IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

VERONICA McCLANE, et. al PLAINTIFFS

vs. Case No. 60CV-21-4692

THE STATE OF ARKANSAS, et. al DEFENDANTS

BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

I. STANDARDS FOR GRANTING A TRO

The standards for granting a TRO under Arkansas law are well established and straightforward: "Under Arkansas law, a circuit court must consider two issues when issuing a preliminary injunction under Ark. R. Civ. R. 65: (1) whether irreparable harm will result in the absence of an injunction or restraining order, and (2) whether the moving party has demonstrated a likelihood of success on the merits." *Arkansas State Plant Board v. Hooks*, CV-21-242 (Ark. Jul. 22, 2021).In *Baptist Health v. Murphy*, 365 Ark. 115, 121, 226 S.W.3d 800, (2006), the Arkansas Court of Appeals explained the standard of appellate review when a Circuit Court grants a preliminary injunction or a TRO:

> "This court reviews the grant of a preliminary injunction under an abuse-of-discretion standard. The standard of review is the same for the two essential components of a preliminary injunction: irreparable harm, and likelihood of success on the merits. There may be factual findings by a circuit court that lead to conclusions of irreparable harm and likelihood of success on the merits, and those findings shall not be set aside unless clearly erroneous. But a conclusion that irreparable harm will result or that the party requesting the injunction is likely to succeed on the merits is subject to review under an abuse-of-discretion standard."[1]

Plaintiffs need not show they are certain to prevail on the merits – only that the odds of them prevailing are greater than 50/50: "The test for determining the likelihood of success is whether there is a reasonable probability of success in the litigation." *Three Sisters Petroleum, Inc. v. Langley*, 348 Ark. 167, 175 (Ark. 2002). Based on the facts set forth in Plaintiffs' Complaint and the applicable law, Plaintiffs have not just shown that they are likely to succeed on the merits – they have shown they are *highly likely* to succeed on the merits. The legal authorities that support that conclusion are discussed in the following sections of this Brief.

II. A TRO IS NECESSARY TO PREVENT IRREPARABLE HARM

The threat of imminent irreparable harm to Plaintiffs' children, Plaintiffs' themselves, and similarly situated public school families across Arkansas is so obvious and well known that the Court could arguably take judicial notice that the threat of irreparable harm to the Plaintiffs is both imminent and real. However, the Court could also find that Plaintiffs have met their burden of establishing irreparable harm simply by reading the Plaintiffs' Complaint and the Affidavit of William G. Jones, M.D., the Chief Medical Officer of CHI St. Vincent Infirmary, who said under oath:

[1] 365 Ark. 115, 121, 226 S.W.3d 800, 806 (Ark. 2006) (citations omitted).

> "It is my considered medical opinion that the use of masks is an important item in preventing the spread of Covid in general and specifically to and from young people who are not vaccinated against Covid. It is well established that Covid can be transmitted and contracted by the exhalation by one person and the inhalation by another of respiratory droplets containing the virus. The use of masks helps to reduce the spread of the virus that causes Covid. They do this by reducing the spread of respiratory droplets containing the virus when a person sneezes, coughs, or talks and by reducing the inhalation of such respiratory droplets by another person. It is my considered medical opinion that schools need the ability to require the use of masks as they reduce the ability of Covid to be transmitted from one person to another and therefore increase the safety of school children and staff and will help reduce the substantial detrimental effects of a person contracting Covid."[2]

Plaintiffs submit that the judicial analysis of whether to grant their request for a TRO can be condensed into the following question: *Should this Court enter an Order that will restore local authority to protect countless adults and children from a deadly virus that recently claimed the lives of 42 Arkansans in one day while creating a minor inconvenience for those who will have to wear a piece of cloth over their face for the protection of themselves and others based on the recommendations of the most qualified medical experts on the planet?*

No court in Arkansas has ever been presented with an easier question. A TRO is not only an appropriate remedy in this case. It is an urgent necessity of the highest importance to Plaintiffs and other parents across Arkansas whose children will otherwise soon be attending mask-optional public schools that will expose them to a virus that poses a significant health risk to K-12 school children – and an even greater risk to those with pre-existing conditions.

Plaintiffs have no adequate remedy at law, are very likely to succeed on the merits, and have shown that they face a significant threat of irreparable harm. Furthermore, the public interest strongly favors the issuance of a TRO.

[2] Complaint, Ex. D.

Although conflicts between governors and legislatures over COVID-19 pandemic responses have often been presented as partisan in nature, this lawsuit presents no political questions – only questions of law. The application of Arkansas law to the facts of this case leads clearly to the conclusion that Act 1002 is unconstitutional in several respects.

III. PLAINTIFF'S ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR SEPARATION OF POWERS CLAIM

This is not the first time the Arkansas courts have been called upon to resolve a dispute between Governor Hutchinson and the 93rd General Assembly about the extent of the Governor's authority to manage the ongoing COVID pandemic. In what appears to have been part of a larger effort to enlarge the legislature's territory by reducing the Governor's powers, eighteen legislators sued the Governor in Pulaski County Circuit Court seeking a ruling that the governor had exceeded the statutory authority given to him under the Disaster Emergency Act to manage the pandemic.

Judge Wendell Griffin sharply disagreed with the legislators and sided with the Attorney General, who was representing the Governor. After Judge Griffin granted the AG's motion to dismiss, the legislators filed a notice of appeal with the Arkansas Supreme Court but dismissed their appeal after the AG filed a brief on behalf of the Governor. *Sullivan v. Romero,* CV-20-721 (Ark. Sup. Ct.)

Although it is not entirely clear which side the AG will take in this case, the following quote from the AG's brief in *Sullivan v. Romero* is instructive on which branch of state government holds the constitutional and statutory authority to lead the State of Arkansas' response to a pandemic:

> "As the Chief Executive of the State, the Governor has inherent authority to respond to a crisis like COVID-19. Additionally, the General Assembly has statutorily empowered him to respond to health emergencies through both the Emergency Services Act and an independent mandate to prevent the spread of contagious

> disease that dates to 1895, see Ark. Code Ann. 20-7-110(b). … Plaintiffs cite no constitutional or statutory provision empowering the General Assembly to direct the State's emergency response. And they cannot avoid the General Assembly's own decision to authorize the Governor's and the Secretary's actions. Ark. Code Ann. 12-75-101 et seq.; id. 20-7-110(b). … Courts have repeatedly concluded that separation-of-powers principles are advanced, not subverted, when public-health statutes are construed to enable the executive "to meet the exigencies of the occasion." Bd. of Trustees of Highland Park Graded Common Sch. Dist. No. 46 v. McMurtry, 184 S.W. 390, 394 (Ky. 1916). COVID-19 itself has led to many examples. The Kentucky Supreme Court recently rejected a claim that its State's governor unconstitutionally encroached on legislative authority. Beshear v. Acree, No. 2020-SC-0313-OA, — S.W.3d —, 2020 WL 6736090, at *16 (Ky. Nov. 12, 2020)."

Plaintiffs embrace the AG's position, as stated above, as well as the AG's reliance on the Kentucky Supreme Court's recent decision in *Beshear v. Acree*. As we pointed out to the Governor and the leaders of the General Assembly before commencing this action, the Kentucky Supreme Court's decision in *Beshear v. Acree* is instructive in more ways than one.

The significance of the *Beshear* decision arises from the fact that the language from the Kentucky Constitution that was interpreted in favor of the Governor's broad powers in the *Beshear* case is *identical to the language in the Arkansas Constitution*. That may seem like a strange coincidence, but it's no coincidence at all. After all, much of Arkansas law is derived from Kentucky law. *Sw. Bell Tel. Co. v. Wilkes*, 269 Ark. 399, 402, 601 S.W.2d 855, 856 (1980). What's more, the Arkansas Supreme Court has relied on that shared history to adopt the Kentucky Supreme Court's analysis of a similar provision in that state's constitution. *Id*. For instance, in *Sw. Bell Tel. Co. v. Wilkes*, 269 Ark. 399, 402, 601 S.W.2d 855, 856 (1980), the Supreme Court of Arkansas said:

> "We have no case directly in point in Arkansas, but the Supreme Court of Kentucky, *a state from whence much of our basic law was derived*, has considered the question. We agree with their interpretation of a similarly worded constitutional provision that "injuries to persons or property" was intended to mean physical injuries to the person and physical damage to property. *Jacobs v. Underwood*, 484 S.W. 2d 855 (Ky. 1972)."

More recently, in the infamous *Lake View* case, the Arkansas Supreme Court paid deference to the Kentucky Supreme Court's position in rejecting the "State's position is that the judiciary has no role in examining school funding":

> "The Supreme Court of Kentucky has emphasized the need for judicial review in school-funding matters. The language of that court summarizes our position on the matter, both eloquently and forcefully, and we adopt it"

Lake View Sch. Dist. No. 25 v. Huckabee, 351 Ark. 31, 53 (Ark. 2002); *see also Little River Cty. Bd. of Educ. v. Ashdown Special Sch. Dist.*, 156 Ark. 549, 556, 247 S.W. 70, 72 (Ark. 1923).

The Arkansas Constitution gives the governor plenary powers to deal with two types of state emergences: "enemies" of the state and "contagious diseases." This is expressly referenced in Article 6, § 19:

> "The Governor may, by proclamation, on extraordinary occasions, convene the General Assembly at the seat of government, or at a different place, if that shall have become, since their last adjournment, dangerous **from an enemy or contagious disease;** and he shall specify in his proclamation the purpose for which they are convened; and no other business than that set forth therein shall be transacted until the same shall have been disposed of; after which they may, by a vote of two-thirds of all the members elected to both houses, entered upon their journals, remain in session not exceeding fifteen days." (emphasis added)

These plenary powers are again implied in Article 6, § 2 of the Arkansas Constitution, which says:

> "The supreme executive power of this State shall be vested in a chief magistrate, who shall be styled "the Governor of the State of Arkansas."

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.

In *Beshear v. Acree*, the Kentucky Supreme Court interpreted identical language in the Kentucky Constitution to mean that the Kentucky Governor has plenary power to manage a state emergency arising from a *contagious disease* without interference from the legislature. For the same reasons articulated by the Kentucky Supreme Court in *Beshear v. Acree*, Governor Hutchinson has the same exclusive authority to manage a pandemic. Act 1002 unconstitutionally interferes with that authority and, therefore, violates the separation of powers doctrine established in Article 4, § 2 of the Arkansas Constitution.

The precedential value of *Beshear v. Acree* is convincingly demonstrated by the presence in our Constitution of the same features and text that caused the Kentucky Supreme Court to unanimously conclude that Kentucky's Governor's pandemic response was an exercise of constitutional powers that originated in the executive branch. *Beshear v. Acree*, 615 S.W.3d 780 (Ky. 2020). Those striking similarities are set forth below:

Kentucky Constitution	Arkansas Constitution
The supreme executive power of the commonwealth shall be vested in a chief magistrate, who shall be styled the "Governor of the Commonwealth of Kentucky." Ky. Const. § 69.	The supreme executive power of this State shall be vested in a chief magistrate, who shall be styled "the Governor of the State of Arkansas." Ark. Const. Art. 6, § 2.
The supreme executive power of the commonwealth shall be vested in a chief magistrate, who shall be styled the "Governor	The supreme executive power of this State shall be vested in a chief magistrate, who shall be styled "the Governor of the State of Arkansas." Ark. Const. art. 6, § 2.

of the Commonwealth of Kentucky." Ky. Const. § 69.	
He shall be Commander-in-Chief of the army and navy of this Commonwealth, and of the militia thereof, except when they shall be called into the service of the United States; but he shall not command personally in the field, unless advised so to do by a resolution of the General Assembly. Ky. Const. § 75.	The Governor shall be commander-in-chief of the military and naval forces of this State, except when they shall be called into the actual service of the United States. Ark. Const. art. 6, § 6.
He shall take care that the laws be faithfully executed. Ky. Const. § 81.	He may require information, in writing, from the officers of the executive department, on any subject relating to the duties of their respective offices; and shall see that the laws are faithfully executed. Ark. Const. art. 6, § 7.
He may, on extraordinary occasions, convene the General Assembly at the seat of government, or at a different place, if that should have become dangerous from an enemy or from contagious diseases. In case of disagreement between the two Houses with respect to the time of adjournment, he may adjourn them to such time as he shall think proper, not exceeding four months. When he shall convene the General Assembly it shall be by proclamation, stating the subjects to be considered, and no others shall be considered. Ky. Const. § 80.	The Governor may, by proclamation, on extraordinary occasions, convene the General Assembly at the seat of government, or at a different place, if that shall have become, since their last adjournment, dangerous from an enemy or contagious disease; and he shall specify in his proclamation the purpose for which they are convened; and no other business than that set forth therein shall be transacted until the same shall have been disposed of; after which they may, by a vote of two-thirds of all the members elected to both houses, entered upon their journals, remain in session not exceeding fifteen days. Ark. Const. art. 6 § 19. In cases of disagreement between the two houses of the General Assembly, at a regular or special session, with respect to the time of adjournment, the Governor may, if the facts be certified to him by the presiding officers of the two houses, adjourn them to a time not beyond the day of their next meeting; and on account of danger from an enemy or disease, to such other place of safety as he may think proper. Ark. Const. art. 6 § 20.

Like Kentucky, Arkansas has a General Assembly that meets for general business only for a few months every two years. Kentucky's legislature, like Arkansas's, lacks the power to call itself into extraordinary session. Kentucky's Constitution, like ours, gives the Governor complete discretion to call an extraordinary session – and to determine, again in his complete discretion, that "danger from an enemy or contagious disease" requires convening the General Assembly outside the usual seat of government. And Kentucky's Constitution, like ours, makes the Governor the "commander-in-chief of [its] army and navy".

Based on those shared characteristics, the Kentucky Supreme Court unanimously held that although its Constitution "does not directly address the exercise of authority in the event of an emergency except as to those events requiring the military," by "provid[ing] for a part-time legislature incapable of convening itself" it "tilts toward emergency powers in the executive branch." *Beshear,* 615 S.W.3d at 786.

The Court held that "[h]aving a citizen legislature that meets part-time as opposed to a full-time legislative body that meets year-round," as we also do, left the General Assembly without the ability to respond quickly to an emergency. *Id.* at 806; *see also id.* n.36. As the Kentucky Supreme Court observed, the Governor's option to call an extraordinary session (as our Governor can do) did not imply that the emergency powers to respond to a pandemic were legislative: That language "is permissive not mandatory, leaving it to the Governor — also duly elected by the People — whether the General Assembly should be convened." *Id.* at 809. Moreover, construing the Constitution to deprive the Governor of emergency powers would prevent any immediate, comprehensive response in view of the General Assembly's inability to convene itself, and the constraints on the length of a session. *Id.* This is particularly important in an emergency caused by

contagious disease because, unlike other disasters that end quickly, "a biological/etiological hazard can hover for weeks and even months."[3]

For those reasons, the Kentucky Supreme Court unanimously held that "the emergency powers the Governor has exercised" – which included a mask mandate – "***are executive in nature, never raising a separation of powers issue in the first instance***." *Id.* at 809 (emphasis added). Further, it held that "[t]his type of highly contagious etiological hazard is precisely the type of emergency that requires a statewide response and properly serves as a basis for the Governor's actions . . . ." *Id.* at 830. In fact, our Constitution supports that conclusion more strongly than Kentucky's: The Governor's authority to convene the General Assembly outside of Little Rock if it "shall have become dangerous from . . . contagious disease" implies that the executive department would include officers whose duties included assessing danger from contagious disease, see Ark. Const. art. 6, § 7, for the Governor's determination.

For the same reasons articulated by the Kentucky Supreme Court *Beshear v. Acree*, Governor Hutchinson has the same authority to manage a pandemic. However, in Arkansas, our Constitution declares a strict separation of powers. Ark. Const. art. 4, § 2. If the power to respond to an emergency caused by contagious disease belongs to the Governor, any intrusion by an act of the General Assembly is unconstitutional and void *even if the Governor agrees with the restrictions*.

Legislative intrusions on the inherent powers of other branches are common, but ineffective. For example, in *State v. Morrill*, the Court reviewed an early statute that permitted punishment for

[3] *Id.* at 809 n.38. As recent events have demonstrated, the Court a pandemic can not only "hover" as *Beshear* holds, but hide–and resurge within months, with greater virulence, to a degree a legislative body could not have reasonably contemplated.

specified acts of judicial contempt but prohibited punishment outside that scope. 16 Ark. 384, 388 (Ark. 1855). But the contempt power is inherent. The Court rejected an argument that "the will of a co-ordinate department" would be the measure of the judicial branch's power in the matter of contempts instead of "the organic law, which carves out the land-marks of the essential powers to be exercised by each of the several departments of the government." *Id.* at 388. Those "express or necessarily implied" powers in the constitution could not be abridged. Otherwise the General Assembly "might encroach upon both the judicial and executive departments, and draw to itself all the powers of government[.]" *Id.* at 390. Where statutory contempt overlapped the inherent contempt power, the statute was "merely declaratory of what the law was before its passage." *Id.* at 391. The attempt to limit the inherent contempt power "can be regarded as nothing more than the expression of a judicial opinion of the Legislature, that the courts may exercise and enforce all their constitutional powers, and answer all the useful purposes of their creation" without punishing other acts. *Id.* The Court would not accept that constraint: "if the General Assembly may deprive the courts of power to punish one class of contempts, it may go the whole length, and divest them of power to punish any contempt." *Id.*

Later, the Court rejected a request to reconsider a summary affirmance that violated a statute requiring courts to state the reasons for their decisions:

> If the Legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement, or prescribe the paper upon which they shall be written and the ink which shall be used . . . . *In its own sphere of duties, this court cannot be trammeled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions*."

Vaughn v. Harp, 49 Ark. 160, 161-62, 4 S.W. 751, 752 (Ark. 1886) (emphasis added).

And it is natural that the drafters of our 1874 Constitution would said who should direct any statewide response to contagious disease, because diseases like malaria, smallpox, typhoid, and yellow fever that have been extinguished and forgotten in Arkansas now were an constant menace then. *See generally* Polly J. Price, *Epidemics, Outsiders, and Local Protection: Federalism Theater in the Era of the Shotgun Quarantine*, 19 U. Pa. J. Const. L. 369 (2016). Indeed, the South "notoriously had the worst health in the nation throughout the nineteenth century and the first half of the twentieth." *Id*. at 374. It would not have occurred to those who drafted the Constitution of 1874 in an agrarian state, at a time before interstate highways or automobiles, that a statewide response to an outbreak of contagious disease should wait until a quorum of them could gallop to wherever the Governor decreed and then (pray God) agree in sufficient number about what to do.

Indeed, those emergency powers were immediately and consistently treated as an executive matter in practice. The first State Board of Health was created by the Governor, not the General Assembly, a mere five years after the Constitution was enacted: August 5, 1879, in response to reports of yellow fever, Governor W.R. Miller commandeered a volunteer board of the State Medical Society and proclaimed it a State Board of Health. In a proclamation titled "Official Recognition of the State Board of Health" republished in the *Arkansas Democrat*, he charged its director and members to take all necessary efforts and lamented that, although it could call on the full extent of his executive power, it could not rely on state funds:

> Sir–In view of the obvious necessity, if quarantine against yellow fever is to be at all enforced in the State, of a uniform and practically authoritative system; and in the absence of necessary legislation, I have determined to request your Board, organized expressly for the purpose of meeting such an emergency, to act as a State Board of Health.
>
> I understand your organization to have been completed soon after your appointment. I would now respectfully recommend that your body be at once convened, a thorough system of quarantine perfected, and effective cooperation with the various local Boards of Health established.

You may depend upon the cooperation and support of the State government to the full extent of the power vested in me.

I deeply regret that no appropriation exists upon which you can rely for permanent support. . . . You must then rely, as I believe you may do, upon the voluntary contributions of individual citizens, and upon appropriations, which I doubt not will be generously made by municipal corporations.

In future communications your organization will be addressed as 'The State Board of Health.'

He followed with a proclamation:

Whereas, it is evident that, in order absolutely, to insure a continuance of that immunity which our people have hitherto enjoyed from attacks of epidemic disease; prudence demands the enforcement of a rigid and general quarantine; and

Whereas, the statutes of the State have provided for quarantine only, within circumscribed limits, immediately surrounding incorporated cities and towns; and the want of due cooperation existing between the various local Boards of Health does, and must of necessity, tend to weaken their efficiency; and

Whereas, the State Medical Society of Arkansas, at its recent session, caused the appointment of certain members of that body, to represent, in the absence of statutory organization for that purpose a State Board of Health;

Now, therefore I, William R. Miller, Governor of the State of Arkansas, do hereby make proclamation that, with a view to secure the public safety, I have called upon the Board of Health aforesaid to take such action as may be proper, to protect the public against epidemic diseases, and henceforth, said Board will be recognized by the Executive Department of the State government, and supported and maintained as such, to the full extent of the power in me vested, and I ask all local Boards of Health to co-operate with said State Board, in all matters touching the rules, regulations and enforcement of a uniform and thorough system of quarantine.

As no appropriation exists by virtue of which the necessary expenses of the operations of said Board can be paid from the treasury of the State, I do hereby call upon the good citizens of the State, and upon its organized municipalities for such generous donations to said Board as may enable it to efficiently discharge its functions in the public interest.

Gov. W.R. Miller, Proclamation of Aug. 5, 1879, republished at Ark. Dem. (Aug. 6, 1879).

The General Assembly formally recognized the State Board of Health in Act 55 of 1881. 1881 Ark. Acts 177. But for the next 26 years, the Board operated without funding. On August 1, 1905, when an outbreak of yellow fever was detected in New Orleans, the Board remained penniless. But thanks to the Governor, it was not powerless. Governor Davis put the Board in command of the state militia by order to its commander:

> Information having reached me officially that yellow fever is prevalent in the city of New Orleans and other Southern cities, and it also appearing that the refugees from these stricken cities are coming and threatening to come into our state, and the state being absolutely helpless as to means to maintain a quarantine by the various Boards of Health, you are hereby directed and commanded to detail from the state guard such officers and men as, in your judgment and in the judgment of the various Boards of Health to be affected, may be necessary to effectually quarantine the various exposed places in the state from the invasion of those who may have had an opportunity to be affected by this disease. These officers and men to act as a posse comitatus under the direction and approval of the sheriffs of the various counties where they may be stationed, and to receive their authority and directions from him under the supervision of the State Board of Health. Said officers and men to be paid out of the general appropriation for the maintenance of the Arkansas State Guard.

Gov. Jeff Davis, Order of Aug. 1, 1905, republished, *Militamen Have Been Ordered Out*, Ark. Gaz. (Aug. 2, 1905).

The Board's chairman wrote later that physicians who accepted appointment "have done so as a courtesy to the governor making the appointment" and in the hope that "by keeping up the semblance of a state board of health the matter of obtaining proper recognition on the part of the legislature would be facilitated, and the board which only existed in name would then become one in reality and effectiveness." R.B. Christian, The Arkansas Board of Health, J. Am. Med. Assoc. 1101 (Oct. 7, 1905). Instead, he complained, "the rulings and all authority of the

state board were virtually set aside and the governor seemed to arrogate to himself entire control of the quarantine situation." *Id.*

The Board's unfunded status continued until, in 1913, the General Assembly gave the Board funding it had always lacked, preserving the discretion it had always exercised in matters of contagious disease. Section 5 of that Act confided "general supervision and control of all matters pertaining to the health of the citizens of this State" to the Board, as well as "direction and control over all sanitary and quarantine measures for dealing with all [contagious] diseases within the State, and to suppress the same and prevent their spread. *State v. Martin*, 134 Ark. 420, 424–425, 204 S.W. 622, 624 (Ark. 1918). Section 6 conferred power to make "all necessary and reasonable rules and regulations of a general nature for the protection of the public health" and for "the suppression and prevention of infectious, contagious and communicable diseases, and for the proper enforcement of quarantine, isolation and control of such diseases[.]"[4]

The Arkansas Supreme Court rejected an improper-delegation argument on the ground that the Act "is essentially an act for the better protection of the health of the citizens" that legislates "specially against the entry into and spread of diseases which are infectious, contagious or communicable." *Id.* at 435, 204 S.W. 624. "The mere fact that the will of the Legislature is to be worked out, through methods and details provided in rules and regulations to be adopted and promulgated by the Board of Health, does not render the act itself incomplete." *Id.* Further, "the creation of boards of health for the purpose of preventing and controlling contagious diseases

[4] *Id.* at 425, 204 S.W. at 624. The Act purported to impose one limit to this discretion: A minor who could be treated safely in his home could not be removed without his or his parents' consent.

and the right of the boards to adopt reasonable rules and regulations for that purpose is not regarded generally as a delegation of legislative authority." *Id.*

The Court said in dictum that "[t]he only authority possessed by the Board of Health is the authority conferred upon it by statute." *Id.* at 424, 204 S.W. at 624. Certainly, legislative recognition was necessary to appropriate funds. But no one had argued that the Board's powers, which included matters of general public health, also included emergency powers that drew from the executive branch. Nor, under the Supreme Court's other cases discussing similar creations of the General Assembly could the statutes creating the Board alter the constitutional character of its duties.[5]

Our Constitution can independently confer power the legislature cannot encroach. The Game and Fish Commission, for example, is "an independent constitutional agency with the clear power to control, manage, restore, conserve, and regulate the birds, fish, game and wildlife resources of the state." *Chaffin v. Ark. Game & Fish Com.*, 296 Ark. 431, 436, 757 S.W.2d 950, 953 (Ark. 1988). Although Amendment 35 gave the legislature the power to appropriate funds, the General Assembly exceeded its constitutional power–and intruded on the Commission's constitutional power–when it attempted to use appropriations to "assert its control over the commission's right to make policy decisions." *Id.* at 436, 757 S.W.2d at 953. The Court held that an executive authority must be free "not only from blatant usurpation of its powers, but from *paralyzing*

[5] *See, e.g., Fireman's Ins. Co. v. Ark. State Claims Com.*, 301 Ark. 451, 458, 784 S.W.2d 771, 775 (Ark. 1990) (act creating Claims Commission delegated duties "which are, under the Constitution, solely the duties of the General Assembly" so its proceedings were not subject to the Administrative Procedure Act); *Helena Water Co. v. Helena*, 140 Ark. 597, 605, 216 S.W. 26, 28 (Ark. 1919) (creating a "Railroad Commission" did not exhaust the General Assembly's power under Amendment 2 to correct abuses by transportation corporations and "the power to create a commission under another name, with the authority enumerated and more, still existed.").

interference as well. The legislature cannot hold the executive branch hostage to its will", nor intrude on its prerogatives. *Id.* at 443–44, 757 S.W.2d at 956-57 (emphasis added); *see also Wells v. Riviere*, 269 Ark. 156, 599 S.W.2d 375 (Ark. 1980) (attempt to usurp Governor's constitutional power to call extraordinary session). Yet that is precisely what it has done with Act 1002.

In sum, it is reasonable to assume the Arkansas Supreme Court will continue to follow the lead of the Kentucky Supreme Court and hold that the Governor's authority to decide what statewide measures to take in an emergency of contagious disease was conferred by the Constitution of 1874, not by the General Assembly. If the Governor exercises or omits to exercise that authority in a way that is contended to violate limits imposed by substantive provisions in Arkansas's Constitution, or binding federal law, that contention can be raised, and any available redress received, in an appropriate proceeding. However, authority was not given by statute, so it cannot be limited by statute, nor can its exercise be controlled or annulled by statute.

For the reasons explained above, it is reasonable to assume that the Arkansas Supreme Court will continue to follow the lead of the Kentucky Supreme Court when called upon to decide separation of powers issues; therefore, it is exceedingly likely that Plaintiffs will prevail on the merits of their separation of powers claim. What's more, Plaintiffs' separation of powers claim is not limited to Act 1002's infringement on the powers of the executive branch. By enacting Act 1002, the General Assembly also attempted to tell the judicial branch of government that it could not impose mask mandates in courtrooms or elsewhere.

Circuit Court Judges in Arkansas are clearly "state officials" within the meaning of Act 1002 and are, therefore, covered by Act 1002 sections (b) and (c).[6] Arkansas judges are not exempt

[6] Under the heading "Elected Officials" on the Arkansas Secretary of State's website, judges are referred to as "Arkansas Judicial Officials."

from complying with Act 1002. After all, the three statutory exceptions set forth in section (e) of Act 1002 say nothing about members of the judicial branch of government. Therein lies yet another fatal flaw in Act 1002. The General Assembly can't tell state court judges what they can or cannot do in their courtroom, yet that's exactly what Act 1002 attempts to do. For that reason, Act 1002 creates an unconstitutional intrusion of territory that belongs exclusively to the judiciary, in violation of the "separation of powers" doctrine set forth in Article 4 of the Arkansas Constitution. Standing alone, this unconstitutional defect in Act 1002 renders the statute void.

III. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR DUE PROCESS CLAIM THAT ACT 1002 IS UNCONSTITUTIONALLY OVERBROAD, SERVES NO LEGITIMATE STATE INTEREST, AND IS FACIALLY IRRATIONAL

In addition to violating Article 4 of the Arkansas Constitution, 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, and creates nonsensical and irrational exemptions that deprive certain classes of citizens and organizations of the health and safety measures provided to others.

For any statute to survive constitutional scrutiny, there must be a conceivable rational basis that supports a legitimate governmental interest. Act 1002 comes nowhere close to meeting this standard. From a constitutional perspective, Act 1002 reaches new heights of irrationality.

On several occasions, the United States Supreme Court has held that, as a matter of due process, legislation that is "unreasonable" or "arbitrary" is unconstitutional even if it does not violate any procedural requirements of the Constitution. *Eubank v. Richmond*, 226 U.S. 137 (1912); *Adair v. United States*, 208 U.S. 161 (1908); *Dobbins v. Los Angeles*, 195 U.S. 223 (1904).

The Supreme Court has also said a legislative act is not valid unless it is "reasonable." *Eubank v. Richmond*, 226 U.S. 137 (1912). Furthermore, the Supreme Court has ruled that a law which furthers illegitimate goals fails to meet the requirements of substantive due process. *See, e.g.*, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116-17 (1976).

"In *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983), [the Arkansas Supreme Court] adopted the rational basis test of the United States Supreme Court for challenges under Amendment 14 to the Arkansas Constitution." *Benton County v. City of Bentonville*, 373 Ark. 356, 358-59 (Ark. 2008). A court may also find that a statute fails to meet the "rational basis" test if the "act was not rationally related to a legitimate governmental purpose." *Id.* at 360. [7]

The attached transcript of Senator Trent Garner's explanation of the reasoning for passing this law leaves no room for doubt about the unconstitutional intent of the General Assembly when it enacted Act 1002. The cruel irony here is that the proponents of Act 1002 claim that they want Arkansans to be able to make their own choices free of mandates from "big government." Yet, by enacting this law, they have removed the ability of parents and K-12 students to choose "inconvenient safety" over "dangerous freedom." And contrary to the letter and spirit of Amendment 55 of our Constitution, the powers that be in Little Rock have also stripped local officials of the right to choose what they prefer. Act 1002 doesn't promote freedom of choice. To the contrary, it's a legislative mandate that leaves Arkansans with only one choice – the one the General Assembly made for them.

[7] With rare exceptions, extrinsic evidence is not admissible for the purpose of construing a statute. Here, however, Senator Garner's and Representative Bryant's statements reveal that Act 1002 was not "rationally related to a legitimate governmental purpose."

The absence of any rational relationship between Act 1002 and any legitimate governmental purpose is showcased in the official video archives of the Arkansas Senate and House of Representatives.[8] 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 perpetuate "strife" among citizens – implying that a 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."

On March 31, 2021, Senator Trent Garner spoke from the Senate floor about the need for SB590 and answered questions about the Bill. In direct conflict with what Representative Bryant said about the need for "uniformity," Senator Garner expressed his opinion that SB590 did not apply to cities.

> "For two reasons I think that this would not include private or cities. One is the language of the rest of the bill, which specifically over and over again addresses the need to do with the executive order. It doesn't bring up cities. It doesn't bring up anything else. Typically when you read law, you read the black letter of the law, but you also look at legislative intent and the law as a whole."[9]

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[8] https://www.arkansashouse.org; https://senate.arkansas.gov/todays-live-stream-meetings/

[9] Senator Trent Garner, Senate Floor Vote, March 31, 2021. A verbatim transcript of the General Assembly's discussions about Act 1002 is attached hereto as Exhibit A.

Senator Garner then tacitly admitted that the specific purpose of Act 1002 was to prevent the Governor from issuing a mask mandate, which he clearly was authorized to do using his constitutional powers and the authority given to the Governor in the Disaster Emergency Act of 1973. Legislation aimed at encroaching on the authority of another branch of government is *per se* an illicit legislative goal.

Senator Garner has also said that Act 1002 was intended to subordinate "comfortable safety" to "dangerous freedom," implying either that: (a) most Arkansans prefer "dangerous freedom" for themselves and their children rather than "comfortable safety"; or (b) there is some fundamental right to "dangerous freedom." Regardless of what Senator Gardner meant, there is no right to "dangerous freedom" that puts others at risk, and there never has been. Furthermore, in other areas of life, the Arkansas General Assembly has squarely rejected the notion that any Arkansan has the right to engage in "self-endangerment" (the legal equivalent of "dangerous freedom") – even when such behavior poses no risk to anyone but themselves. For that reason, the General Assembly has passed laws requiring motorcycle drivers under 21 years of age to wear a helmet, requiring front seat passengers to wear a seat belt, requiring small children to ride in car seats, requiring children 12 and younger to wear life jackets while boating, and allowing civil commitment of mentally ill persons who pose a risk to themselves – not to mention mandatory vaccinations for school children.

But that's not all. For the past 116 years, the United States Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) has been the law of the land. In *Jacobson*, the State of Massachusetts enacted legislation authorizing local governments to require immunizations that in the opinion of the locality's governing authorities were necessary to protect the public health.

The City of Cambridge noted that smallpox cases had been increasing in that community and ordered the residents of the City to be vaccinated. When Jacobson refused vaccination, the City proceeded criminally against him. Jacobson asserted that the ordinance adopted by the City violated the Fourteenth Amendment's guarantee against deprivations of life, liberty, and property without due process of law and further violated the "spirit" and the preamble of the Constitution. Jacobson was found guilty, with the Massachusetts Supreme Judicial Court upholding his conviction.

On appeal to the United States Supreme Court, Jacobson raised the same arguments. After rejecting the appellant's general arguments which were based on the preamble and the "spirit" of the Constitution, the Court moved on to determine if the statute in question violated the appellant's liberty that was protected by the Fourteenth Amendment. To preface its analysis, the Court noted that police powers are broad and generally empower the state to enact laws to protect the public health and safety of its citizens. These may include quarantine laws and a broad range of public health measures. Additionally, the state may invest local governments with the power to enact regulations addressing the protection of public health.

As to Jacobson's right to "dangerous freedom," the Supreme Court noted that under our system of government, liberty and freedom are not a license to do what one wants.

> "[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. . . . [I]n 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*."[10]

The principles articulated by the Supreme Court in *Jacobson* have stood the test of time for more than a century. In 1905, the great danger was a smallpox epidemic. Today, it is the Delta variant of COVID. *Jacobson* is still the law of the land, and "the safety of the general public" still demands that state and local officials be allowed to implement measures for the public's protection against this deadly virus.

In civilized societies governed by the "Rule of Law," individuals do not have the right to unfettered "personal freedom" – dangerous or otherwise. In a surging deadly pandemic, compelling school children to be educated in a dangerous environment cannot possibly be seen as furthering a legitimate governmental interest. For that reason alone, Act 1002 fails the "rational basis" test and is, therefore, unconstitutional.

Worse yet, the exemptions in Act 1002 make the application of Act 1002 inherently irrational. Whether by design or thoughtless mistakes in drafting the Senate Bill that became Act 1002, this piece of legislation is fundamentally flawed in other ways. Indeed, as the examples that follow illustrate, Act 1002 has produced results that are indefensibly irrational and ridiculously absurd. For example:

Act 1002 exempted from the ban on government mask mandates "a facility operated by the Department of Corrections." Other detention facilities were not exempted, meaning that Act 1002 prohibits County Sheriffs from requiring prisoners in county jails to wear masks. This irrational

[10] *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905) (emphasis added).

dichotomy results in death row inmates being afforded more protection against the Delta variant than the protection given to K-12 school children. Likewise, the legislation allows the Department of Corrections to follow CDC guidelines to provide the safest possible health environment for long-term prison inmates convicted of rape and murder who never leave the prison. Yet, on the other hand, Act 1002 prevents County Sheriffs from creating the safest possible environment or following CDC guidelines with respect to persons simply charged with, much less convicted of, far less serious offenses (*e.g.*, DWI and shoplifting) and pre-trial detainees who are being transported to and from courtrooms every day.

Remarkably, the failure to exempt all detention facilities isn't the only irrational exemption in Act 1002. When exempting "state-controlled health care facilities" from the ban on face mask mandates, the drafters of Act 1002 apparently forgot to consider that Arkansas has many "county-controlled hospitals," predominantly in rural parts of Arkansas. There's no exemption in Act 1002 that even arguably includes county-controlled hospitals. There should have been, however. By arbitrarily creating two classes of government hospitals, the General Assembly has denied equal protection of the laws to a population that is already underserved, many without access to internet service, and already challenged by the distance they must travel to receive adequate medical care. There is no question that Act 1002 makes it illegal for any county-controlled hospitals to require patients, visitors, or the medical staff to wear face masks. This is yet another reason why Act 1002 lacks any conceivable rational basis, as required by the Arkansas Constitution.

IV. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR DUE PROCESS AND EQUAL PROTECTION CLAIMS

Act 1002 Violates the Constitutional Right of Arkansas' Children to an Adequate Education

The Arkansas Constitution protects its citizens from government interference with substantive due process rights, and it secures for its citizens the right to equal protection of the laws. Act 1002 defies both of these principles in multiple ways.

The Arkansas Constitution safeguards the populace from governmental excessive interference with certain core substantive rights. Article 2, § 2 of the Constitution provides: "All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing, and protecting property, and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed." Ark. Const. Art. 2, § 2.

Further, the right to an adequate education is one of the specific substantive rights enumerated by the Constitution: "Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, 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."

The *Lake View* court set forth a number of findings in its opinion that emphasize and solidify the crucial importance of this constitutional guarantee. Indeed, "[e]ducation has been a constitutional focus and mandate since the founding of our state." *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 491 (Ark. 2002). "That education has been of paramount concern to the citizens of this state since the state's inception is beyond dispute." *Id.* At 492. "It is safe to

say that no program of state government takes precedence over it." *Id*. "[T]he right to equal educational opportunity is basic to our society." *Id*. The General Assembly has "acknowledged that the state is constitutionally required to provide a general, suitable, and efficient system of free public schools, and that the Arkansas courts have held that obligation to be a 'paramount duty.'" *Id.* "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 school children of Arkansas with an adequate education." *Id.*

Thus, the provision of adequate education is the state's highest calling, and yet Act 1002 affirmatively interferes with Arkansans' constitutional right to an adequate education by forcing Arkansas' children into a physically unsafe educational environment. Specifically, as elaborated upon above, the Act prohibits proven public health measures (i.e., mandatory masking) during a public health emergency (a state of uncontrolled transmission of a deadly airborne virus). The right to be physically safe while pursuing one's education must be recognized as a minimum threshold of adequacy. Thus, in enacting Act 1002, the legislature has failed in its "absolute constitutional duty to educate our children."

In addition to violating the plain language of Article 14, Act 1002 also violates general due process principles. In *Lake View*, the Arkansas Supreme Court stopped short of declaring that an adequate education should be deemed a fundamental right for due process purposes; however, the Court did not foreclose the issue for future determination. See *Lake View* at 495 ("[B]ecause 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 reach the issue of whether a fundamental right is also implied.") Given the special place of education in Arkansas' constitutional firmament, declaring a minimally safe educational environment a fundamental right

for due process purposes should be uncontroversial. Further, it is desirable because the established due process framework provides clear guidance on how state action interfering with that right should be evaluated.

Governmental interference with citizens' fundamental rights triggers strict scrutiny, a standard that Act 1002 cannot survive. *See Jegley v. Picado*, 80 S.W.3d 332, 350) (Ark. 2002) ("When a statute impinges on a fundamental right, strict scrutiny applies, and it cannot survive unless a compelling state interest is advanced by the statute and the statute is the least restrictive method to carry out the state interest.") Importantly, under strict scrutiny, the burden is on the State to show that the statute advances a compelling interest and that the statute is narrowly tailored to achieve that interest. *Lake View* at 499.

Regarding the first prong of the standard, the State can show no compelling governmental interest that is served by Act 1002. The only interest cited in the statute is a vague and undefined reference to "the public peace, health, and safety of the citizens." This unspecified interest cannot outweigh the specific and concrete obligation to provide an adequate public education. As the Court has said of that duty: "no program of state government takes precedence over it."

Regarding the second prong of the strict scrutiny standard, if a statewide prohibition on mask mandates is necessary to preserve the public peace, health, and safety of the citizens, then why wouldn't the exclusion of private schools, state-owned or state-controlled healthcare facilities, facilities operated by the Department of Corrections, and facilities operated by the Division of Youth Services destroy this goal? The unprincipled, uneven, and arbitrary application of the law to some settings and not others belies any contention that it is narrowly tailored and/or necessary to achieve the State's ill-defined goals. Further, to the extent the state claims to be advancing the public health and safety, this contention strains credulity. The sole purpose of Act 1002 is to rob

school districts and other government entities of a critical, proven public health tool in the very midst of a worsening pandemic. Act 1002 does not advance any government interest in the health and safety of its citizenry; rather it actively thwarts those interests. Such justifications do not pass muster under rational basis review, much less strict scrutiny.

Act 1002 Violates the Right of Arkansas' Children to Equal Treatment

Multiple provisions of the Arkansas Constitution guarantee that Arkansans will be treated equally by their government. Most notably, Article 2, § 3 provides: "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." In addition, Article 2 Section 18 states: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

Act 1002 creates numerous distinctions between the citizens of Arkansas. First, it creates a fundamental distinction between employees of private businesses versus employees of state-run institutions. It further distinguishes between employees of a state-owned or state-controlled healthcare facility, a facility operated by the Department of Corrections, and a facility operated by the Division of Youth Services of the Department of Human Services, versus all other employees of state-run institutions. In each case, the former group of persons has the opportunity to benefit from mandatory mask policies, while for the latter this option is entirely foreclosed.

Most importantly, Act 1002 draws a distinction between children who are able to attend private schools and children who must attend public schools. These two groups of children are similarly situated with respect to their interest in receiving an adequate—and minimally safe—education. And yet they are not treated alike. Rather, for one set of children their individual school

may choose to implement life-saving public health measures, while the legislature has foreclosed that option for children in public schools.

As argued above, strict scrutiny should apply to review of Act 1002. But even were the Court to apply rational basis review (because the classifications at issue are neither suspect nor quasi-suspect), see *Landers v. Stone*, 496 S.W.2d 370, 377 (Ark. 2016) (rational basis review applies where no suspect class is at issue), Act 1002 is still so patently irrational and outside the scope of legitimate legislative activity that it cannot survive even this deferential level of scrutiny.

"The equal protection clause permits classifications that have a rational basis and are reasonably related to a legitimate government purpose." *McDaniel v. Spencer*, 457 S.W.3d 641, 650 (Ark. 2015). "Equal protection does not require that persons be dealt with identically; it requires only that classifications rest on real and not feigned differences, that the distinctions have some relevance to the purpose for which the classification is made, and that their treatment not be so disparate as to be arbitrary." Id. Nonetheless, "the state cannot create different classifications on the basis of criteria wholly unrelated to the purpose for which the classification was established." *Burt v. Arkansas Livestock and Poultry Com'n*, 644 S.W.2d 587, 589 (Ark. 1983).

Similar to the argument above, under the first prong of the rational basis review, the only conceivable government interest supporting Act 1002 is that set forth in the body of the law: to preserve "the public peace, health, and safety of the citizens." It is conceded that, in the abstract, such an interest is legitimate.

But it is in the second prong of the test—which requires that the law be related to the purported government interest – that the State's justification falls apart. As argued above, Act 1002 actively and aggressively thwarts any public health goals by robbing school districts and other government entities of a critical, proven public health tool in the very midst of a worsening

pandemic. Rational basis review is the lowest form of judicial scrutiny, but it is not a toothless standard. Act 1002, in its manifest irrationality, defies even this deferential test. In short, a statewide prohibition against mask policies is "wholly unrelated" to any conceivable notion of the public interest.

Again, "the right to equal educational opportunity is basic to our society." *Id.* Act 1002 brutally divides Arkansas' children into two groups: those who are able to access private education, and those who are not. Children in the latter category are affirmatively precluded from receiving basic public health protections. And yet there is no difference between these two groups of children with respect to their interest in and entitlement to a minimally safe educational environment. By depriving a subset of Arkansas' children of a minimally physically safe educational environment, Act 1002 violates the State's core commitment to equal educational opportunity.

Consistent with Amendment 55 to the Arkansas Constitution,[11] the statutes that govern secondary schools make clear that the General Assembly has treated each school district as essentially a mini-agency, consistent with the remainder of Art. 14, § 4. When the General Assembly has passed laws regulating student dress or conduct in the past, it has done that by requiring school districts to include a provision in their written student conduct policies. For example, Ark. Code. § 6-18-502(a) provides: "The Division of Elementary and Secondary Education shall establish rules for the development of school district student discipline policies." Then in the following section, the General Assembly said: "Each school district in this state shall

[11] Amendment 55 adopts the conservative principle of "home rule" by granting broad authority to County Quorum Court to self-manage local matters, including such things as public health and education.

develop written student discipline policies in compliance with the rules established by the Division of Elementary and Secondary Education and shall file the policies with the division." Ark. Code § 6-18-503(a)(1)(A).

The Arkansas Department of Education has implemented those regulations in its "Rules Governing Student Discipline and School Safety," which do not include anything preventing school districts from requiring masks. That's not surprising. After all, the General Assembly hasn't just delegated the authority to regulate school discipline and safety to local school officials. Consistent with the Arkansas Supreme Court's decision in *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 91 S.W.3d 472 (Ark. 2002), which reinforced the state's obligation to provide an "adequate" education for K-12 school children, the General Assembly has *mandated that local school districts enforce school policies to "ensure the safety of every student during school hours.*" Ark. Code § 6-15-1005. Furthermore, the General Assembly has required local school districts to enforce a code of behavior for students that *respects the rights of others* and maintains a <u>*safe*</u> and orderly environment." *Id.*

"The existence of an absurd result is yet another case where a canon is used both as a de facto justification for interpretation and as a canon of interpretation." <u>Statutory Interpretation in Arkansas: How Arkansas Courts Interpret Statutes. A Rational Approach</u>**,** Ark. Law Notes (Prof. M.W. Mullane, 2005). Applying this rule of statutory construction to Act 1002, forcing this unconstitutional law on school districts would create a result that is nothing short of absurd. After all, if school districts are prohibited from requiring students from wearing face masks: (a) a student's face would be the only body part the school could not require the student to cover; and (b) preventing student illness and death from a highly contagious disease would be the only governmental interest the district was not allowed to consider. Because there is no express

reference to school districts in Act 1002, we believe that Act 1002 could be construed not to have been intended to apply to public schools, which the General Assembly has referred to specifically and regulated indirectly in other statutes.

The Arkansas Supreme Court has embraced the rule of statutory construction that, in the absence of a clear expression of intent to apply a general statute to a more specific one, courts should interpret conflicting statutes by giving meaning to the statute that is most specific. "Where a specific statute conflicts with a general statute dealing with the same subject matter, the plain meaning of the specific is presumed to control that of the general statute." Statutory Interpretation in Arkansas: How Arkansas Courts Interpret Statutes. A Rational Approach, Ark. Law Notes (Prof. M.W. Mullane, 2005) (citing $75 in U.S. Currency v. State, 205 WL 668605 (Ark. App. 2005). Act 1002 is far less specific than Ark. Code § 6-18-503 and makes no mention of school districts. Therefore, a Court could assume that the General Assembly did not intend to withdraw or modify the broad authority to school discipline and safety when it enacted Act 1002. Therefore, in addition to invalidating this statute on constitutional grounds – the Court could construe Act 1002 to mean that its ban on mask mandates does not apply to local school districts.

V. CONCLUSION

For the reasons set forth hereinabove, Plaintiffs have shown they are likely to succeed on the merits, that there is a significant threat of irreparable harm to their children, and that the public interest would be served by this Court entering a TRO.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I, Thomas A. Mars, hereby certify that a copy of this Brief in Support of Motion for a Temporary Restraining Order was served on the Defendants this 4th day of August 2021 through KaTina Guest, Assistant Attorney General, who has confirmed that she will accept service and appear on behalf of all the Defendants.

By: */s/ Thomas A. Mars*

EXHIBIT "A" TO
BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A TRO

Senate and House Transcripts related to Senate Bill 590 (Act 1002)

[Transcribed exactly as stated. Grammatical errors are the speaker's.]

Senate Public Health Committee
March 29, 2021 3 p.m.

Committee Members:
Cecile Bledsoe, chair
Scott Flippo, Vice-chair
Bart Hester
David Wallace
Breanne Davis
Kim Hammer
Dan Sullivan
Ben Gilmore

Trent Garner: Thank you, Madam Chair. In the last year during the pandemic, we have seen an unprecedented use of power in the executive branch here in the state of Arkansas. Out of our fear for an unknown virus released on Arkansas by the communist Chinese party, our government has taken dramatic steps and directions that I never thought I would see in my lifetime.

Businesses forced being shut down, not allowed to earn a living. Schools closed as parents had to scramble to take care of their children. Fines and penalties being given out to some businesses that are simply trying to operate that business while other businesses being excluded.

All this was not done by law or legislative process. It was done by the stroke of a pen. Without bringing legislation into -- bringing this law into the legislature to be voted on, the power consolidated in the executive branch was nearly unlimited and decisions were made nearly unilaterally. If you don't -- if you look at the last year in Arkansas and across the United States and understand the dangers that has happened by this consolidation of power in one branch and know what history has led to in other countries, this is a dangerous precedent.

Now we went from two weeks to flatten the curve to get past the summer to get through the winter to getting tested. Now you have to be vaccinated. A year later, and we're still under this control. Most controversial of these moves in Arkansas was the so-called mask mandate. This executive order, which allowed penalties on individuals who did not wear a mask, was a very specific kind of punishment. This wasn't a business, which had a license. This was individuals in the community that could be fined up to a $500 for failing to follow this. You know, we had -- we could have had plenty of time to discuss this as legislators. We could have came as special session to do this, and we didn't.

Here's why you should support this bill. If you agree with this bill -- if you disagree with the mask mandate, you should support this bill because it not only ends the current mask mandate, it prevents any future mask mandate related to Covid-19 until we're past this crisis. If you support the mask mandate, you should support this bill. Why? Because you look what happened whenever the mask mandate was done by executive order. How many police chiefs and fire -- police departments wrote and said they will not enforce this? I'm an attorney. When this came out, I sat down and read this and had to write a summary for the people to understand because it's so convoluted and misunderstanding.

Think about this: They can write you a fine up to $500 for the mask mandate. The police can. But yet in that same executive order, they could not detain you. How do you not detain somebody and then turn around and give them a fine? It was a poorly written, sloppily written executive order done by a branch of government that should not be writing laws.

If you support the mask mandate, you should want the legislator to come together, have committee meetings, discuss it, have it heard on the floor, have the debate, have experts sit in this chair, explain what that bill is about and be voted on yes or no. This bill would help that moving forward.

Let me end it with this. I know there was a lot of changes made when Covid-19 hit. I understood it. There was a great amount of fear, uncertainty, unknown. We didn't know what the next year would hold. But now we do. We need to send a clear message today that in the future, we'll be more prepared and that we as legislators will have more of a say in how this process will work and how important it is to be. I don't know about you, but I'll take a dangerous freedom over a comfortable servitude any day of the week. With that, I'll take any questions.

Bledsoe: All right. Any questions from the committee? All right, seeing none, we have one person that is signed up to speak against the bill. And, uh, Laura Shoo, if you would come forward. When you get settled, if you would state your name and where you're from for the record. And you're recognized.

Laura Shoo: Thank you, madam chair, members of the committee, Senator Garner. We appreciate the opportunity to speak on this bill today. As you all know, the public health emergency has been extended by 60 days to allow for rapid response. The Department of Health initially acted in intraverious within its authority under statutory emergency powers and under 20-7-109 and 110 and the rules pertaining to reportable diseases that were approved -- reviewed and approved by the Public Health Committee and by ALC (Arkansas Legislative Council) in 2018.

This bill would take away the flexibility to react quickly, and it conflicts with the new process under Act 403 of 2021. It provides no sunset provision if mitigation efforts were necessary in the future. The governor has stated that the face covering directive will end at midnight on March 31st. This is based on metrics that have been evaluated over a period of time, including the

7-day average of testing positivity, daily testing specimens, and daily hospitalization rates. This bill repeatedly states that it is no longer necessary without any metrics or fact-finding.

It states that it is for all mandatory face covering requirements. It says “including, but without limitations the ones that are imposed by the executive orders and the ADH directives.” There are many private business, including hospitals and restaurants that have announced that they are continuing best practices and will require a mask. This bill would limit their choice and their freedom to do so.

There are also federal mandates that require face coverings, including for public transit passengers and the transportation security administration doesn’t plan to lift that requirement until May 11, 2021. This bill sends the wrong message, and we want to continue to protect each other and respect each other and take it seriously while we get everyone vaccinated. Thank you.

Bledsoe: Thank you. Would you take questions? All right. Any questions from the committee for Mrs. Shoo? All right, Senator Hester.

Hester: Did you say this would limit a private company’s right to require masks from the public when they come in? Like, if I was going to eat at Chili’s tonight, and they wanted to have a mask mandate, this would prevent that?

Shoo: The way this reads on page 2, line 4, it says, “including, without limitations.” It says on the effective date of this act, all mandatory face covering requirements are removed.

Bledsoe: Okay. Any other questions? All right. Anyone else in the room, would you like to speak for the bill? Against the bill? Thank you, Mrs. Shoo. All right, if you want to close for your bill.

Garner: Yes, I’ll just strongly push back. This is all dealing with government executive action, Department of Health, or executive order. By no means does this preclude a private business or company from being able to actually stop people. Like, right now, you can preclude somebody for no shoes, no shirt, no service? That same business will be able to do that for masks. It’s their discretion as a private property owner how they want to do that as long as they don’t run into any type of discrimination laws, such as limiting them for race, gender, or other things. That is completely false. I will strongly push back on that assessment. With that, I am closed.

Bledsoe: Okay. Ladies and gentlemen. All right, I have a motion. Okay, a second. All those in favor, say aye.

Committee: Aye.

Bledsoe: All those opposed?

Committee: No.

Bledsoe: All right, I'm sorry, ladies and gentlemen. I think I heard four no's. So, let's do it again. Let's do it again. Just a minute. All those in favor, say aye.

Committee: Aye.

Bledsoe: All those opposed, no.

Committee: No.

Bledsoe: Okay. Congratulations, your bill passes. All right.

EXHIBIT "A" TO
BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A TRO

Senate Floor Vote
March 31, 2021
1 p.m.

Garner: Members, for the last year about this time whenever the Covid-19 crisis hit us, unleashed on us from a Wuhan lab and from covering up by the communist Chinese party, things have happened that I've never thought would happen in the state of Arkansas. We've seen dramatic changes to our date of life. We've seen rulings come down that I didn't think I would ever see as a grown adult. Most contentious of this was the executive order put in place by the governor dealing with mandatory mask requirements.

Now, we all know that order sided (?) yesterday. And that was a good move by the governor. I think it's necessary based on the public health data that we have and how things have changed through the success of us handling the virus. But what this bill does is make sure that we don't have that happen again by executive order or by government fiat. Quite simply, this allows any time for related to the Covid-19 mask mandate, we as a General Assembly will have a direct say in how it works.

Now, if you're in here and you agree with the mask mandate, you should want this bill. Why? Because the executive order as it was written was a poorly constructed legal document. It's what happens when the executive branch tries to write legislation. When it came out -- I don't remember if you remember, but there was mass confusion by the population (wondering?) what exactly they had to do as far as following the mandate. I as an attorney looked through it and put a synopsis on my Facebook and social media. And even there was some parts of it that I was confused.

Within that executive order, it said you could get a fine up to $500 for not following the mask mandate from the law enforcement. Yet in that same order, it said you could not be detained by law enforcement. Now how is law enforcement going to detain you and give you a ticket if they can't detain you to give you the ticket? I don't know if y'all remember, do you remember how many letters came out from police chiefs who said they just can't follow this mandate. That's because it was poorly written, poorly constructed, and poorly done. And it's something that should be gone through the General Assembly.

If you didn't support the mask mandate, you should support this bill because it stops the executive branch from unilaterally issuing an executive order dealing with this one particular subset of issues. And it's just related to Covid-19. So if there's a Covid-2021 tomorrow, it will not affect that.

With that, I'll take any questions from these distinguished body.

Pitsch: Are there any questions? I saw Senator Teague first. Then we'll go to Senator Hammer. Senator Teague, you are recognized.

EXHIBIT "A" TO
BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A TRO

Teague: Senator Garner, I meant to ask you before you got down there, and I apologize. Does this affect the cities? I think the city of Little Rock kept a mask prohibition and maybe Fayetteville or someplace. Does this affect that?

Garner: I and checking with BLR (Bureau of Legislative Research) says it does not. I know there's differences of opinion. I believe Senator Tucker has a difference of opinion. But my reading of it, and the way I talked to BLR, it does not.

Teague: Thank you.

Garner: I mean, we could run a bill to do that, for sure.

Pitsch: Senator Hammer, you are recognized for questions.

Hammer: Thank you. Thank you, Mr. President. Senator Garner, what I was wondering is with the newly passed legislation where we have some authority over the executive branch as far as taking up issues like this and it running through, you know, appropriate committees where we can terminate these kind of things, what would be -- what are we missing that we need this given the fact that we now have that other bill in place? Would you balance the two, please?

Garner: Excellent question. What stops the governor tomorrow from extending the mask gate again for another 60 days?

Hammer: Would we not have the procedures in place to address that under--

Garner: Eventually, sir. That's where I think the distinction is. Eventually we could come back and do it within that order. I agree with you and that's why I have not run this legislation earlier. I wanted to the first day of session. But I respected your work and the work you did on that bill to put us in the process. This is a subset issue that I don't think we should go back to the mask mandate as contentious as that was. This isn't -- I have a business license, you can pull my business license. This isn't, I'm selling alcohol. This is me as a individual having a fine placed on me by an executive order by one person making that decision.

If this is needed, and it could. We could have a spike next where participates -- which, which desires us to have a mask mandate again. I don't know if I'd be for or against that, but I could see the need. It requires the General Assembly to come to special session or if we're in session to come together and have a say on it. Why is that important? Experts come. They discuss it. We go through the legislative process. We put in place a bill that has the enforcement of law with the end date and is in there. And law enforcement will not laugh it off, like many of them did the executive order, because we have power over them in other different ways as we've seen from some of the debate today. That's the distinction, sir, I think between this and your very good bill which is more of a forward thinking. I think this one for the current crisis keeps us very restrictive in that manner.

Hammer: Okay, thank you for the explanation.

Pitsch: Senator Sullivan, you are recognized for questions.

Sullivan: Thank you. Isn't one of the other differences that this would involve the entire legislature, whereas the bill that Senator Hammer passed may only end up in ALC?

Garner: Yes, sir. And that, I mean, like I said, I think Senator Hammer did great work. I'm not knocking his bill. But I'm not on ALC. I probably won't be for, assuming I run for re-election, for a while because of how it's broken down. I don't have a direct say unless someone doesn't come and I'm alternative in that body. Now, that's an imperfect process that had to be in place because when we're not in session, ALC is the legislator in session. I understand it. This gives every one of us a voice, and more importantly, that is a mechanism to extend or not extend the governor's rule over us in that capacity. It's us giving a blessing to what he did or to not. This is us coming now saying we will put it into force of law created by our Constitution to give us the power to legislate to write laws. That distinction is very important and something that I think was negated too many times this last year.

Pitsch: Senator Eads, you are recognized.

Eads: Does this allow local businesses to still make decisions as far as for their employees and their customers at the local level?

Garner: Once again, I am checking with BLR about this. I think that it does. I know Senator Tucker disagrees, and the Department of Health disagrees. And he'll speak at that language. I can explain why I do not. My intent when I sent this BLR was only to deal with the executive orders in coming out. And there's a language that I think is unclear, which could always be tightened up. But I do not think it does what Senator Tucker does, respectfully. As he explains his position, I think he'll do a great job explaining the counter to that. My -- I'm not trying to mislead you. My take is it does not. There is difference in opinion.

Eads: Thank you.

Pitsch: Are there any other questions? Seeing none, would anybody like to speak against the bill? Senator Tucker, you are recognized to speak against the bill.

Tucker: Thank you, Mr. Chair. And I'm not going to speak to whether we should prohibit the governor, because I think probably every member has their mind made up on that. I'm really just going to speak to the questions raised by Senator Teague and Senator Eads. I do think the way the language in the bill is written, it would prohibit cities and private institutions from putting a mask mandate either in their municipalities or in their private places of business.

The reason is because on page 2 of the bill in section B -- this is on line 3. It says, "All mandatory face covering requirements, including without limitation requirements imposed by the

executive order issued by the governor." So that to me necessarily implies that it's addressing face covering requirements in addition to the one imposed by the governor. And the only ones I'm aware of in addition to the one imposed by the governor are ones imposed by cities and private businesses. So, to me, that language -- and I understand, Senator Garner and I have discussed this, and he has a difference of opinion, which I respect. That's my read of it, is that it, because of that language, it necessarily applies to orders in addition to the governor's order and that affects cities and private businesses. That's my read of the bill.

So, appreciate a no vote for that reason. I'd be happy to answer --

Pitsch: Are you willing for a question?

Tucker: Yes, sir.

Pitsch: Senator Blake Johnson for question.

B. Johnson: In that "including without limitations," that's on state orders. I mean, that's how I would read that. If there was another state order and he didn't lift them yesterday, that would be on another state order, you know, without limitations.

Tucker: I'll explain why I disagree. On line 3, it says "all mandatory face covering requirements." If right there it said, "all state-imposed mandatory face covering requirements," then I would agree with your point, Senator Johnson. But it says "all mandatory face covering requirements" without qualification. And then it says "including without limitation" the one imposed by the governor.

B. Johnson: Okay.

Pitsch: Are there any other questions? Seeing none.

Tucker: Thank you.

Pitsch: Anybody that would like to speak for the bill? Seeing none, Senator Garner, you are allowed to close.

Garner: Yes sir, I'll be very brief to discuss that point. I wanted to hear the other side. For two reasons I think that this would not include private or cities. One is the language of the rest of the bill, which specifically over and over again addresses the need to do with the executive order. It doesn't bring up cities. It doesn't bring up anything else. Typically when you read law, you read the black letter of the law, but you also look at legislative intent and the law as a whole. But even if you read the black letter of law, I think the word mandatory is the key element. Mandatory implies a legislative or an executive branch kind of government structure behind it rather than some other word which would be less precise. With that being said, if it passes this body and I keep hearing this, I am more than happy to make a small amendment on the other side of the

House -- on the other side of the chamber -- to address that. I think it's a easy fix. I know that's an imperfect thing to say. But I think under currently it's good, but I'm always opening to making things more clear in the language of the law. With that, I am closed.

Pitsch: Senator Garner is closed. Is there any objection to rolling the vote? And I would remind members that this has an emergency clause, so 24 votes is required. Is there any objection to rolling the vote? We have an objection to rolling the vote. Madam Secretary, please call the roll.

[Initial votes: 14 yes, 9 no, 10 not voting, 2 present (Failed)
Yes:
Ballinger, Beckham, Caldwell, Clark, Davis, Flippo, Garner, Gilmore, Hester, M. Johnson, Sample, Stubblefield, Sullivan, Wallace
No:
Bledsoe, Chesterfield, Elliott, Flowers, Hendren, Hickey, Hill, Ingram, Tucker
Present:
Eads, Hammer
Not Voting:
Dismang, English, Irvin, B. Johnson, Leding, Pitsch, Rapert, Rice, Sturch, Teague]

Pitsch: Okay, which Senators would like to change their vote? Let's start over here. I have a yes for Senator Blake Johnson. Anyone else? Seeing none. Over here, I've got a yes for Senator Hill, a yes for Senator Rapert, a yes for Senator Rice. I believe Senator Leding is a no. Do I have anybody else? Senator Pitsch is a yes. Am I missing someone? Senator Irvin is a yes.

Changed votes:
B. Johnson: Yes (previously did not vote)
Hill: Yes (previously no)
Rapert: Yes (previously did not vote)
Rice: Yes (previously did not vote)
Leding: No (previously did not vote)
Pitsch: Yes (previously did not vote) - [put vote over 18 to pass without emergency clause]
Irvin: Yes (previously did not vote)

Final votes: 20 yes, 9 no, 4 not voting, 2 present (Passed without emergency clause)
Yes:
Ballinger, Beckham, Caldwell, Clark, Davis, Flippo, Garner, Gilmore, Hester, Hill, Irvin, B. Johnson, M. Johnson, Pitsch, Rapert, Rice, Sample, Stubblefield, Sullivan, Wallace
No:
Bledsoe, Chesterfield, Elliott, Flowers, Hendren, Hickey, Ingram, Leding, Tucker
Present:
Eads, Hammer
Not voting:
Dismang, English, Sturch, Teague]

Pitsch: Madam Secretary, cast up the ballot. With 20 yeas, 9 nays, 4 no votes, the emergency clause failed but the bill passes. Did I call that correctly? Oh, 4 not voting, excuse me. So the bill passes, the emergency clause fails. Return to the Senate -- transmit to the Senate -- to the House, excuse me.

[5 minutes later]

Pitsch: We're going to go to Senator Garner for motion. You're recognized.

Garner: Yes, sir. So everybody understands, this is SB590, the one I just voted on for the mask requirement. It requires a emergency, which we did not get. So I'm going to make a motion to expunge the vote by which the emergency order failed and ask that it be re-run again. Is that the proper motion on the second part?

Ann Cromwell: [illegible]

Garner: Be re-voted only on the emergency party.

Pitsch: That is a proper motion. All in favor of accepting the motion to expunge the vote on the emergency clause only, please say aye.

Senators: Aye.

Pitsch: Same sign opposed? [silence] Your motion passes. Did we do it there?

Garner: Motion to re-vote SB590, the emergency clause only.

Pitsch: That is a proper motion. Is there any comment on the motion? Seeing none, all in favor of accepting the motion, please say aye.

Senators: Aye.

Pitsch: Same sign opposed? [silence] Motion carries. So we need to have a vote, Madam Secretary. Is there any objection to rolling the vote on that emergency clause only? We need 24 votes. Seeing none, Madam Secretary, please roll the vote.

[Votes: 34 yes, 1 no, 0 present, 0 not voting
Yes: Ballinger, Beckham, Bledsoe, Caldwell, Chesterfield, Clark, Davis, Dismang, Eads, Elliott, English, Flippo, Garner, Gilmore, Hammer, Hendren, Hester, Hickey, Hill, Irvin, B. Johnson, M. Johnson, Leding, Pitsch, Rapert, Rice, Sample, Stubblefield, Sturch, Sullivan, Teauge, Tucker, Wallace
No: Flowers]

Pitsch: Are there any senators that wish to change their vote? I have Senator Chesterfield is no. Sturch is not voting. I've got Senator Tucker with a no vote. Senator Ingram with a no vote. Senator Hendren with a no vote. Senator Elliott is a no vote. We've got Senator Chesterfield as a no. Do we have any other senators wishing to change their vote? Looking around the room. Last chance. Madam Secretary -- Senator Leding is a no. Madam Secretary, I think we've given them enough time. Please cast the ballot.

[Changed votes:
Chesterfield: No (from yes)
Sturch: Not voting (from yes)
Tucker: No (from yes)
Ingram: No (from yes)
Hendren: No (from yes)
Elliott: No (from yes)
Leding: No (from yes)

Final vote: 27 yes, 7 no, 0 present, 1 not voting
Yes: Ballinger, Beckham, Bledsoe, Caldwell, Clark, Davis, Dismang, Eads, English, Flippo, Garner, Gilmore, Hammer, Hester, Hickey, Hill, Irvin, Ingram, B. Johnson, M. Johnson, Pitsch, Rapert, Rice, Sample, Stubblefield, Sturch, Sullivan, Teauge, Wallace
No: Chesterfield, Elliott, Flowers, Hendren, Ingram, Leding, Tucker
Not voting: Sturch]

Pitsch: With 27 yea, 7 nay, 1 no vote -- 1 not voting. So the emergency clause does pass as 24 votes were needed. Transmit to the House.

EXHIBIT "A" TO
BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A TRO

House Public Health, Welfare and Labor Committee
April 15, 2021 9:30 a.m.

Ladyman: Rep. Wardlaw, you're recognized to present SB590. Committee, it's SB590.

Wardlaw: Thank you, Mr. Chair. SB590 has an amendment, I think. If staff will get the amendment out to the committee.

Ladyman: Okay. Let's give them a few minutes to look at that. [silence] If you would, please introduce yourself and who you represent.

Cryer: Thank you, Mr. Chairman. My name is Christine Cryer. I'm the chief legal counsel for the Department of Corrections.

Wardlaw: So, Mr. Chair -- committee -- I haven't worked on this bill at all until this morning. But I was contacted this morning by a couple of departments within the state and they asked me to work with Senator Garner to work on an amendment. I will tell you that it's never been easier to work with any member in my life. Senator Garner said get an amendment and I'm good with it. So we worked with some different agencies.

And if you'll turn to the second page of amendment, E1, 2, and 3 exempts these people from being able to have -- these folks will be able to have a mask mandate if they see need for. And I will tell you I brought the Department of Corrections to the table because if you saw the news release yesterday, the Department of Corrections is down to less than 50 cases of Covid-19 within the Department of Corrections. All 50 cases are new inductees to the department, so you have to think back that we send all of our new inductees male and female to two different facilities to find out whether they're adaptable to a single cell or to a group, meaning general population. We don't want to send any of those people out with Covid-19 now that we've worked that through our departments. So we want to be able to require masks in those diagnostic centers to make sure we have no spread when we bring in a new inmate. Senator Garner allowed us to do that in this amendment.

Private businesses, if they want to have a mask mandate, we're allowing them to make the decision on theirself. We don't want to have a perception of big government. So then a state-owned or state-controlled healthcare facility -- so like UAMS. DHS has the human development centers. Those areas, they still have admissions, which means those admissions need to be protected and the people in those facilities need to be protected from those admissions. So they're still allowed to have a mask mandate. With that, I'd be happy to take any questions.

Ladyman: Representative Dotson, you're recognized.

Dotson: Thank you, Mr. Chair. I'm still kind of looking through the amendment, which as I understand it is now the bill or would now become the bill. I guess the first question that pops out to me is Representative Bryant is being added as a co-sponsor, and not you?

Wardlaw: That is correct. The senator had to run to another committee. I was never supposed to run the bill, but he asked me to run it because the amendment is my amendment. If you look at the back, it's on the back.

Dotson: Yeah, I see that.

Wardlaw: Yes, sir. But I will not be running it on the floor. Representative Bryant will be the person. I'm not taking his bill away from him.

Dotson: Okay. Thank you.

Ladyman: Any other questions? Representative Allen, you're recognized.

Allen: Well, if this passes, will this be in conflict with the guidelines of the CDC?

Wardlaw: We don't think so at the current moment because it still allows those people to have masks in those places of congregation like a hospital, human development center, a prison, those sort of places.

Allen: What about public schools?

Wardlaw: Public schools are not exempt in here. But my understanding is those superintendents are making those decisions independently today. And I see Dr. Cloud nodding his head yes that I'm saying that right.

Allen: So does that mean I have to take Dr. Cloud's word?

Wardlaw: Yes. [laughter]

Ladyman: Representative Gray, you're recognized for a question.

M. Gray: Thank you, Mr. Chair. What about DYS? Do they need -- possibly need an exclusion, or should I -- should we --?

Wardlaw: I'm pretty sure they're excluded through the state-owned or controlled healthcare facility because most of their facilities would fit under behavioral health or developmental disabilities.

M. Gray: Okay. Could I ask a follow-up?

Ladyman: Yes, you're recognized for a follow-up.

M. Gray: Could I bring Mark White up and just ask him to make sure?

Wardlaw: Absolutely.

M. Gray: Okay.

Ladyman: Mr. White, if you would, come up and introduce yourself and who you represent.

White: Thank you, Mr. Chairman. Mark White, Department of Human Services. I think in answer to your question, Rep. Gray, it depends on how you define healthcare facility. With DYS, we do have some that provide behavioral health. Others do not. And so I'm not certain if it would apply to that. And I'll just apologize. We first saw the amendment about 5 minutes ago. The other concern which I'm looking at and I don't know is it's not clear to me if this will allow us to continue enforcing CDC guidelines for nursing homes that we regulate. And that's another potential issue, but, again, having just looked at this, I'm not certain yet.

Wardlaw: I will pull it down for this afternoon's meeting, and I will add in the DYS facilities under those 1, 2, and 3 as a fourth one, because I can see where the healthcare definition may not reach all their facilities. Because some of them are foster-type facilities and they probably need added. Because any facility that's bringing in new admissions would need to be protected.

M. Gray: Thank you. And I support the bill fully. I think doing that would be great.

Wardlaw: Would that make the department happy?

White: I think so. I think the only other question is that nursing home issue, but we'll take a look at it and we'll --

Wardlaw: I think it's covered under number 1, the private business.

White: Okay.

Wardlaw: Because nursing homes are all private businesses for the most part.

White: Right.

Wardlaw: And your state-owned ones are covered under number 2. So I think we're covered there. We just need to cover the foster centers. I'll get that amended and we'll bring that back this afternoon with the permission of the chair.

Ladyman: Thank you, Representative. Representative Allen, you're recognized.

Allen: Yeah, thank you. I have a question for Representative Wardlaw, but we need to talk.

Wardlaw: Okay.

Ladyman: Okay, thank you, Representative Wardlaw.

Wardlaw: Thank you, committee. Sorry for the confusion.

EXHIBIT "A" TO
BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A TRO

House Public Health, Welfare and Labor Committee
April 15, 2021 2 p.m.

Ladyman: SB590. You're recognized to present the bill.

Wardlaw: It has an amendment. I don't think we adopted the amendment this morning. If we did, then I'd like to expunge --

Ladyman: No, we did not.

Wardlaw: Okay. Thank you.

Ladyman: Okay, the amendment's coming around.

Wardlaw: I will explain the amendment.

Ladyman: Yeah, go ahead. We looked at it this morning, so go ahead.

Wardlaw: Thank you, Mr. Chair. The amendment does what you guys asked me to do this morning. I added in DYS to make sure all facilities that have mass dormitories or admissions can still wear a mask. We're definitely not making everybody happy. We think we got the nursing home portion covered with the private business and with the ability for them to be able to still do it so they can comply with the CDC guidelines if said guidelines are there. So with that, I'd make a motion to adopt the amendment.

Ladyman: I have a motion to adopt the amendment. Any discussion on the motion? Seeing none, all in favor signify by saying aye.

Committee: Aye.

Ladyman: All opposed, nay. [silence] Motion carries. Your amendment's been adopted. You're recognized to present the bill as amended.

Wardlaw: The bill pretty much is the amendment, Mr. Chair. I'd be happy to take any questions. We've pretty well already waded this water this morning.

Ladyman: Any questions from committee? [silence] Seeing none, anyone here to speak against the bill? Please introduce yourself and who you represent.

Shoo: Thank you, Mr. Chair, members of the committee. I'm Laura Shoo. I'm general counsel for the Department of Health. We appreciate the opportunity to review the amendment that became the bill this morning and this afternoon. We do still have some concerns about the bill as it is written. We think there are some unintended consequences with this bill. As you all know, with the approval of ALC, the public health emergency has been extended by 60 days. And that's to

allow for continued legislative efforts to enact executive orders and to provide a rapid response if needed. And the governor also administered his executive order 21-7 on March 31st. The face covering directive was ended at the end of March based on the metrics and the science that have been evaluated over a period of time.

This bill takes away the flexibility to react quickly. It also conflicts with the new legislative review process under Act 403 of 2021 because it provides no sunset provision if mitigation efforts were necessary in the future. The amendment may exempt private businesses like hospitals, groceries, and restaurants that have already announced they are continuing best practices and will require a mask, but it still states that "all mandatory face coverings shall end" by including without limitation the ones issued by the executive orders and the ADH directives.

There are cities, counties, schools, higher education that want mask requirements. Most were planning to re-evaluate every 30 days or over the summer. This is taking away their local control. There are also health science schools with clinical classes that have contact with immunocompromised patients. And while the amendment exempts the ADC, it does not exempt city jails or county detention facilities that may require masks for congregate settings to protect against litigation.

We have a concern about the Department of Health's main office and the 92 local health units which may not fall in the definition of healthcare facility. In Section 2, there's very broad language. Does this affect face masks or face shields for sports? It doesn't refer to Covid or the public health emergency. Is this talking about sports face shields? Or protection for job-related safety reasons. This also refers to only legislation, which infers that it's only during a session, which also conflicts with Act 403 of 2021, which is a new process for directives in public health emergencies during the interim.

It prohibits the use of masks for all time. Are we talking about times with other diseases? What if we need to temporarily use a mask mandate during an outbreak? What if a local area needed it? There have been mumps outbreaks in Northwest Arkansas. We've had Hep A outbreaks in Northeast Arkansas.

The bill sends the wrong message. And while Arkansas has fully vaccinated about 25% of the people 16 and up and about 50% of individuals 65 and older, we want to be able to continue to protect each other and respect each other and take it seriously while we get everybody else vaccinated. And I believe we have Secretary Key here from the Department of Education to answer any specific questions about schools. Thank you.

Ladyman: Any questions from committee? Representative Boyd, you're recognized.

Boyd: Thank you, Mr. Chair. Mrs. Shoo, I mean I didn't see this amendment earlier. Maybe other committee members did, and something you said in your testimony made me look at this. So, on the first page -- do you have a copy of the amendment? Have you seen it?

Shoo: Yes, I have it in front of me.

Boyd: Okay. On C at the very first place it says, “the use of a face mask, face shield, or other face coverings shall not be a condition for entry, education, or services.” So, you said something about sports and other things, and I just -- to me, that excludes it. But you’re an attorney. I’m just curious why you don’t think that that would exclude these other things where it might be necessary. Thank you.

Shoo: We’re concerned about the fact that it’s so broad. While it talks about state agencies in subsection B, it does say “entry, education, or services” under subsection C. And so it shall not be a condition. So if educators in school districts in local control wanted to use a mask mandate, they would not be able to under this bill.

Ladyman: Representative Dotson, you’re recognized for a question.

Dotson: Thank you, Mr. Chair. Did -- I’m assuming you reviewed this this morning, and I think this amendment is identical to the one we saw this morning with the exception that it adds that DYS services exemption in there. Were you able to get with the sponsor of the amendment to address those concerns in between this morning and this afternoon? I know we haven’t had a whole lot of time. But did you bring those up?

Shoo: We talked with Representative Wardlaw in the interim.

Wardlaw: They did.

Shoo: And I’ve also reached out to the Municipal League and Association of Counties to try and get their insight on this also. But we do think this is very broad. It does include a political subdivision of the state. It’s my understanding that several cities and several counties and school districts have issued their own mask requirements.

Dotson: Follow up?

Ladyman: Yes, you can have a follow-up.

Dotson: So, I guess, did you support the bill before it was amended?

Shoo: We were going to testify against the bill before it was amended.

Dotson: Okay. Thank you.

Ladyman: Representative Boyd, you’re recognized.

Boyd: Thank you, Mr. Chair. Just a quick question. So you believe this would immediately -- once it was approved and signed by the governor or let go into law or whatever that it would end the mandate in Little Rock, Fayetteville, and Rogers immediately?

Shoo: That's my reading of it, but obviously I don't represent the cities or the counties. But that's my reading of it.

Ladyman: Any other questions from committee? [silence] Seeing none, thank you for your comments. We have Christine Cryer signed up to speak against the bill. Please introduce yourself and who you represent.

Cryer: Thank you, Mr. Chairman. My name is Christine Cryer. I am the chief legal counsel for the Department of Corrections. When I signed up to speak against the bill this morning, that was prior to the amendment being made. Now that the Department of Corrections has been added to the bill, we no longer oppose it.

Ladyman: Thank you. Thank you for your comments.

Cryer: Thank you. Thank you.

Ladyman: Okay, no one else is signed up to speak for or against the bill. Anyone in the audience who wants to speak against the bill? For the bill? Against? I don't read. I'm not sign language --. Please introduce yourself and who you represent.

White: Sorry, Mr. Chairman. Mark White, Department of Human Services. This is probably more on the bill. But just a couple of things -- I just wanted to make sure the committee was aware of just so everybody's on the same page and we fully understand the effect of the bill. One, of course, we do appreciate the addition of the DYS exemption. That certainly does help us. Secondly, I just want to make sure everyone understands we do have some federal mandates in some of our programs that we have to enforce CDC guidelines in certain types of facilities. Nursing homes are the most common example of that. But as Representative Wardlaw said, he thinks that that private business exception allows us to continue to do that, and we don't disagree. But I just want to make sure that folks understand that this does not change those federal mandates that we have to enforce on these other types of facilities.

And the other concern that I've heard from our folks that I'll just pass along to you and you can do with it as you will. We -- so far as I know, I don't know that we've gotten a single complaint from any employees about having to wear a mask. I think we have heard complaints and worries from employees about working in an environment without masks. And so I think there is a concern of is this going to create a recruitment issue for us if employees are not wanting to work in an environment where masks are not being used in this present climate. I can't tell you that that's going to happen. I have absolutely no proof whatsoever. But that's just a consideration that was brought to me, and I just wanted to share that with the committee. And that's all I have, Mr. Chairman.

Ladyman: Any questions? [silence] Seeing none, thank you for your comments. Representative, are you ready to close for your bill?

Wardlaw: Mr. Chair, I'd be closed. I'd make a motion do pass as amended.

Ladyman: I have a motion of do pass as amended. Any discussion on the motion? [silence] Seeing none, all in favor, signify by saying aye.

Committee: Aye.

Ladyman: All opposed, no?

Committee: No.

Ladyman: Ayes have it. Congratulations, your motion has passed. [silence] Roll call.

Votes: 13 yes, 1 no, 5 not voting
Yes: Cloud, Wing, Coleman, Boyd, Gonzales, M. Gray, Bentley, Payton, Miller, Dotson, McGee, Wardlaw, Ladyman
No: Perry
Not voting: Davis, Penzo, Pilkington, Allen, Eubanks

Ladyman: Congratulations, your bill has passed.

EXHIBIT "A" TO
BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A TRO

House Vote
April 20, 2021 1 p.m.

Speaker: Representative Bryant, you're recognized to explain the bill.

Bryant: Thank you, Mr. Speaker. Members, if it's one thing that the pandemic has taught us is what is able to be tolerated easy by society and what is not. I think one of the executive orders that came out of the pandemic was the mask mandate. It created a lot of strife among us. And one of those reasons for strife was, is it a law, is it a regulation, is it a guideline. We had open members of our leadership from sheriffs to police chiefs to mayors say they're not going to enforce it or they are going to enforce it. So what this bill does is says that the rights for this mandate, if enacted in the future, will be upon its people that represents itself, which is the General Assembly of Arkansas. Now it does not affect private entities or state-owned hospitals. They're free to do as they want to protect themselves and their businesses. But as far as the state is concerned, we as the General Assembly will create the law that will be enforced by society. Is any questions?

Speaker: Representative Flowers, for what purpose?

V. Flowers: Question.

Speaker: You're recognized.

V. Flowers: So in my district, it was ground zero. We had the first case. We had some of the highest numbers in the state as it relates to hospitalization, death, and the like. Obviously, the impact was different in different parts of the state. So why would we take local control away from mayors and county judges who might have to respond differently in one part of the state than the other to this or any other pandemic?

Bryant: I think uniformity is the biggest issue, that even though your area you may feel has suffered, there's some members of your society that may say, you know what, I don't feel that my liberty should be restricted to do that. That's the legislature's responsibility. If it comes from the executive office, they might say, well, as a mandate, is it a law. Well, a mandate has the force of a law, but there's a lot of people or a lot of members of the sheriffs or the police that say, you know what, we're going to be just peacemakers on that issue. We're not going to come write tickets, which just, again, just perpetuates the strife among its citizens.

V. Flowers: Follow up?

Speaker: You're recognized.

V. Flowers: I understand the point of uniformity as it relates to commerce. But when it comes to public health and people's lives are on the line, and let's say, as my mayor did, she responded to the guidelines, she responded to the needs in our city and in our county, why would we take

that authority away from our local cities to address the different needs? I mean, why would we do that for an arbitrary need for, I guess, uniformity when, again, lives are at stake and you have health officials at the state level and at the federal level that are providing a way for us to exercise uniformity if that's the concern?

Bryant: It is, but it's still a function of state government. When an emergency gets issued, obviously the governor and the Health Department are going to recommend that. But when it comes to face masks requirements, we are going to write legislation to pass, not rely on executive order that creates too much ambiguity and force. The legislature should be the one that promulgates that.

Speaker: Representative Clowney, for what purpose?

Clowney: Question.

Speaker: You're recognized.

Clowney: Representative Bryant, I understand that the intention of this is to be narrowly tailored to face masks that cover the mouth and nose for Covid. But under my reading of the bill, I'm concerned this is going to apply to things like a chemistry lab at the University of Arkansas. Right? If you're got professors saying you've got to wear a covering that covers your face. Or a welding class at one of our two-year colleges. Can you address that concern?

Bryant: I think with state-owned or state-controlled facilities -- healthcare facilities. That's a safety concern for them to conduct business. I don't think that would be effective of this, of this bill.

Clowney: Follow-up. So, I mean, the University of Arkansas chemistry lab, for instance, I don't think would be considered a healthcare agency, right, that would be covered under that exception. And I guess what I'm looking at is on page 2, line 11, "on a state agency of entity or a state or local official recommends that an individual in the state use a face mask, face shield, or other face covering." Does that not, in your opinion, apply to the sorts of settings that I was talking about?

Bryant: It doesn't, in my opinion.

Clowney: Okay, thank you.

Bryant: Thank you for the good vote.

Speaker: Representative Bryant has explained the bill. Would anyone like to speak against the bill? Would anyone like to speak for the bill? Representative Wardlaw, you're recognized to speak for the bill.

Wardlaw: Thank you, Mr. Speaker. When we put the amendment on in committee, the only people that spoke against this bill was the Department of Health. All day today, I've been getting texts and calls from higher ed. They never said a word in committee. Folks, this process works in the committee process. If they got a problem with a bill, they need to come to the committee and speak against the bills. But they want to express their muscle by texting and calling every member instead of coming into committee where they can be questioned about why they have those viewpoints. They didn't do that. So with that, I'd appreciate a good vote.

Speaker: Representative Wardlaw has spoken for the bill. Would anyone like to speak against the bill? [silence] Would anyone like to speak for the bill? [silence] Senator Bryant is for the bill. The question before the House is passage of Senate Bill 590. Prepare the machine, Mr. Clerk.

Vote: 69 yes, 20 no, 0 present, 11 not voting
Vote counts

Speaker: Has everyone voted? We're voting on the bill and the emergency clause. Has everyone voted? Cast up the ballot, Mr. Clerk. By a vote of 69 yeas, 20 nays, and 0 present, the bill and emergency clause are passed.

EXHIBIT "A" TO
BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A TRO

Senate Public Health, Welfare, and Labor Committee
April 21, 2021 scheduled for 2 p.m., actually began at 6:41 p.m.

Flippo: Senator Garner, we're going to start off with Senate Bill 590. We've got a concurrence for the House amendment?

Garner: Yes, we do, sir. Quick what this bill does. Basically we just exempted a few place, made sure it was clear for private industries, they weren't included. We got rid of it for Covid-19. Just any kind of future mask mandate, they'll have to actually come to the legislator. I think this is good bill. And I'll be closed for my bill.

Flippo: Okay. We do have some people signed up to speak on this bill. First off, we're going to start with Mrs. Karen Walters. Oh.

Sullivan: Motion for immediate consideration.

Flippo: We had a motion by Sen. Sullivan, second by Sen. Davis. It's a non-debatable motion. All in favor?

Committee: Aye.

Flippo: Opposed?

Committee: No.

Flippo: Motion carries. All right, members. Senator Garner, you closed for your bill?

Garner: All right, Senator Garner's closed for his bill. What's the pleasure of the committee? We've got a motion by Senator Davis, a second by Senator Sullivan. All in -- Any discussion on the motion? Thank you, Senator Hammer.

Hammer: Mr. Chair, I want to voice, and I understand we've all been here a long time, but so have people who've been in this room. They've been here since 1:45 [time was currently 7:05 p.m., according to Senate records], some of them sitting here waiting for us. And I know it's the end of the session and everything. I am going to voice my objection to this because it means we will have not heard opposition or input onto this bill. And I'm going to go on record of voicing my opposition. I respect the process, but I am going to voice my opposition that we did not let the people in the audience to at least have what we've allowed other people to have, and that is at least 2 minutes on this bill. And I just want to get that out there on record. Thank you.

Flippo: Thank you, Senator Hammer. All right, members. We've got a motion on the floor. We've got a motion by Senator Davis and a second by Senator Sullivan. All in favor, say aye.

Committee: Aye.

Flippo: Opposed. [silence] Congratulations, Senator.

Garner: Thank you, sir.

EXHIBIT "A" TO
BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A TRO

Senate Vote with Amendment
April 22, 2021 1 p.m.

Sturch: Senator Garner, you're recognized to present your amendment.

Garner: My bill, my amendment.

Sturch: You've heard an explanation of the amendment. Senator Chesterfield has a question.

[inaudible]

Garner: It makes a few changes about make sure we exclude private businesses, kind of take away some of the more restrictive languages and kind of excludes a few more people who wanted to be excluded from the House end.

Sturch: Any further questions? Senator Hammer, you're recognized for a question.

Hammer: Clarification from the Chair, please?
Sturch: Yes, sir.

Hammer: This is on the amendment, but then the underlying bill will be discussed after this amendment, correct?

Sturch: Right after. Yes, sir. That's correct. Any other questions about the amendment? Seeing no further questions, you've heard an explanation of the amendment. All in favor of the amendment, say aye.

Senators: Aye.

Sturch: Any opposed? [silence] Amendment is adopted. We'll now take up the underlying bill and its emergency clause, Senate Bill 590. Senator Garner, you're recognized to present your bill.

Garner: Mask mandate. Y'all know the terms with it. You either like it or you don't like it. I'll take any questions.

Sturch: You've heard an explanation of the bill. Senator Hammer has a question.

Hammer: Thank you, Mr. Chair. Senator Garner, two things. One, does this -- is this going to capture schools? Because one of the concerns is that in a lab environment and other environments, it would remove the requirement for that. Could you address that issue, please?

Garner: Yes, sir, it should address schools. It does education as well.

Hammer: I'm sorry?

Garner: Yes, sir. It does address school. It does education within the bill. Correct.

Hammer: And follow up, Mr. Chair?

Sturch: Sure.

Hammer: This has an emergency clause on it, so it would require 24 votes to get the emergency clause or we'll be voting it separate?

Sturch: No, we'll be voting it together as long as it passes.

Garner: Assuming it doesn't pass, then -- if this body determines we don't need to put the emergency clause on there, I would probably respect this body in that decision and make sure we push this past until the summer to make sure everybody who has it now can get the final part of it.

Hammer: Ok, thank you.

Sturch: Any further questions for Senator Garner? Senator Beckham.

Beckham: The way the bill is written, does it prevent chemistry labs and things like that in high schools from requiring face masks?

Garner: No, I don't think so. I think that is related to the Covid -- related to a pandemic if you look at the languages. I think normal utilized mask in all capacities would be fine. I do not think that would be an issue. I just kind of fundamentally disagree with that legal principle.

Beckham: Okay.

Garner: Yes, sir.

Sturch: Any further questions for Senator Garner? Any further questions? Seeing no further questions, is there anyone who would like to speak for or against this bill? Seeing none, Senator Garner, you're recognized to close.

Garner: I'm closed. Thank you.

Sturch: Senator Garner has recognized he's closed for the bill. Is there any objection to rolling the vote on the bill? There is an objection, so Madam Secretary, please call the roll.

[Initial votes: 15 yes, 8 no, 10 not voting, 2 Leave (Failed)
Yes:

Ballinger, Beckham, Davis, Dismang, English, Flippo, Garner, Hester, Hill, B. Johnson, Pitsch, Rapert, Rice, Sullivan, Wallace
No:
Chesterfield, Elliott, Hammer, Hendren, Hickey, Ingram, Sample, Tucker
Present:
Not Voting:
Bledsoe, Caldwell, Clark, Eads, Gilmore, M. Johnson, Leding, Stubblefield, Sturch, Teague
Leave:
Flowers, Irvin]

Sturch: Are there any senators wishing to vote or change their vote? Senator Clark is aye. Senator Bledsoe is no. Senator Gilmore is aye. Any other senators wishing to vote or change their vote? Senator Stubblefield is aye. Senator Eads is aye. Any other senators wishing to vote or change --? Are there any senators wishing to vote or change their vote? Seeing none, Madam Secretary, please cast up the ballot.

Changed votes:
Clark: Yes (previously did not vote)
Bledsoe: No (previously did not vote)
Gilmore: Yes (previously did not vote)
Stubblefield: Yes (previously did not vote)
Eads: Yes (previously did not vote)

Final votes: 19 yes, 9 no, 5 not voting, 0 present, 2 on leave (Passed without emergency clause)
Yes:
Ballinger, Beckham, Clark, Davis, Dismang, Eads, English, Flippo, Garner, Gilmore, Hester, Hill, B. Johnson, Pitsch, Rapert, Rice, Stubblefield, Sullivan, Wallace
No:
Bledsoe, Chesterfield, Elliott, Hammer, Hendren, Hickey, Ingram, Sample, Tucker
Not voting:
Caldwell, M. Johnson, Leding, Sturch, Teague
Leave:
Flowers, Irvin]

Sturch: With a vote of 19 yeas, 9 nays, 0 present, the bill has passed but the emergency clause has failed.