

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
CIVIL DIVISION**

LITTLE ROCK SCHOOL DISTRICT
and MARION SCHOOL DISTRICT

PLAINTIFFS

v.

CASE NO. 60CV-21-_____

HON. ASA HUTCHINSON, in his
Official Capacity as Governor of the
State of Arkansas, and STATE OF
ARKANSAS

DEFENDANTS

COMPLAINT

For their Complaint, the Little Rock School District (“LRSD”) and the Marion School District (“MSD”) state:

Introduction

This case presents the question of whether there exists a rational basis for exposing public school students in Little Rock and Marion and throughout Arkansas to the very real threat of serious illness and death. Arkansans are living through a worsening Covid-19 pandemic. The strong consensus of medical and public health experts is that requiring the wearing of masks in schools will significantly reduce the risk of contracting that highly contagious and virulent disease. No rational reason exists for denying public school students, teachers and staff, and the school boards which are obligated to keep them safe, the ability to ensure that all who work and learn in our public schools are as safe as possible.

Parties

1. Plaintiff LRSD is a “body corporate” with the statutory authority to sue and be sued in its own name. Ark. Code Ann. § 6-13-102. LRSD is responsible for maintaining a safe learning environment for its students and a safe working environment for its teachers and staff.

2. Plaintiff MSD is a “body corporate” with the statutory authority to sue and be sued in its own name. Ark. Code Ann. § 6-13-102. MSD is responsible for maintaining a safe learning environment for its students and a safe working environment for its teachers and staff.

3. Defendant Hon. Asa Hutchinson is the Governor of Arkansas. He signed Act 1002 of 2021 into law in April 2021. Governor Hutchinson is sued in his official capacity.

4. The filing of this lawsuit was authorized by a vote of the LRSD Board of Directors on August 4, 2021.

Jurisdiction and Venue

5. This Court has subject matter jurisdiction pursuant to Ark. Code Ann § 16-111-102 and Ark. Code Ann. §16-111-103.

6. Venue lies in Pulaski County pursuant to Ark. Code Ann. § 16-60-101 because Plaintiff Little Rock School District has its principal office in Pulaski County, and pursuant to Ark. Code Ann. § 16-60-104 because LRSD and MSD bring this action against the State and a State officer.

Facts

7. Act 1002 of 2021 prohibits certain governmental entities, including school districts, from requiring the mandatory use of face masks without regard to the risk that students, teachers and staff will be exposed to a highly contagious and virulent disease. Arkansas Acts of 2021, No.

1002 (attached as Exhibit A). According to Act 1002, “[t]he use of a face mask, face shield, or other face covering shall not be a condition for entry, education, or services.”

8. Act 1002 of 2021 would prohibit LRSD from mandating the use of protective face masks even in classes such as chemistry, stagecraft, welding and shop, and in athletic activities such as football and baseball, and other fields of endeavor where face coverings and face shields have traditionally been required to protect students from physical injury.

9. Within the text of Act 1002, the General Assembly specifically designated that Act 1002 would be placed in the Arkansas Code at Ark. Code Ann. § 20-7-142. Following the enactment of Act 1002, the General Assembly enacted a later statute on a different subject (vaccine passports), Act 1030 of 2021, which it specifically designated as Ark. Code Ann. § 20-7-142.

10. When the General Assembly passed Act 1002 in April of 2021, Covid-19 cases were on the decline. The seven-day average of new cases in April was below 200, down from a peak in January 2021 of over 3,000.

11. Due largely to the highly contagious and virulent Delta variant, Covid-19 cases in Arkansas and in the Little Rock School District are rising rapidly. The seven-day average of new cases in Arkansas on July 28, 2021 was over 1,600.

12. As of July 27, 2021, 1,025 Covid-19 patients were hospitalized in Arkansas, with 382 of those in intensive care, leaving only 39 ICU beds available statewide. The number of patients on ventilators was 205, up from 172 the day before. Twenty-four young patients were hospitalized in Arkansas Children’s Hospital. All of these numbers are steadily increasing.

13. As of July 27, 2021, there were 2,052 new Covid-19 cases statewide within the last twenty-four hours. The number of new cases reported each day is steadily increasing. On July 29, the number of new cases was 2,843, the highest number since January 2021.

14. The University of Arkansas for Medical Sciences is experiencing a record number of hospitalized Covid-19 patients.

15. The State's top public health official, Health Secretary Jose Romero, announced on July 28, 2021 that he would seek money from the State's Coronavirus Relief Fund to expand hospital capacity. Dr. Romero's announcement came as the number of hospitalized Covid-19 patients exceeds 1,000 for the first time since January 2021 and continues to grow. On August 4, that number reached 1,232.

16. Dr. Romero appeared at the Governor's press conference on August 3 to present some "sobering numbers". As of August 1, nearly 19% of all active Covid-19 cases were in kids under the age of 18. More than half of those were 12 and under. Between April and July, there has been nearly a 570% increase in the number of Covid-19 cases in children under the age of 18, and a nearly 690% increase in cases in those children 12 and under. There has been nearly a 270% increase in hospitalizations of children under 18 years of age. Between April and July 2021, there has been a 275% increase in the number of children in intensive care units, and 20% of them are under the age of 12. Among children less than 18 years of age who were hospitalized in July, 58% of them were less than 12 years of age.

17. On July 27, 2021 the Arkansas Department of Education released its "2021-2022 COVID-19 Guidance for Schools". That guidance includes the following:

Because children under the age of 12 cannot be vaccinated against COVID-19 at this time, *consistent and correct mask usage is recommended while indoors in all school settings with children under age 12*. In addition, consistent mask usage should be strongly considered in any classroom setting where the vaccination status of students of any age cannot be confirmed.

2021-2022 COVID-19 Guidance for Schools, p. 2. (emphasis added).

18. The ADE’s guidance also notes the conflict between Arkansas law and Centers for Disease Control (CDC) recommendations: “Although masks or other face coverings can no longer be mandated in Arkansas public schools, as prohibited by Act 1002 of 2021, the CDC currently recommends the following regarding wearing of mask in school settings:

- **Indoors.** Mask use is recommended for people who are not fully vaccinated including students, teachers, and staff. Children under two years of age should not wear a mask.

Id.

19. MSD encompasses one of the larger geographic footprints in the state, requiring some 40 buses filled to capacity to transport 2,500 students over 2,500 miles twice daily. Dr. Glen Fenter Affidavit, Attached as Exhibit B, p. 1.

20. Over 70% of MSD students qualify for free or reduced lunch, and space restrictions force MSD to place students in sub-optimal transportation and facility conditions that do not comply with the CDC’s guidance for social distancing to reduce the spread of the Covid-19 virus and its variants. It is physically impossible for MSD to provide appropriate social distancing on its buses, classrooms or cafeterias. Ex. B, p. 1.

21. Despite MSD’s efforts, which include a school-based health clinic which provides easy access to Covid-19 vaccinations, numerous community-based vaccine clinics, and incentives like gift certificates, groceries and large-screen TVs, vaccination rates within the MSD student population remain low. A large percentage of MSD students reside in single-parent homes, forcing a difficult balancing act for parents who are forced to choose between working and providing the learning support required for their students to succeed virtually. Additionally, an estimated one out of three MSD students have no access to reliable internet service in their homes, making consistent communication between MSD faculty and students difficult. Despite MSD’s best

efforts, very few of its students who chose to participate in the virtual education option last school year achieved an acceptable level of academic progress. Ex. B, p. 2.

22. While MSD continues to diligently encourage students, faculty, and staff to get vaccinated and voluntarily wear masks, more is needed in order to avoid mandated school closings and the subsequent economic upheaval that occurred in the early days of the Covid-19 pandemic and the associated school closings. The General Assembly's decision to prohibit schools from issuing any mask mandate based upon localized needs has severely undermined MSD's ability to slow the spread of exposure to Covid-19 and its variants. Ex. B, p. 2.

23. In MSD's first week of school, seven students and three employees tested positive for Covid-19. Under the current guidance for schools issued by the ADE, both individuals testing positive for Covid-19 and individuals exposed to a confirmed case of Covid-19 must quarantine. This guidance provides that individuals who have been exposed to a confirmed case of Covid-19 need not quarantine if they have no symptoms and if the *both the infected and exposed individual consistently and correctly were wearing a mask*. Following this guidance, MSD placed 168 individuals in quarantine during the first week of school. If all of the individuals merely exposed to, but not testing positive for, Covid-19 had been consistently and correctly wearing masks, only 12 individuals would have needed to quarantine.

24. Because MSD cannot mandate that its students, faculty, and staff wear masks, the number of individuals who must quarantine is exponentially greater than it has to be. If MSD could issue its own policy requiring students and employees to wear masks, it could more effectively prevent transmission of an exposure to Covid-19 and its variants and avoid the necessity of a school closure.

25. If MSD were not subject to Act 1002 of 2021, Superintendent Fenter would recommend to the MSD Board that it approve a mask mandate, and he is confident that the Board would implement a mask mandate for the reasons set forth in his Affidavit.

26. The situation in the Marion School District (MSD) in East Arkansas provides a window into the not-too-distant future for Arkansas school districts. In just over a week, if Act 1002 remains in effect, MSD's experience is likely to be repeated throughout the state, resulting in unnecessary exposure of students, faculty and staff to Covid-19, and unnecessary deprivations of educational opportunities.

27. The Center for Disease Control (CDC) recommended on July 27, 2021 that masks be worn by everyone in schools, whether vaccinated or unvaccinated, as protection against the transmission of Covid-19.

28. The Washington Post reported on July 29, 2021 that an internal CDC document states, with respect to the alarming rise in Delta variant Covid-19 cases among both unvaccinated and vaccinated people, that "[t]he war has changed" since Act 1002 was passed three months ago.

29. The CDC issued an Order on February 1, 2021 which requires that masks be worn on all public conveyances, including school buses.

30. The Arkansas Chapter of American Academy of Pediatrics (ARAAP) currently recommends "mandatory K-12 student and teacher masks" because "masks are the state's best tool to prevent spread" of Covid-19.

31. On July 26, 2021, the Federal District Court for the Eastern District of Arkansas issued an order requiring that masks be worn throughout the federal courthouse.

32. On July 30, 2021, the Federal District Court for the Western District of Arkansas issued an order requiring that participants in jury trials, grand juries, and other large gatherings “must wear a mask, regardless of their vaccination status, in all public areas of the courthouses.”

33. In late July of 2021, some circuit court judges in Pulaski County began to move back to “virtual only” proceedings.

34. On July 29, 2021 Governor Hutchinson issued an Executive Order declaring a state of emergency due to the precipitous rise in Covid-19 cases. Executive Order No. 21-14, attached as Exhibit C. In it, Governor Hutchinson notes that the “Delta Variant of COVID-19 has infected thousands of Arkansans in recent months”; that “[i]nfections and hospitalizations continue to rise at an alarming rate, placing accessibility to health care facilities for all Arkansans at risk”; that in the coming weeks hospitalizations will likely match or exceed the highest number reached so far during the COVID-19 pandemic; that the “rapid rise in cases and resulting hospitalizations is placing an unsustainable strain on Arkansas hospitals already struggling to staff their facilities; and that the Delta Variant is having a “catastrophic statewide impact... on the healthcare system of Arkansas”.

35. On July 29, 2021, Governor Hutchinson announced that he would call the General Assembly into special session to address the risk that Act 1002 of 2021 poses for schools, and particularly younger students who are not eligible to be vaccinated saying, “This is necessary really for providing local school boards the ability to protect those most vulnerable young people twelve and under as they go to school.” That legislative session began on August 4, and is unlikely to result in legislation that will allow school districts to adequately protect their students and staff.

36. The first day of school for students in the Little Rock School District is August 16, 2021. Teachers and staff are already gathering in the schools to prepare for that day. Athletic teams are already practicing, and other extracurricular activities are also underway.

37. LRSD employs approximately 3,400 people, including about 1,900 teachers.

38. LRSD is responsible for the education of about 21,612 students at 47 schools.

39. LRSD contracts with a private company for the transportation to and from school for many of its students, but provides transportation directly for its special education students.

40. LRSD has a duty to keep its schools safe for its students. *See, e.g.* Ark. Code Ann. § 6-15-1005 (“Arkansas schools will have safe and functional facilities.”); Ark. Code Ann. § 6-18-708 (“A school district must develop procedures concerning student physical activity to keep students safe from, among other things, ‘a communicable disease’.”); Ark. Code Ann. § 6-10-126 (“A superintendent may delay the start of school or close school early in emergency circumstances including a ‘contagious disease outbreak’.”); Ark. Code Ann. § 6-18-701 (“A school district board of directors may appoint a physician or nurse to conduct physical examinations of public school students ‘to detect contagious or infectious diseases’.”.)

41. Arkansas has compulsory school attendance laws which require students to attend school. Ark. Code Ann. § 6-18-201. This includes, of course, students under the age of twelve for whom no Covid-19 vaccine is currently available.

42. According to recently published news reports, Dr. Rick Barr, Chief Clinical Officer at Arkansas Children’s Hospital located in Little Rock, Arkansas, has provided the following assessment of the impact of the current rise in Covid-19 cases among children:

- The cases we’re seeing at Arkansas Children’s Hospital are very different than what we saw earlier in the COVID pandemic with the other variants. The delta variant is acting very differently with respect to kids. Previously, when children were admitted and tested positive for COVID, it was often

what I call an incidental finding. They were coming in the hospital for some unrelated reason, maybe a surgery or some other medical condition, and they just happened to test positive but didn't have any symptoms from their COVID viral infection.

- In June and July, we started seeing kids coming in the hospital that were sick with COVID. We're seeing respiratory infections, pneumonia, requiring oxygen, requiring assistance to breathe, so that's definitely a change. And just in the month of July we've admitted over 40 children to the Arkansas Children's Hospital with COVID infections and a number of those have ended up in the intensive care unit. I have to emphasize as well that at least half of those children that we've admitted are over the age 12, and eligible for a vaccine but none had been fully vaccinated.
- School is incredibly important. We saw early on the pretty dramatic social, emotional and mental health complications from the pandemic, from social isolation and kids not being in school. So it's really important for kids to go back to school. But that can only be done safely with masking, with the use of hand sanitizer and social distancing indoors, all those preventative measures that we know really work. The science is very good on those now.
- Arkansas Children's Hospitals are treating a record number of children who are hospitalized with Covid-19. We had 24 pediatric patients hospitalized with Covid-19 on July 28, 2021, a 50% increase over any previous peak during the pandemic. Of the 24 children, seven were in intensive care and two were on ventilators. This is the worst that we've seen it for kids, absolutely.

43. Within the Little Rock School District, the Pinnacle View football team has had to stop practice because of a Covid-19 infection and nine students had to be quarantined. On July 26, 2021, the Southwest High School volleyball team was on its way to a tournament in Russellville but had to turn its bus around and return to Little Rock instead of participating in the tournament because of a Covid-19 infection which resulted in 18 students being quarantined. LRSD is receiving daily reports of additional staff and student Covid-19 infections.

44. On July 26, 2021, LRSD Board of Directors unanimously passed a resolution declaring that, if not for Act 1002 of 2021, the LRSD would implement a mask mandate for the safety of its students, their families, their teachers, and the many other LRSD employees who risk

being exposed to this deadly disease at school and at work. The resolution is attached as Exhibit D.

45. On August 4, 2021, the LRSD Board of Directors voted to file this lawsuit.

46. LRSD and MSD students, the vast majority of whom are unvaccinated, will suffer irreparable harm if they are required to gather in their classrooms with maskless classmates and needlessly expose themselves to an unnecessarily increased risk of contracting Covid-19.

Count I – Arkansas Constitution Article 14, § 1

47. Act 1002 of 2021 violates Article 14, § 1 of the Arkansas Constitution which requires that “the State shall ever maintain a general suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.”

48. Issues regarding the State’s compliance with Article 14, § 1 are justiciable, and are not “political questions”. *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 51-56, 91 S.W.3d 472, 482-83 (2002).

49. The judiciary has a duty to ensure that the State meets its obligations under Article 14, § 1. *Cf. Id.* at 54 (“This court’s refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a disservice to the people of the state. We refuse to close our eyes or turn a deaf ear to claims of dereliction of duty in the field of education.”).

50. In his concurrence in the 2002 *Lake View* decision, Justice Hannah noted that the Arkansas Supreme Court “has not specifically defined the terms ‘general, suitable, and efficient’”. *Lake View*, 351 Ark. at 102 (Hannah, J., concurring). He reviewed the case law concerning those terms (*Id.* at 102-04) and concluded that “[a]lthough the terms ‘General, suitable, and efficient’

might be more finitely defined, under the facts of this case, further definition is not necessary.” *Lake View*, 351 Ark. at 103 (Hannah, J., concurring).

51. The Arkansas Supreme Court “has said repeatedly that in construing the language of our constitution, we must give the language it’s plain, obvious, and common meaning. *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 67, 91 S.W.3d 472, 492 (2002)(citations omitted).

52. In this case, as in *Lake View*, the “meaning of the words general, suitable and efficient that may be derived from our case law is more than sufficient to use in determining whether the constitutional mandate has been met by the General Assembly.” *Id.* at 103-04. A general, suitable and efficient system of public education is not one which may be accessed only at great risk to the students and their teachers.

53. In two previous cases challenging the State’s compliance with the Education Article of the Arkansas Constitution, the Arkansas Supreme Court found it unnecessary to determine whether the right to a public education is fundamental, because there was clearly no rational basis for the state statutes which were challenged in those cases. *See Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. at 71 (“Nevertheless, because we conclude that the clear language of Article 14 imposes upon the State an absolute constitutional duty to educate our children, we conclude that it is unnecessary to raise the issue of whether a fundamental right is also implied.”); *DuPree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 346, 651 S.W.2d 90 (1983)(“Consequently, even without deciding whether the right to a public education is fundamental, we can find no constitutional basis for the present system, as it has no rational bearing on the educational needs of the district.”). The same is true in this case. While LRSD contends that the right to a public education in Arkansas is a fundamental right, requiring students to risk their health and that of their families to receive the

education they are promised in the Arkansas Constitution cannot survive even rational basis review.

54. In *Lake View*, the Arkansas Supreme Court held that in the funding context, the State’s obligation to provide a general suitable and efficient system of free public schools required that the State provide “an adequate education”. *Lake View*, 351 Ark. at 66-67 (“There is no question in this court’s mind that the requirement of a general, suitable, and efficient system of free public schools places on the State an absolute duty to provide the schoolchildren of Arkansas with an adequate education.”). Where the safety and the lives of unvaccinated students are at risk, the State cannot provide a suitable or efficient system of public schools without attempting to mitigate those risks, and certainly not when the State actively intervenes to prevent school districts from protecting their students.

55. Giving the language of our constitution “it’s plain, obvious, and common meaning,” a suitable and efficient system would not require students to risk their health and their lives to get the education promised to them in the Arkansas Constitution, especially when the State is required to “adopt all suitable means” to provide them “the advantages and opportunities of education.”

56. Act 1002 of 2021 unconstitutionally deprives LRSD and MSD students of their right to a “general, suitable and efficient system of free public schools.”

Count II – Equal Protection

57. The Arkansas Constitution contains an equal protection clause at Article 2, § 3 which reads as follows:

Equality before the law.

The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition.

58. Act 1002 makes irrational distinctions between similarly situated public entities in violation of the equal protection clause of the Arkansas Constitution.

59. For example, Act 1002 does not apply to a “state-owned or state-controlled healthcare facility”, but there is no exemption for other publicly owned or controlled healthcare facilities. This means that, for no rational reason, the University of Arkansas for Medical Sciences can require the wearing of masks, but the many county hospitals throughout the state cannot.

60. Act 1002 also exempts a “facility operated by the Department of Corrections”, but there is no exemption for other schools or detention facilities. This means that, for no rational reason, the Arkansas Correctional School District can require the wearing of masks, but LRSD and other public school districts throughout the state cannot. This also means that, for no rational reason, masks can be mandated at Arkansas state prisons but not at county detention facilities or local jails.

61. Act 1002 also exempts a “facility operated by the Division of Youth Services of the Department of Human Services”. This means that, for no rational reason, masks may be required throughout the Division of Youth Services’ education system, but they may not be required by LRSD or other Arkansas public school districts.

62. These irrational distinctions deprive LRSD, MSD and other Arkansas public school districts of “equality... before the law” in violation of Article 2, § 3 of the Arkansas Constitution.

Count III – Federal Preemption

63. LRSD, like most other Arkansas school districts, provides transportation to and from school for some of its students.

64. Section 361 of the Public Health Service Act, 42 U.S.C. § 264, authorizes the Secretary of Health and Human Services (“Secretary”) to issue regulations necessary to prevent the foreign and interstate spread of communicable diseases.

65. The Secretary has delegated this authority to the Centers for Disease Control and Prevention (CDC) and the United States Food and Drug Administration (FDA).

66. Subsection (e) sets forth § 361’s preemptive scope. It provides that § 361 preempts any state law that “conflicts with an exercise of federal authority under this section,” but otherwise generally preserves state law.

67. On February 1, 2021 the Centers for Disease Control issued an order pursuant to Section 361 of the Public Health Service Act, and 42 C.F.R. 70.2, 71.31(b) and 71.32(b) that requires passengers and drivers on school buses, including buses operated by public and private school systems, to wear masks for the duration of travel. The CDC’s order remains in effect.

68. 42 C.F.R. 70.2 authorizes the CDC to take such measures to prevent such spread of the diseases as deemed reasonably necessary when it determines that the measures taken by health authorities of any State or possession (including political subdivisions) are insufficient to prevent the spread of communicable diseases.

69. The February 1, 2021 Centers for Disease Control Order states that any state or territory without sufficient masking requirements for transportation systems within this jurisdiction has not taken adequate measures to prevent the spread of Covid-19 from such state or territory to any other state or territory.

70. The Order further states that, unless excluded or exempted as set forth in the order, persons must wear a mask while boarding, disembarking and traveling on any conveyance into or within the United States.

71. Additionally, conveyance operators (bus drivers) may transport only persons wearing a mask and must use best efforts to ensure that masks are worn while embarking, disembarking, and throughout the duration of travel.

72. In contrast, Act 1002 explicitly provides that the LRSD “shall not mandate an individual in this state to use a face mask, face shield, or other face covering.”

73. Act 1002 further explicitly provides that “the use of a face mask, face shield, or other face covering shall not be a condition for entry, education, or services.”

74. Act 1002’s prohibition on LRSD and MSD requiring the use of masks is in direct conflict with the CDC’s February 1, 2021 order and is preempted by the CDC’s order pursuant to subsection (e) of 42 U.S.C. § 264.

Count IV – Separation of Powers

75. The General Assembly has unconstitutionally restricted the Governor’s power to address public health emergencies.

76. The Governor and other “officers of the executive department are not bound to execute a legislative act which, in their judgment, is repugnant to the Constitution.” *Little Rock & Fort Smith Ry. v. Worthen*, 46 Ark. 312, 325 (1885). This is because “[t]heir primary allegiance is due to the constitution; and if there be a conflict between the two, the constitution is the higher law, or, rather, the supposed is not a law at all, being null and void.” *Id.*

77. The legislature has unconstitutionally restricted the Governor’s emergency powers which are vested in the Governor by Ark. Code Ann. §§ 12-75-101 *et seq.*

78. The General Assembly has also unconstitutionally restricted the power of state court judges to manage proceedings in their courtrooms. Act 1002 of 2021 would preclude even

the Arkansas Supreme Court from requiring those employed by the Court, or the litigants who appear before the Court, to wear masks.

79. Act 1002 of 2021 violates Article 4, § 1 of the Arkansas Constitution, which divides “[t]he powers of government of the State of Arkansas” into “three distinct departments, the legislative, the executive, and the judicial.” Arkansas Constitution, Article 4, § 1.

80. In enacting Act 1002 of 2021, the legislature has usurped the powers allocated in the Arkansas Constitution to the executive and judicial branches, in violation of Article 4, § 1 of the Arkansas Constitution, and Act 1002 is therefore unconstitutional.

Count V – Act 1002 of 2021 Was Repealed by Act 1030 of 2021

81. Act 1002 of 2021 designated that the substantive portion of that law would be set out in a new section of the Arkansas Code at § 20-7-142.

82. After the enactment of Act 1002, the Governor signed into law Act 1030 of 2021. Act 1030 was “approved” on April 29, 2021. Act 1030 amended the Arkansas Code “to add an additional section” designated as Ark. Code Ann. § 20-7-142. The language of Act 1030 thereby replaced the language of Act 1002 in Ark. Code Ann. § 20-7-142.

83. The legislative intent of the Arkansas Code is to “resolve conflicts which exist in the laws and to repeal those laws which:

...
(3) Have been superceded by the enactment of later laws.”

Ark. Code Ann. § 1-2-101.

84. Ark. Code Ann. § 1-2-116 concerns amendments to the Code. According to Ark. Code Ann. § 1-2-116(d):

A unit should be repealed as distinct from amended, when an outright repeal thereof is intended or *when the subject matter of the proposed new law is more than a mere amendment or revision of the old unit.*

Id. (emphasis supplied).

85. Under Ark. Code Ann. § 1-2-207(b)(1), both Act 1002 and Act 1030 could be “given effect” if they both concerned “the same subject matter”, but they don’t. Act 1002 has to do with mask mandates, and Act 1030 has to do with vaccine passports.

86. After Act 1002 was enacted and designated as Ark. Code Ann. § 20-7-142, Act 1030 was enacted in its place because it too was designated as Ark. Code Ann. § 20-7-142. The subject matter of Act 1030 is different from Act 1002. Act 1030 is “more than a mere amendment or revision of” Act 1002. Act 1002 was therefore repealed by Act 1030. Ark. Code Ann. § 1-2-116(d).

Individual Liberty vs. Public Safety

87. The United States Supreme Court recognized 116 years ago that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 27 (1905). In the middle of a smallpox epidemic, the Court struck the appropriate balance between individual liberty and the safety of the general public:

There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,—especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Id. at 29.

88. The Supreme Court observed that there are “manifold restraints to which every person is necessarily subject for the common good.” *Id.* at 26. Organized society could not exist safely otherwise. *Id.* “Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy.” *Id.* “Real liberty for all”, the Court found, could not exist under the principle that each individual person can do whatever he or she wants “regardless of the injury that may be done to others.” *Id.*

WHEREFORE, LRSD and MSD respectfully request that the Court:

- (1) Declare that Act 1002 of 2021 violates Article 14, § 1 and Article 2, § 3 of the Arkansas Constitution;
- (2) Declare that, to the extent Act 1002 of 2021 would prohibit a requirement that masks be worn on school buses, it is preempted by the CDC order of February 1, 2021 requiring the wearing of masks on all public conveyances, including school buses;
- (3) Declare that Act 1002 of 2021 violates the separation of powers provision of the Arkansas Constitution found in Article 4, § 1;
- (4) Declare that Act 1002 of 2021 shall have no force or effect, and shall not be enforced by the State of Arkansas, during the pendency of this litigation;
- (5) Issue a temporary restraining order or a preliminary injunction enjoining the enforcement of Act 1002 of 2021; or, in the alternative, enjoining enforcement of Act 1002 as applied to school districts;
- (6) Following a full hearing on the merits of this case, issue a final order declaring that Act 1002 is unconstitutional and enjoining its enforcement; and
- (7) Provide such other relief as the Court deems to be just and proper.

Dated: August 5, 2021.

Respectfully submitted,

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NOTIFICATION TO DEFENDANTS

For the purpose of satisfying the notice requirement in Ark. R. Civ. P. 65, I certify that a file-marked copy of this Complaint will be mailed and hand-delivered to Senior Assistant Attorney General Ka Tina R. Guest, 323 Center Street, Suite 200, Little Rock, AR 72201, who has agreed to accept service on behalf of Governor Hutchinson.

/s/ Christopher Heller
Christopher Heller