



COVID-19 Fact Sheet (updated May 23, 2022)

Legal Liability for Acts of “COVID Denialism”

From the inception of the COVID-19 pandemic in early 2020, federal, state, tribal, and local governments have varied in their approaches to protect the public’s health. While [many governmental policies and approaches aim to protect individuals from COVID-related harms](#), some responses directly contravene known, efficacious interventions or scientific findings that promote positive public health outcomes. Shunning mask and vaccine mandates/passports, forgoing social distancing, re-opening rapidly following expiration/rescission of stay-at-home orders, and other actions framed in the context of “[COVID-19 denialism](#)” can contribute directly to increased infections, excess morbidity, and deaths.


Government actors or entities supporting or furthering acts of COVID denialism resulting in harms to specific individuals or the public may be liable in manifold ways. Potential avenues for liability may include federal sanctions, cuts, or take-overs; preemptive efforts; Section 1983 actions; *parens patriae* suits; disability discrimination claims; and civil litigation. In an attempt to forego potential liability risks, select states have proposed legislation to limit liability for government actors. This memo examines these liability issues based on current or potential legal trends.

I. Federal Sanctions, Cuts & Take-overs

Noncompliance with federal public health actions or requirements, a common “denialist” tactic, may result in monetary or other sanctions, funding cuts, and take-overs of state programs.

A key feature of many federal distributions of public health, education, or other funds to states or localities is the federal government’s legal capacity to take back appropriated monies that are not used for intended or consistent purposes. The American Rescue Plan Act (ARPA) of 2021,¹ for example, authorized billions of dollars for COVID-19 response efforts based on federal priorities outlined in President Biden’s COVID-19 national strategic plan.² This included direct funds to detect and trace infections, expand the public health workforce, support community health centers, and purchase, distribute, and administer COVID-19 tests, vaccinations, and other therapeutics.³ States’ receipt of federal relief funds also included a unique, “claw back” condition.⁴ In essence, federal relief funds used to offset state tax cuts during the ensuing 3 years of receipt must be returned.⁵ The provision was immediately challenged by over 20 state Attorneys General⁶ arguing unconstitutional interference with state tax authorities.⁷

One of these states, [Arizona, sued the U.S. Department of the Treasury in March 2021](#), seeking to enjoin the rule preventing the state from using COVID relief funds to supplement lost tax revenue. In July 2021, the federal district court dismissed the case for lack of subject matter jurisdiction, holding that Arizona did not show a cognizable injury and thus lacked standing. [In October, the Treasury Department sent a letter](#) to Arizona Governor Doug Ducey, warning the state to not misuse pandemic relief funds. In January 2022, the [Treasury Department](#) sent a second letter, threatening to reclaim pandemic response resources from Governor Ducey after he allegedly authorized the use of millions of relief aid dollars to



undercut mask requirements in schools, fund state immigration policies, and diminish taxes. Federal authorities also stated that they would withhold future appropriations if Arizona did not amend programs using federal funds to undermine school mask mandates (e.g., a [\\$163 million federal program providing relief funds](#) to public and charter schools but excluding schools requiring masks). Governor Ducey counter-sued, attempting to block federal efforts to claw back pandemic funds, alleging inappropriate federal exercises of power. However, in [May 2022, the federal Court of Appeals for the Ninth Circuit](#) found that Arizona does in fact have standing to challenge the American Rescue Plan Act (ARPA) since there was a "realistic danger" to the state and a potential infringement on its sovereignty by way of the possible coercive funding. This court did not address the merits of the case, but rather sent the case back to the district court for further proceedings..

Texas, Louisiana, and Mississippi also sued the U.S. Treasury Department in October 2021, challenging the federal agency from using a provision of ARPA to reclaim federal funding from states using pandemic aid to fill budget gaps resulting from tax revenue reductions. [On April 8, 2022, a federal district judge](#) in Texas blocked the Treasury Department from recovering pandemic relief funds from the 3 states, characterizing the "strings" attached to the funds as creating a "gun to the head" for states that could not afford to turn down billions in federal pandemic aid.

In addition, state or local governments spurning federal objectives may find their actions thwarted by proposed or actual federal take-overs. If states mishandle pandemic relief efforts, the federal government may legally step in under specific circumstances to manage programs receiving federal funds (e.g., nursing facilities, specific health care enterprises).

II. Federal Preemption

Pursuant to the Constitution's Supremacy Clause, federal law is supreme and may preempt conflicting state or local laws. Consequently, legislatures, governors, or other state officials enacting COVID-19 denialist policies may find their actions are preempted by federal authorities.


The federal [Public Readiness and Emergency Preparedness \(PREP\) Act](#) authorizes the Secretary of Health and Human Services (HHS) to "make a declaration . . . recommending" the use of certain "covered countermeasures" responding to a situation [deemed] a public health emergency. Countermeasures authorized under the PREP Act preempt "any provision of law or legal requirement that . . . is different from, or is in conflict with, any requirement applicable under this section" related to those countermeasures.

In an [Advisory Opinion](#) issued in January 2021, HHS confirmed that the PREP Act "(1) provides complete preemptive federal jurisdiction . . . and (2) applies to cases where the alleged harm results from failure to use (and even refusal to use) a covered countermeasure when that failure arises out of the conscious [or deliberate] allocation and prioritization of the countermeasures." The PREP Act thus preempts state tort claims related to liability and immunity, including those involving scarce resource allocation and decision-making, creating exclusively federal causes of action. Throughout the pandemic, federal courts have routinely held that PREP Act claims against government actors fall under federal jurisdiction.⁸

However, some federal appellate court decisions have limited the PREP Act's seemingly broad liability provisions. [Three circuit court decisions](#) in 2021 and 2022 affirmed lower courts' decisions to remand suits alleging negligence claims under the PREP Act back to state courts, finding that the Act does not entirely bar claims under state law. They held that Congress only intended federal causes of action for "willful misconduct." [The Eleventh Circuit is currently](#) deciding whether the PREP Act is a complete preemption statute in a similar case.

In November 2021, [Tennessee](#) and [Florida](#) enacted laws restricting employers' abilities to require COVID-19 vaccinations in the workplace. Tennessee's law exempts employers subject to the Centers for Medicare and Medicaid Services' (CMS) vaccine mandate for health care workers (HCWs). Following lengthy litigation across the country, the U.S. Supreme Court upheld the legality of the CMS vaccine mandate on January 13, 2022, effectively preempting all conflicting state laws. [Florida Governor Ron DeSantis](#) indicated his state will not enforce the federal mandate in health care facilities although his state [dropped its legal challenge](#) to the rule on January 24.

In March 2022, a [federal judge in Michigan](#) upheld the enforcement of the federal Head Start program's vaccine mandate in the state after finding that it was likely constitutional under the Supreme Court's CMS vaccine mandate ruling. A federal district court in Montana, [on March 18, 2022](#), blocked a state law prohibiting health care providers from denying employment, goods, or services based on an individual's COVID-19 vaccination status on the grounds that the Montana law is



incompatible with CMS' vaccine mandate, which requires facilities to ensure all staff have been vaccinated or qualify for an exemption. To the extent the state law did not require employees, including those subject to the CMS mandate, to demonstrate vaccination status, it was preempted.

Preemption can also be wielded as a double-edged sword. Parents challenged a 2020 D.C. Council law allowing children as young as 11 years old to get vaccinated for COVID-19 without parental consent or knowledge, alleging the law was preempted by the National Childhood Vaccine Injury Act. On [March 18, 2022, a federal district court](#) agreed, holding that federal law preempted the District's law which required health care providers to act outside the scope of federal law (i.e., directing providers to leave "blanks" on the child's vaccination records).

Preemption claims also arise at the local level. For example, [Dane County \(WI\) residents and businesses](#) challenged the county health officer's authority to issue emergency orders without the Dane County Board's approval. Oral arguments were heard by the Wisconsin Supreme Court in March 2022.

III. Section 1983 Actions

Section 1983⁹ is a federal law providing a cause of action for individuals deprived of a right held under federal law by a state or local official. For example, the Eighth Amendment protects convicted prisoners from cruel and unusual punishments. Prisoners alleging Eighth Amendment violations may bring Section 1983 lawsuits against offending officers.

In an [April 2020 lawsuit](#) against the Dallas County (TX) sheriff, prisoners argued that the sheriff's COVID-exacerbated jail conditions violated their constitutional rights by placing them at serious risks of infection or death. They allege that the sheriff did not enforce social distancing, provide personal protective equipment (PPE), or offer testing at the jail, leading to a "public health nuisance." In a request for [dismissal](#), the sheriff's office stated that it had taken measures to protect the inmates housed in the jails, including new sanitation and isolation procedures. Similar suits have been replicated at correctional facilities nationwide.

Additional Section 1983 actions may flow from denials of other constitutional rights under the color of state law, including COVID-19 denialist laws or policies circumventing reproductive rights, privacy interests, personal freedoms, or disability protections. In the case *In re Abbott*,¹⁰ litigants raised Section 1983 claims against Texas' 2020 attempt to shut down all surgical abortions during the early stages of the pandemic. Suits addressing specific denials of clear constitutional rights without justification, consistent with COVID-19 denialism, may be framed similarly.


However, not all such claims support liability themes for acts of COVID-19 denialism. Some claims may seek exclusions from public health interventions. In September 2021, for example, HCWs in New York filed a Section 1983 action against Governor Kathy Hochul, health commissioner, and attorney general. Plaintiffs alleged the state's emergency regulation requiring HCWs to be fully vaccinated against COVID-19, without permitting religious exemptions, violated their constitutional rights because it "forb[ade] employers from considering religious exemptions under processes guaranteed by federal law."¹¹ A federal district court initially granted a temporary restraining order to stop enforcement of the vaccination requirement, but the Second Circuit Court of Appeals vacated the injunction, upholding the mandate. The Supreme Court ultimately declined to hear an appeal.

IV. *Parens Patriae* Suits

In *parens patriae* actions, government in its role as "legal protector" can sue to abate egregious impacts on behalf of its citizens.

In actions challenging CMS' vaccine mandate, states questioning the mandate's legality argued that they had standing as protectors of their citizens' rights. [Texas](#) argued that its *parens patriae* interest in the health of its citizens was rooted in its "critical healthcare workforce shortage," and concerns that a vaccine mandate would cause "an exodus of healthcare workers," increasing the burden on the state's unemployment insurance funds. The argument failed as the Supreme Court affirmed (as noted above) that CMS' use of its conditional spending powers to mandate vaccines was constitutionally sound.

Similar state-based legal challenges against President Biden's [Executive Order](#) (E.O.) requiring COVID-19 vaccination for federal contractors posit legal standing based on *parens patriae*. Some courts have rebuffed this claim. A district court in



Arizona, for example, noted that the Supreme Court has “long-since held” that states lack standing as *parens patriae* to bring suit against the federal government, founded on the principle that because state citizens are also citizens of the United States, the federal government is the “ultimate parens patriae of every American citizen.”¹²

The flip side of *parens patriae* suits relates to cases that states may bring to reverse or counter denialist policies against persons or entities seeking to enforce or implement them. States may presumably bring such cases against public or private sector entities circumventing efficacious public health measures, provided state populations are impacted. Historically, some states have even sought litigation against offending neighboring states on environmental and other grounds that directly and negatively impact their states’ populations.¹³

V. Civil Liability

Civil lawsuits may thwart some extreme examples of COVID-19 denialism. Lawsuits may be filed against state or local government actors seeking civil damages or enjoining E.O.s and actions that hinder efforts to stop the spread of COVID-19.


In August 2021, local school officials in [San Antonio](#) and Bexar County (TX) sued Governor Greg Abbott over his E.O. forbidding locales from imposing COVID-19 safety measures including occupancy limits and mask mandates. A state court judge issued a temporary restraining order, allowing the local school districts to impose their own mask mandates in schools, pending litigation. In November 2021, a [state appellate court](#) upheld the restraining order, holding that Texas cannot bar localities from enacting their own pandemic safety rules. A [federal district court](#) later issued a permanent injunction, finding the E.O. was unconstitutional and in violation of the Americans with Disabilities Act (ADA). However, in December 2021, the Fifth Circuit Court of Appeals stayed the district court’s order, determining that the E.O. did not conflict with local laws.

In [Virginia](#), 7 public school districts sued Governor Glenn Youngkin in January 2022, objecting to the Governor’s E.O. making mask-wearing optional in schools. The school districts argued that the E.O. conflicts with and overrides the districts’ own mask policies, which require masks for in-person learning and activities per state law authorizing them to enact their own in-school policies. An Arlington circuit court judge granted the districts’ request to temporarily ban the E.O., finding that the governor cannot wield his emergency powers to override decisions of local school boards. However, in early February 2022, the Virginia Supreme Court [dismissed](#) the lawsuit, stating that the petitioners could not seek relief from the E.O. since no actionable source of legal authority over the governor had been identified. Furthermore, the E.O. did not override school districts’ abilities to set masking policies, thus allowing them to conform with CDC guidelines in the end. Appeals are ongoing. Meanwhile, a federal judge ceased enforcement of the E.O. after finding federal law violations (discussed below).

In [New Jersey](#), the families of deceased veterans who had died of COVID complications in 2 state-run nursing homes were “preparing to file lawsuits that accused the state of gross negligence.” Before the suits could be filed, New Jersey “agreed to pay \$53 million to [the] families of [the] 119 veterans.” [Court filings claimed](#) that staff at the facilities “were barred from wearing masks before April 2020 to avoid scaring residents,” and that “[s]ick and healthy residents were allowed to congregate” while “staff members moved from room to room in the nursing homes without taking proper precautions to avoid transmitting the virus.” A similar [complaint](#) was filed in [Massachusetts](#) where the case is [ongoing](#).

On [July 22, 2020](#), an amended complaint submitted by employees of multiple federal agencies against the U.S. government alleged in part that they had been made to work through COVID-19 “without sufficient protective devices,” seeking [back pay](#), including hazard pay, as compensation for their claimed damages. The case is [ongoing](#). A lawsuit filed on April 4, 2022 against [the City of Raleigh, North Carolina](#), challenged the city’s COVID-19 policies, requesting back pay for time spent testing, attorneys’ fees, and other damages, including a health care plan surcharge for unvaccinated employees.

In Minnesota, a property owner challenged Governor Tim Walz’s March 2020 E.O. mandating a statewide residential eviction moratorium. To “alleviate displacement of families arising out of the COVID-19 pandemic and loss of employment,” the E.O. prohibited landlords from evicting tenants who failed to pay rent. In the suit, property owners alleged the E.O. intruded on their ability to manage their businesses and properties and violated rights under the contract clause, takings clause, due process clauses, and First Amendment. Lower courts dismissed the claims. On April 5, 2022, however, the Eighth Circuit Court of Appeals reversed the dismissals, finding that the plaintiff “plausibly pleaded” the E.O. “substantially



impaired its contractual bargain” and sufficiently alleged that the E.O. deprived it of rights to exclude tenants without compensation, constituting a non-regulatory government taking. The case was remanded back to the district court.

Across the United States, COVID-19 killed [more than 200,000 nursing home residents and staff](#) (as of January 31, 2022). Many of these facilities are government-run. Multiple lawsuits allege facilities contributed to infections and deaths by failing to implement appropriate safety measures. [In January 2022, a state-run veterans home in New Jersey](#) agreed to pay \$53 million to the families of 119 veterans living in 2 facilities. Similarly, a [Massachusetts veterans home](#) reached a \$56 million settlement to 84 veterans and their families in May 2022.

Some claims against the government have been rejected. For example, employees of a meatpacking facility in [Pennsylvania](#) sued the U.S. Secretary of Labor and the Occupational Safety and Health Administration (OSHA). They alleged the federal government acted “arbitrarily and capriciously in failing to seek” a court order preventing their employer from continuing unsafe COVID-19 working conditions that could cause imminent harm. The court [rejected](#) these claims, finding no imminent danger.

[New York](#) residents sued the World Health Organization (WHO) in April 2020, alleging negligence in responding to the COVID-19 pandemic. In April 2021, a federal court in New York granted WHO’s motion to dismiss based on immunity.

VI. Discrimination

Government may differentiate between populations without infringing constitutional rights if there is a sufficient basis for such distinctions in the interests of public health. However, claims of unwarranted discrimination against government actors may arise where public health efforts differentiate on the basis of race, disability, or other protected classes, including instances where government inappropriately targets people with certain conditions for health interventions.

In December 2021, FDA released [guidance](#) regarding the allocation of monoclonal antibody treatments and oral antivirals for COVID-19 treatment. The treatments were authorized for individuals “who are at high risk for progression to severe COVID-19” and refers to CDC’s guidance on “People with Certain Medical Conditions.” Ongoing supply shortages during the 2021-2022 Omicron variant surge encouraged several states to adopt FDA-aligned policies that prioritized race or ethnicity in allocating the treatments. Several federal lawsuits challenged the policies as discriminatory.

[New York’s policy](#) explicitly noted that “non-white race or Hispanic/Latino ethnicity should be considered a risk factor, as longstanding systemic health and social inequities have contributed to an increased risk of severe illness and death from COVID-19.” It was challenged by White, non-Hispanic plaintiffs alleging violations of the 14th Amendment equal protection clause and Title VI of the Civil Rights Act. On March 15, 2022, a [federal district judge in New York](#) held that the plaintiffs failed to show they would be harmed by the non-enforceable guidelines advising providers to consider race and ethnicity as risk factors. A challenge filed in another New York federal district is ongoing.

Oregon, finding that COVID-19 disproportionately affected Black individuals, earmarked \$62 million of its federal COVID-19 relief funding exclusively for these residents. Lawsuits by Mexican-American and White businesses owners challenged the action on racial discrimination grounds. [The case is ongoing](#), with federal funding remaining on hold.

Discrimination claims have also been made on the basis of disability. On March 17, 2022, a professor at Kutztown University of Pennsylvania, a public institution, [alleged disability discrimination and retaliation](#) under Section 504 of the Rehabilitation Act. The professor, who was undergoing chemotherapy and thus at high risk for severe COVID-19, sought damages after the university failed to accommodate her and allow her to keep teaching remotely despite a state mandate to provide flexible work arrangements for those at risk. The case is ongoing.

Plaintiff parents of children suffering from disabilities putting them at increased COVID-19 risks challenged Virginia Governor Youngkin’s January 2022 E.O. providing that parents can opt children out of masking requirements in Virginia schools (discussed above). The parents alleged that the E.O. and related state laws violate rights under federal law. On March 23, 2022 a federal district court judge stopped the E.O. from being enforced on grounds that parents had the right to request a [reasonable](#) modification under the Americans with Disabilities Act (ADA) and Rehabilitation Act.

VII. Proposed Legislation to Preclude Government Entity Liability

Government officials are generally protected from lawsuits alleging rights violations under principles of sovereign or qualified immunity. During declared emergencies, additional protections may be available (e.g., PREP Act, discussed above) to insulate public sector entities and actors from direct liability. In addition, some states have proposed and passed explicit bills to preclude government entity liability related to COVID-19 harms, including Alabama (SB [30](#)), Florida (CS/SB [72 and 7014](#)), Idaho (HB [6 and 149](#)), Louisiana (HB [826](#)), Michigan (HB [6030](#)), Montana (HB [435](#)), Nevada (SB [4](#)), North Carolina (HB [118](#)), Ohio (HB [606](#)), Oregon (SB [780](#)), and Tennessee (SB [8002](#)).

These bills generally aim to shield government and civil actors from liability from claims for COVID-19 infection or any injury caused by exposure. Traditionally these shields have been applied to HCWs, but trends across these and other states have expanded protections to government and private individuals. To claim these protections, public or private actors generally must be acting in compliance with local COVID-19 public health policies and responses.

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The Network for Public Health Law provides information and technical assistance on issues related to public health. The legal information and assistance provided in this document do not constitute legal advice or legal representation. For legal advice, please consult specific legal counsel. Support for the Network provided by the Robert Wood Johnson Foundation. The views expressed in this document do not necessarily reflect the views of the Foundation.

¹ Pub. L. No. 117-2, 135 Stat. 2 (2021).

² Emily Cochrane, *Congress Clears \$1.9 Trillion Aid Bill, Sending It to Biden*, N.Y. TIMES, <https://www.nytimes.com/2021/03/10/us/politics/covid-stimulus-bill.html> (Mar. 30, 2021) (explaining that President Biden's relief plan provides multiple benefits to assist Americans with financial hardships during the pandemic).

³ Molly Ramsdell et al., *What It Means for States: The American Rescue Plan Act Provisions*, NAT'L CONF. STATE LEGISLATURES (Mar. 10, 2021), https://www.ncsl.org/Portals/1/Documents/statefed/The-American-Rescue-Plan-Act-Provisions_v01.pdf [<https://perma.cc/KN7K-QX9N>].

⁴ Amanda Albright, *U.S. Offers States \$350 Billion in Aid, with Conditions*, BLOOMBERG (May 10, 2021, 2:54 PM), <https://www.bloomberg.com/news/articles/2021-05-10/u-s-offers-states-350-billion-in-virus-aid-with-conditions> [<https://perma.cc/N2B8-PQT5>].

⁵ Stephen Kranz, Mary Kay McCalla Maritire & Richard C. Call, *Federal COVID-19 Relief Bill Brings State Tax Policy to a Grinding Halt*, NAT'L L. REV. (Mar. 16, 2021), <https://www.natlawreview.com/article/federal-covid-19-relief-bill-brings-state-tax-policy-to-grinding-halt> [<https://perma.cc/5LPT-DWK8>].

⁶ Letter from State Attorneys General to Secretary Janet L. Yellen, Treasury Action to Prevent Unconstitutional Restriction on State's Fiscal Policy through American Rescue Plan Act of 2021 (Mar. 16, 2021), <https://law.georgia.gov/press-releases/2021-03-16/carr-urges-feds-respect-states-ability-cut-taxes> [<https://perma.cc/QA2J-FCRE>].

⁷ *Id.* (summarizing Georgia Attorney General Chris Carr by saying “[a]s it is written, the [ARPA] could be used to deny Georgia the ability to cut taxes in any manner for years to come . . . [and] it would amount to an unprecedented federal takeover of state tax policy and would represent the greatest attempted invasion of state sovereignty by Congress ever”).


⁸ *Maglioli v. Alliance HC Holdings LLC*, 16F.4th 393 (3d. Cir. 2021); *Mitchell v. Advanced HCS, L.L.C.*, 28 F.4th 580 (5th Cir. 2022).

⁹ 42 U.S.C. § 1983 (2020).

¹⁰ 956 F.3d 696 (5th Cir. 2020), *vacated*, *Planned Parenthood Ctr. for Choice v. Abbott*, No. 20-305, 141 S. Ct. 1261 (Jan. 25, 2021).

¹¹ *Dr. A. v. Hochul*, 2021 WL 4189533 (N.D.N.Y. Sept. 13, 2021).

¹² *Brnovich v. Biden*, 2022 WL 252396 (D. Ariz. Jan. 27, 2022).



¹³ See, e.g., *Missouri v. Illinois*, 180 U.S. 208 (1901) (suit to prevent the discharge of sewers into the Mississippi River); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (suit to enjoin enforcement of a law which would restrict Ohio and Pennsylvania's natural gas supply); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (suit to restrain Minnesota from increasing the flow of an interstate stream).