arkansas became so dire that then Governor Jeff Davis called out the Arkansas militia to enforce a quarantine under the management of the Board of Health. He did so based on the Supreme Court's reasoning in the *Jacobson* case and under the authority given to him by the same Constitution we live under today – which mandates a separation of powers among the three branches of government and gives the Governor “supreme power” to respond to a pandemic without restrictions or interference. In keeping with Arkansas’ long history of embracing a “home rule” form of government,³ Governor Davis’ executive order gave broad deference to local officials in combatting the pandemic:

“While the state quarantine is being carried into effect under the direction of the state board [of health] the precautions for the sanitary improvement of Little Rock are being carried forward under the direction of the city board. ... Mayor Brewer of Texarkana telephoned Mayor Lenon yesterday that his town had quarantined against all Louisiana towns because of the reported existence of the fever at Shreveport.”

22. As further explained in Plaintiffs’ Brief in support their Motion for a TRO, the language in the Arkansas Constitution, Art. 6, § 19, has been interpreted to give Governor

² See also [A Constitutional Guide to Emergency Powers](#), *Wall Street Journal* (March 19, 2020).

³ See, e.g., Ark. Const. Amendment 55.

Hutchinson “supreme” plenary authority to deal with two specific types of state emergencies without regard to any laws the legislature has passed: (1) an attack by “enemies” of the state; and (2) emergencies that arise from a “contagious disease.” The Arkansas Constitution therefore prohibits the legislature from banning face mask mandates to slow the spread of a “contagious disease” for the same reason the legislature could not pass a law that prohibits the Governor from activating the Air National Guard in defense of an attack by “enemies” of the state. The reasoning behind the constitutional ban on interference by the legislature in these two situations is self-evident.

23. When more than 5,500 Arkansans had already lost their lives to COVID – and months before we reached the current death toll of more than 6,100 Arkansans – Arkansas Senator Trent Garner introduced Senate Bill 590 (“SB590”) to prohibit any state or local official from requiring anyone to wear any kind of face covering or face mask for any reason.⁴ A complete and accurate copy of Act 1002 is attached as “Exhibit C.”

24. The most direct and persuasive evidence of the legislative intent behind SB590 can be found in the official video archives of the Arkansas House of Representatives.⁵ On April 20, 2021, when asked by another member of the House of Representatives why the legislature should deprive local officials of the right to decide whether to impose a mask mandate “when lives are at stake,” Rep. Joshua Bryant (R-Rogers), the co-sponsor of SB590, replied by saying that “uniformity is the biggest issue” and that face mask mandates perpetuates “strife” among citizens – implying that a

⁴ On its face, Act 1002 would prohibit every high school and university in Arkansas from requiring football players to wear a face mask, a requirement imposed on every school by the organizations that govern collegiate and high school sports.

⁵ <https://www.arkansashouse.org>

decision about whether to require face masks should be made by the legislature – not by local officials or the Governor. Rep. Bryant seemed unfazed by another legislator’s suggestion that the pandemic wasn’t over, that “lives [were] at stake,” and that “a need for arbitrary uniformity” would prevent local officials from protecting their local citizens. Rep. Bryant responded by saying that whether to mandate face masks was a “function of state government” and that the legislature was “going to write legislation to pass and not rely on an executive order that creates too much ambiguity and force.”

25. In fact, as evidenced by subsequent legislative action regarding the pandemic, Senator Garner, Rep. Bryant, and other legislators were well aware of the possibility that Arkansas might be hit by a surge of a “mutated more virulent strain” of COVID that would “impact[] children”:

(2) Conditional Mandate for Vaccination of Children.

(A) If a variant of COVID-19 occurs and mutates to be a **more virulent strain that impacts children** within two (2) years from the date that the United States Food and Drug Administration approved the immunization or vaccination for COVID-19, then the Secretary of the Department of Health and the Governor shall request a meeting within two (2) weeks of the discovery of the virulent strain of the Senate and House Committees on Public Health, Welfare, and Labor.

26. What little else we know about the legislature’s intent in enacting Act 1002 is based on public comments made by Senator Garner, the bill’s main sponsor. Among other things Senator Garner has publicly said the following about the General Assembly’s intent in enacting Act 1002:

“I’d rather have a dangerous freedom than a comfortable safety,” said Arkansas state Sen. Trent Garner, who successfully pressed a ban on mask mandates and, like many like-minded officials, is adamant it stay in place.

Republican Senator Trent Garner represents El Dorado and authored the bill. He says the government should not mandate masks. He says this letter is another example of democrats overreacting to the situation.

"They've used this pandemic from the start to gain more power and control over the people of Arkansas. The reality is the democrat's ideas for the last year, and a half failed and what they should do is allow people to make their own personal medical choices and get your big government mandate away from the people," he said.

Senator Garner says parents can choose to send their kids back to school with masks because they know what's best for their family.

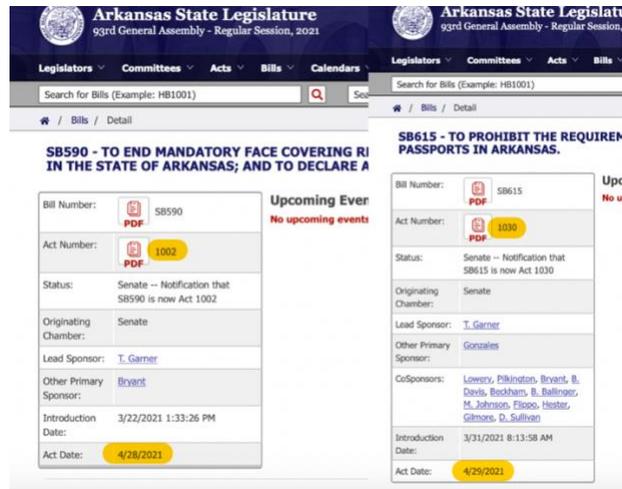
"It's everybody's personal choice. I've heard from 10 times as many parents who do not want to have to send their kids back with a mask or want the option to do it as the conditions on the ground change. The people of Arkansas are smarter than the Arkansas democrats in the general assembly. They know what's best for them and their family," he said.

"The reality is we've been under CDC guidance, we've been under these big government mandates, we've been under regulations on the people for the last 18 months and it's done nothing to help stop this pandemic from having another surge, the delta variant. We've tried the government's approach over and over again," Garner told 40/29 in a Wednesday interview.



27. SB590 was initially referred to and heard in the Senate Public Health, Welfare and Labor Committee, on or about March 29, 2021. It was passed by the Senate and referred to the House on or about March 31, 2021. The bill was subsequently referred to the House Public Health, Welfare and Labor Committee where it was amended and referred to the House for vote as amended. SB590 then went back to the Senate for concurrence before being sent to the Governor. Representative Bryant was added as a co-sponsor in the House, but it appears that most of the House action was led by Representative Wardlaw, who was the proponent of the amendment mentioned above, the specific purpose of which remains unclear.

28. The legislative history of Act 1002 is unremarkable with one exception: When the Governor signed into law a ban on vaccine passports on April 29, 2021 (Act 1030), the section of the Arkansas Code that was to be amended by Act 1030 was the same section of the Arkansas Code that was referenced when the Governor had signed Act 1002 into law the previous day:⁶



It would, therefore, appear that Act 1030 repealed Act 1002 by operation of law.⁷

29. In the months that followed the enactment of Act 1002, the behavior, cavalier attitudes, and choices made by many Arkansans made our state a prime target for a mutation of the COVID virus that became known as the “Delta variant.” During this time-period, multiple news reports showed a heavy resistance among adult Arkansans to the widely available COVID vaccines, social distancing, and the wearing of face masks. Less than 40% of adult Arkansans chose to be vaccinated, ranking Arkansas at or near the bottom of the fifty states.

30. By the first week of July 2021, the number of new COVID cases, hospitalizations, COVID patients on ventilators, and deaths were setting off alarms with the Arkansas Department

⁶ Both laws were to be codified as an amendment to Ark. Code 20-7-142.

⁷ Ark. Code § 1-2-20.

of Health, UAMS, and health professionals throughout the state. On July 8, 2021, Governor Hutchinson held the first of several “Community COVID Conversations” that were being planned around the state. The meetings were intended to combat a rising number of cases by allaying fears about getting vaccinated. As the Governor began his town hall meetings at various locations throughout the state, the reaction of those who attended the meetings raised even greater concerns about the resistance to vaccinations. The Governor was routinely met with skepticism by constituents who had come to believe that: (a) the vaccines were part of a secret government plot to implant microchips in people; (b) the vaccines caused infertility and other adverse health problems; and/or (c) that a cattle de-wormer called “Ivermectin” was a cheap, effective, and safer way to guard against the incredibly contagious Delta variant.

31. The number of people choosing to get the vaccine increased significantly in July, presumably because of the Governor’s efforts. On the other hand, the increase in the number of recently vaccinated Arkansans was outpaced by the COVID metrics tracking new cases, hospitalizations, COVID patients on ventilators, and deaths. By the middle of July, many national news organizations were referring to Arkansas as the “epicenter” of the pandemic.

32. There is no COVID vaccine that’s safe for children under 12 who therefore have no choice about being vaccinated. That makes K-12 children extraordinarily vulnerable to being infected with the Delta variant. Children also have no choice about going to school. Arkansas law requires them to do so. Ark. Code § 6-18-2101.

33. By the end of June 2021, parents across the state began sharing their concerns about their K-12 children going to public schools that were prohibited by Act 1002 from requiring school children to wear face masks. Parents of K-12 children were not the only ones worried about the

impact Act 1002 would have on the health and safety of their children. Several Arkansas health officials went public to share their grave concerns:

In [an interview](#) with KUAJ that aired Tuesday, May 11, ACHI President and CEO Dr. Joe Thompson discussed his concerns about recent legislative action to ban mask mandates in Arkansas.

“Senate Bill 590, now Act 1002, prohibits the executive branch at the state level or even at the municipal level from enforcing a mask mandate,” Thompson said. “I am concerned that this takes away an important emergency authority from leadership in our communities and at the state level. We don’t know when we’re going to have the next pandemic, and clearly, as a respiratory virus, masks and the mask requirement [were] an important source of defensive positioning until we could get vaccines.”

34. Although the Governor’s daily COVID reports did not reveal how many of the sick and deceased Arkansans were children, one needed to look no further than Children’s Hospital to realize how dire the situation has become for children under 12 – whose only protection from the Delta variant is face masks and social distancing.



Arkansas Children's experienced a record number of COVID-19 hospitalizations today with 24 patients who are positive for COVID-19. This record high is a 50 percent increase over any previous daily hospitalization peak Arkansas Children's has faced during the pandemic. Our previous peaks occurred earlier this month and in January.

Of the 24 patients admitted, 7 are in intensive care and 4 are on ventilators. None of the hospitalized patients have been fully immunized against COVID-19 even though more than half of them are eligible.

Arkansas Children's appeals to families and the public to please vaccinate children who are eligible immediately. We will continue to see more kids get sick quickly and the best ways to reduce the spread of COVID-19 are by taking the vaccine, masking and social distancing.

Dr. Rick Barr
Chief Clinical and Academic Officer

35. Though the Governor’s daily COVID reports do not show how many COVID patients are children, at least two Arkansas children have already died as a direct result of COVID:

LITTLE ROCK, Ark. (KATV) — The Arkansas Department of Health confirmed Thursday that two children have died from COVID-19.

The department said the first pediatric COVID-19 death happened at the end of last year but took time to confirm. The second death happened this month.

The state on Thursday reported 1,860 new cases of the virus, the second day this week new cases have topped 1,800. More than 19 percent of the 9,654 tests conducted were positive.

Active cases increased by 876 to 12,779.

36. To underscore the importance of giving local officials the authority to mandate face masks, the following letter from the Cystic Fibrosis Foundation reinforces that certain K-12 school children are at a much higher risk of being infected by the Delta variant than other children, that the consequences for them can be far more deadly, and that requiring every student to wear a face mask is the most effective way to protect these high-risk children:



July 30, 2021

Hon. Jimmy Hickey, Jr.
President Pro Tempore
Arkansas Senate
3216 East 35th Street
Texarkana, AR 71854

Hon. Matthew Shepherd
Speaker
Arkansas House of Representatives
200 N. Jefferson Ave.
El Dorado, AR 71730

Dear President Hickey and Speaker Shepherd,

On behalf of the 300 people in Arkansas living with cystic fibrosis (CF), we write to urge the legislature to amend Act 1002 to exempt all K-12 schools from policies prohibiting mask requirements to ensure the necessary flexibility to protect students and staff during the ongoing COVID-19 pandemic. Additionally, we urge you to direct school districts to offer remote learning during the 2021-2022 academic year as an accommodation for students at higher risk for severe illness from the virus, including those with CF.

About cystic fibrosis and COVID-19

Cystic fibrosis is a life-threatening genetic disease that affects more than 30,000 people in the United States, including 130 children in Arkansas. CF is a complex, multi-system disease that causes the body to produce thick, sticky mucus that clogs the lungs and digestive system, which can lead to life-threatening infections. Cystic fibrosis is both serious and progressive, while great strides have been made in the treatment of the disease, lung damage caused by infection is irreversible and can have a lasting impact on length and quality of life.

As COVID-19 continues to present a serious ongoing risk to Arkansas residents, both children and adults living with the CF remain at increased risk for severe illness from the COVID-19, as compared to those without underlying conditions.¹ Community transmission of the virus remains high in Arkansas and, as of July 30, over 1700 new cases in Arkansas have been reported in the past week, the third highest rate of any state in the country.² In light of the recent emergence of the Delta and other new variants, the Centers for Disease Control and Prevention (CDC) has recommended that Americans continue to reduce the risk of transmission of COVID-19 and protect those who are most vulnerable to infection.³

Amend Act 1002 to extend flexibility for all K-12 schools

As communities plan for a return to in-person learning this fall, Arkansas schools must have the flexibility to implement necessary safety measures to protect their students and staff. However, Act 1002 bars local school districts from implementing mask mandates, limiting their ability to implement safety measures for all students,

¹ <https://www.cdc.gov/coronavirus/2019-nCoV/daily-life-coping/children/symptoms.html#higher-risk>

² https://www.cdc.gov/covid-data-tracker/#cases_casesper100klast7days

³ <https://www.cdc.gov/coronavirus/2019-nCoV/need-extra-precautions/people-with-medical-conditions.html>

including those with underlying conditions like CF who may be at greater risk of severe illness from COVID-19. In the absence of approved vaccinations for children under age 12, precautions like masking remain a vital tool in preventing infection and spread of the virus; both the CDC and American Academy of Pediatrics recommend universal masking in schools at this time, with the goal of keeping students safe and physically present in school.^{4,5} We urge Arkansas to amend Act 1002 to add all schools as an exempt category under Section 20-7-142 (e) of the law.

Extend remote learning accommodations for the 2021-2022 academic year

In addition to allowing school districts the flexibility to implement safety measures for their staff and students, we urge you to direct school districts in Arkansas to extend remote learning as an accommodation for high-risk students and their families, including children with CF and their siblings. This request echoes the recommendations of the American Academy of Pediatrics (AAP) that "special considerations and accommodations to account for the diversity of youth should be made, especially for populations facing inequities, including those who are medically fragile or complex."⁶ The Cystic Fibrosis Foundation believes that the decision to return to in-person learning should be made on a case-by-case basis and is best left to a child's family and their care team.

The Cystic Fibrosis Foundation urges you to swiftly amend Act 1002 to provide an exemption for all K-12 schools and to advise local school districts to adopt remote learning as an option for people with CF and their families during the 2021-2022 academic year. We stand ready to serve as a resource to the legislature and to the state as they plan for the reopening of K-12 schools this fall. Please contact Sage Rosenthal at srosenthal@cff.org or (301) 841-2632 (301) if you would like to discuss this issue further.

Sincerely,

Mary B. Dwight
Senior Vice President of Policy & Advocacy

cc: Gov. Asa Hutchinson
Com. Johnny Key
Hon. Scott Flippo
Hon. Keith Ingram
Hon. Austin McCollum
Hon. Tippi McCullough

⁴ <https://www.cdc.gov/coronavirus/2019-nCoV/community/schools-childcare/1-12-guidance.html>

⁵ <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>

⁶ <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>

CYSTIC FIBROSIS FOUNDATION
NATIONAL OFFICE

4550 MONTGOMERY AVE, SUITE 1100N
BETHESDA, MD 20814

TEL: 800.FIGHT.CF
WEB: WWW.CFF.ORG

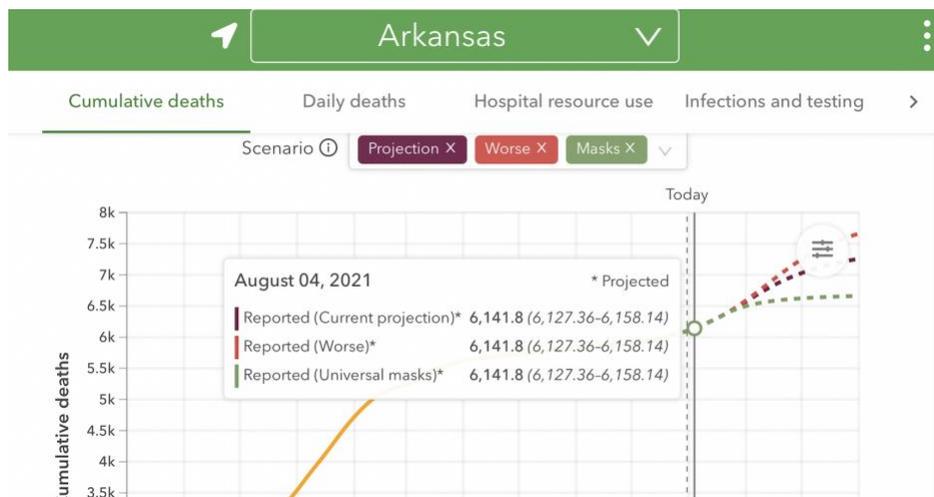
37. An announcement by the Alabama Department of Education earlier today adds even more weight to the importance of recognizing that a legislative ban on face masks in K-12 public schools is likely to cause irreparable harm to children with pre-existing conditions:

HEALTH

Alabama Public Health recommends masks for all in schools

ADPH's Dr. Karen Landers writes that at least 108 Alabama children who had COVID-19 developed Multisystem Inflammatory Syndrome.

38. The following report shows the latest statistics and trends for deaths of Arkansans resulting from COVID:



39. As of the filing of this Complaint, the most credible, scientific national and state public health officials have unanimously recommended that K-12 school children wear face masks at school. The superintendents and boards for the school districts in which Plaintiffs' children attend

have made clear that, but for the removal of their local authority by Act 1002, they would implement a mask mandate this coming school year.



CDC Centers for Disease Control and Prevention
CDC 24/7: Saving Lives. Protecting People™

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COVID-19

Your Health Vaccines Cases & Data Work & School Healthcare Workers Health Depts Science More

- Vaccines
 - Getting Your Vaccine +
 - Types of Vaccines Available +
 - Possible Side Effects
 - After You're Fully Vaccinated -
 - Guidance for Fully Vaccinated People**
 - Safety & Monitoring +
 - Effectiveness +
 - Myths & Facts
 - Frequently Asked Questions
 - About COVID-19 Vaccines +
 - Communication Resources +

Interim Public Health Recommendations for Fully Vaccinated People

Updated July 28, 2021 Languages Print

Summary of Recent Changes

Updates as of July 27, 2021

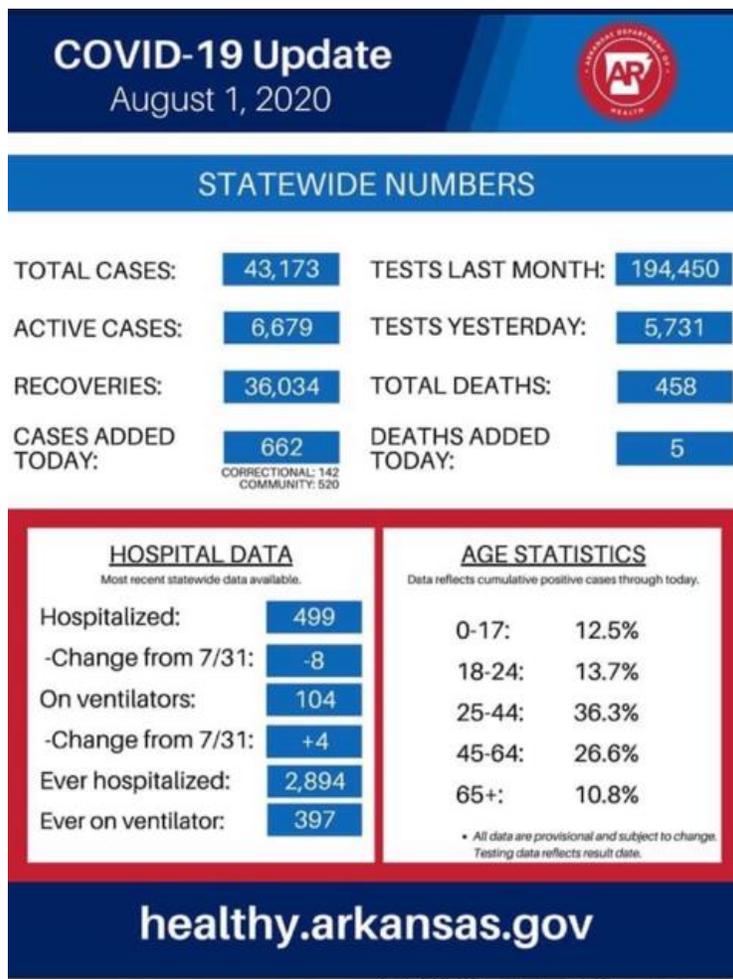
- Updated information for fully vaccinated people given new evidence on the B.1.617.2 (Delta) variant currently circulating in the United States.
- Added a recommendation for fully vaccinated people to wear a mask in public indoor settings in areas of [substantial or high transmission](#).
- Added information that fully vaccinated people might choose to wear a mask regardless of the level of transmission, particularly if they are immunocompromised or at [increased risk for severe disease](#) from COVID-19, or if they have someone in their household who is immunocompromised, at increased risk of severe disease or not fully vaccinated.
- Added a recommendation for fully vaccinated people who have a known exposure to someone with suspected or confirmed COVID-19 to be tested 3-5 days after exposure, and to wear a mask in public indoor settings for 14 days or until they receive a negative test result.
- CDC recommends universal indoor masking for all teachers, staff, students, and visitors to schools, regardless of vaccination status.

The Margin

American Academy of Pediatrics urges universal masking in schools for everyone ages 2 and up — whether vaccinated or not

Last Updated: July 20, 2021 at 4:27 p.m. ET
First Published: July 19, 2021 at 12:13 p.m. ET

40. The following chart reflects the state’s official COVID metrics as of August 1, 2021 and notes that children accounted for 12.5% of the positive COVID tests:



41. On July 29, 2021, Governor Hutchinson issued Executive Order No. EO-21-14, a true and correct copy of which is shown below:



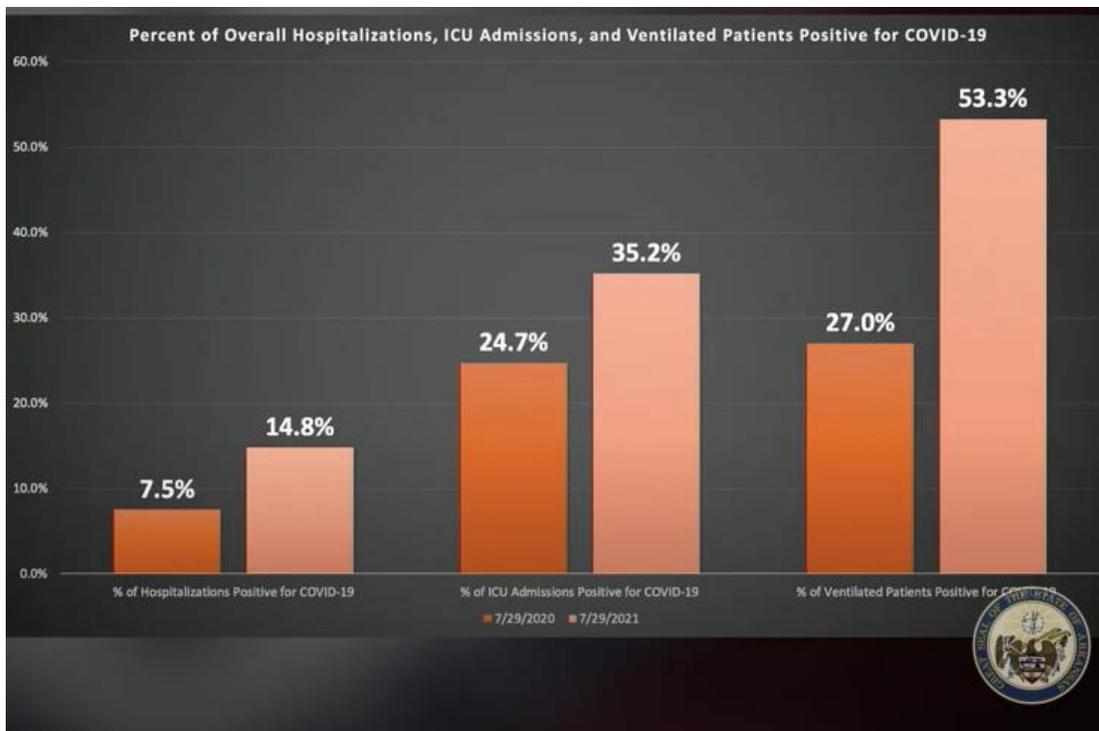
42. After declaring a state of emergency, Governor Hutchison held a press conference during which he displayed and commented on the following charts to convey his concern about the unprecedented increases in key metrics used to track the COVID pandemic.

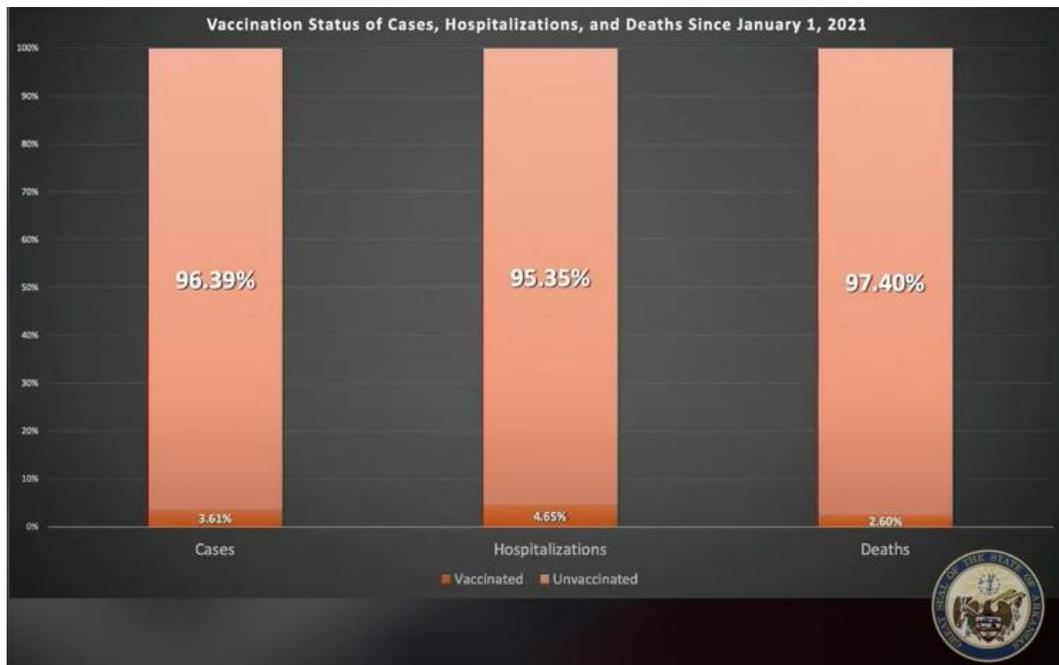
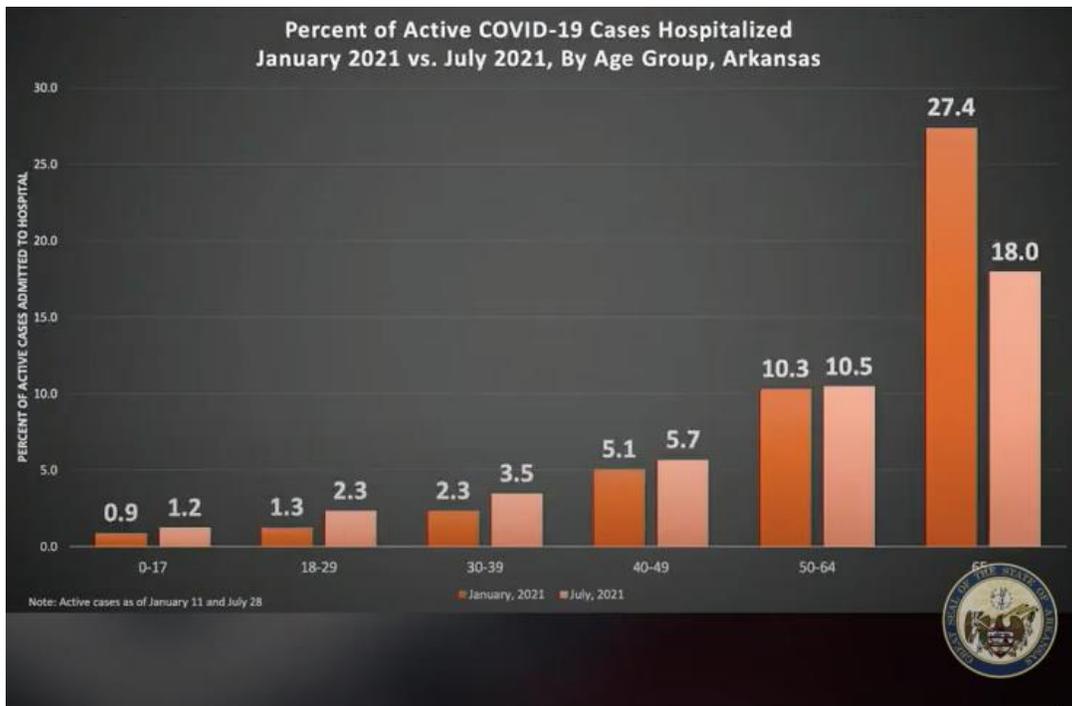
CASES			TESTING		
	Total	Change from yesterday		Total this month	Results yesterday
TOTAL CASES:	382,569	+2,843	PCR:	162,967	8,519
TOTAL ACTIVE CASES:	17,232	+1,431	ANTIGEN:	86,200	1,893
TOTAL DEATHS:	6,110	+11			

VACCINATIONS			TODAY'S NEW CASES		
	Total	Change from yesterday	Counties with most new cases added today:		
DOSES RECEIVED:	2,837,960	+19,100	Pulaski	381	
DOSES GIVEN:	2,322,861	+10,717	Washington	209	
PERCENT DOSES GIVEN:	81.80%		Benton	193	
INDIVIDUALS PARTIALLY IMMUNIZED:	297,266	+5,519	Active Cases by Type:		
INDIVIDUALS FULLY IMMUNIZED:	1,053,989	+2,855	Correctional:	48	
			Community:	17,184	

HOSPITAL DATA		
		Change from yesterday
CURRENTLY HOSPITALIZED:	1,055	-9
CURRENTLY ON VENTILATORS:	219	+10
EVER HOSPITALIZED:	18,503	
EVER ON VENTILATORS:	1,879	

*All data are provisional and subject to change. Testing data reflects result date. Case data includes confirmed and probable cases and deaths. Cases and deaths may decrease if they are reclassified. The net change is shown. Vaccination numbers include the state and federal program. As more Arkansians are fully immunized, the number of partially immunized may decline from day to day.



43. During the press conference, the Governor made clear that, based on the opinions of health care experts and the alarming COVID metrics that were continuing to get worse, he favored allowing local school districts to make decisions about face mask mandates. For that reason, the Governor announced that he was going to call a special session of the legislature to consider amending Act 1002 or take other action to remove the restrictions it had placed on local school boards and superintendents. The special session is scheduled to begin on Wednesday, August 4, 2021.

44. It remains uncertain whether enough state legislators will vote to restore the authority of local school officials to make decisions about the health and safety of K-12 school children. However, even if an amendment to that effect is approved by a majority vote, it would not become effective for 90 days unless two-thirds of the legislature support attaching an emergency clause to the amendment, which by all accounts seems unlikely.

45. The public schools attended by Plaintiffs' children are offering remote learning. However, for the reasons explained in the Plaintiffs' attached affidavits, a remote learning option – necessitated in part by an unconstitutional ban on face mask mandates – is neither adequate nor feasible for Plaintiffs and many other similarly situated parents of K-12 public school children.

46. As explained in Plaintiffs' Brief in Support of Plaintiffs' Motion for Preliminary Injunction, remote learning in Arkansas public schools that is necessitated by mismanagement of the current state emergency deprives Plaintiffs' children of the "adequate" education guaranteed to them by the Arkansas Constitution.⁸

⁸ <https://www.nytimes.com/2020/11/06/nyregion/nyc-remote-learning.amp.html>
<https://amp.usatoday.com/amp/4436558001>
<https://www.axios.com/coronavirus-remote-learning-d1f66050-b002-4ac5-a3ef-fc397fb0257f.html>

47. As further evidenced by the attached affidavit of Dr. William G. Jones, Chief Medical Officer of CHI St. Vincent Infirmiry, the exigency and severity of this statewide emergency cannot be overstated. Time is running out for Plaintiffs, other K-12 public school parents, and the superintendents and school boards who are charged with the responsibility of managing Arkansas' 262 school districts. Without immediate intervention by the Arkansas judiciary, the restrictions imposed on state and local officials by Act 1002 will result in many more Arkansas children becoming very sick, and some of them will inevitably die.

CLAIMS FOR RELIEF

COUNT I

48. Plaintiffs incorporate by reference in this Claim for Relief the previous paragraphs of this Complaint.

49. Act 1002 violates the separation of powers doctrine established in Article 4, § 2 of the Arkansas Constitution by intruding on the Governor's exclusive authority to respond to emergencies that arise from "contagious diseases."

COUNT II

50. Plaintiffs incorporate by reference in this Claim for Relief the previous paragraphs of this Complaint.

51. Act 1002 violates the guarantees of due process and equal protection, as established by Article 2 of the Arkansas Constitution.

52. On its face and as applied, Act 1002 advances no conceivable legitimate government interest, is overbroad, fails to satisfy the “rational basis” standard of constitutional scrutiny, and creates nonsensical and irrational exemptions that deprive certain classes of citizens and organizations of the health and safety measures provided to others.

COUNT III

53. Plaintiffs incorporate by reference in this Claim for Relief the previous paragraphs of this Complaint.

54. Act 1002 violates the rights of K-12 public school children, as guaranteed by Article 14, § 1 of the Arkansas Constitution, by preventing the State of Arkansas and local school districts from “maintain[ing] a general, suitable and efficient system of free public schools” and “adopt[ing] all suitable means to secure the people the advantages and opportunities of education.”

55. Act 1002 also deprives Arkansas children of their constitutionally guaranteed right to an adequate free public education by irrationally distinguishing between various groups of Arkansas children with respect to basic physical safety in their educational environment, which in and of itself violates their right to due process and equal protection of the laws.

COUNT IV

56. Plaintiffs incorporate by reference in this Claim for Relief the previous paragraphs of this Complaint.

57. During the current state of emergency, the prohibition of face mask mandates in Act 1002 conflicts with the Emergency Services Act of 1973 (“ESA”), Ark. Code § 12-75-101, and

constitutes an unlawful attempt to usurp the statutory authority the legislature delegated to both the Governor and local officials when it enacted the ESA.

COUNT V

58. Plaintiffs incorporate by reference in this Claim for Relief the previous paragraphs of this Complaint.

56. Pursuant to Ark. Code § 1-2-120, the enactment of Act 1030 repealed Act 1002 by operation of law.

NOTICE TO DEFENDANTS

59. For the purpose of satisfying the notice requirement in Ark. R. Civ. P. 65, once filed, a copy of this Complaint, Plaintiffs' Motion for a TRO, and the supporting Brief will promptly be delivered to Attorney General Leslie Rutledge.

REQUEST FOR RELIEF

WHEREEFORE, pursuant to Ark. R. Civ. P. 65(a) and 57, Plaintiffs respectfully request that the Court:

- (a) Enter a Temporary Restraining Order in the form to be proposed by Plaintiffs' counsel in a subsequent e-filing or in a similar form;
- (b) After further briefing and an evidentiary hearing (should a hearing be necessary), enter an Order permanently enjoining the enforcement of Act 1002; declaring that Act 1002 is facially unconstitutional or, in the alternative, that Act 1002 is unconstitutional as applied to K-12 public schools; ordering Defendants to pay the costs of this litigation, including an award of reasonable attorneys' fees to Plaintiffs; and all other legal and equitable relief to which Plaintiffs are entitled.

Respectfully submitted,

By: /s/ Thomas A. Mars
Thomas A. Mars, AR Bar 86115
MARS LAW FIRM, P.A.
5500 Pinnacle Point Drive, Suite 202
Rogers, AR 72758
Office: (479) 381-5535
tom@mars-law.com

John C. Everett, AR Bar 70022
EVERETT LAW FIRM
P.O. Box 1460
12217 W. Hwy. 62
Farmington, AR
72730-1460
Phone: (479) 267-0292
john@everettfirm.com

Ryan K. Culpepper, AR Bar 2012093
CULPEPPER LAW FIRM, PLLC
P.O. Box 70
Hot Springs, AR 71902
Phone: (501) 760-0500
ryan@theculpepperfirm.com

ATTORNEYS FOR PLAINTIFFS