THE CIRCUIT COURT OF ST. LOUIS COUNTY
TWENTY-FIRST JUDICIAL CIRCUIT OF MISSOURI

THE STATE OF MISSOURI ex rel. ERIC S. SCHMITT; ALLYSIA ROGLES; and SARAH SALEM; *Plaintiffs*, v. FERGUSON-FLORISSANT SCHOOL DISTRICT; *Defendant*.	No. 22SL-CC00524

PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION

As Missouri, like the nation, attempts to regain normalcy in the wake of the COVID-19 pandemic, schools are one area of society where normalcy is not only achievable, but also necessary. Roughly two years after COVID-19 reached America, the data is clear: schools are not drivers of transmission and COVID-19 does not pose a serious risk to children. Equally clear is that the pandemic has taken a toll on the country's children. From their health to their education, COVID-19 mitigation measures harmed children in the name of protecting them from a disease that was no more dangerous to children than the seasonal flu.

One of the artifacts of the pandemic standing between children and normalcy are mandatory mask requirements in schools. Until 2020, public health officials had not endorsed the idea that masks could limit the spread of a respiratory virus like COVID-19. Nearly two years later, it is increasingly clear why: masks do not prevent the spread of COVID-19. It is also clear that masks have downsides. Putting a child in a mask for eight hours during the school day is uncomfortable, limits the child's educational development, and serves as a constant reminder of overplayed pandemic woes—woes that add to the mental stress that child already faces. For children with special educational needs, masks are an additional limit that serve to separate them even more from their peers. Yet school administrators persist in imposing masking requirements based on nothing but arbitrary metrics that do not actually reflect the severity of this disease.[1] Two years after the arrival of COVID-19, it is now apparent that schools believe masking to be a

[1] For comparison, Denmark declared it will no longer categorize COVID-19 as a "socially critical disease" starting February 1 despite a surge of cases caused by an omicron subvariant. Camille Gijs, *COVID-19 No Longer a 'Socially Critical Disease' in Denmark, Health Minister Says*, Politico (Jan. 26, 2022), https://politi.co/3g3cJPQ.

permanent solution, and that the only temporary thing about the promises that masks were a stopgap measure were the promises themselves.

The time has come to make good on the promise that COVID-19 mitigation measures, masks included, are temporary. To that end, Plaintiffs bring this lawsuit. Ferguson-Florissant School District (the "District") has imposed a mask mandate. It has no legal authority to do that. By statute, that power rests with the State of Missouri and is exercised by the Department of Health and Senior Services (DHSS). The District cannot point to any contrary statutory authority that permits it to require its students to cover half their faces.

For those reasons, Plaintiffs request this Court enjoin enforcement of the District's Mask Mandate.

FACTUAL BACKGROUND

I. Ferguson-Florissant's Mask Mandate

For basically the whole school year, students at the District's schools have gone to class with their face covered. The reason: The perceived threat of COVID-19. COVID-19 is a respiratory disease caused by a coronavirus, SARS-CoV-2. SARS-CoV-2 spreads via droplet and aerosolized particles (or aerosols), which are microscopic, inhalable particles. *See* CDC, *How COVID-19 Spreads* (last updated July 14, 2021), https://bit.ly/35nQUsl. Mechanically, that is similar to how the influenza virus spreads. *See*, *e.g.*, CDC, *Similarities and Differences Between Flu and COVID-19* (last visited Jan. 28, 2022), https://www.cdc.gov/flu/symptoms/flu-vs-covid19.htm; *cf.* EUROPEAN CDC, USING FACE MASKS IN THE COMMUNITY: FIRST UPDATE 5 (2021) (looking at studies involving the effect of masks in preventing influenza, though cautioning about extrapolating those conclusions to COVID-19).

Yet despite the near-constant presence of respiratory illnesses with transmission mechanisms similar to COVID-19, there is no evidence that masks, like the ones the District

allows, prevent the spread of those diseases. *See*, *e.g.*, WORLD HEALTH ORG., NON-PHARMACEUTICAL PUBLIC HEALTH MEASURES FOR MITIGATING THE RISK AND IMPACT OF EPIDEMIC AND PANDEMIC INFLUENZA 99 (2019) ("[O]ur review identified a lack of compelling evidence for the effectiveness of hand hygiene, respiratory etiquette and face masks against influenza transmission in the community."). Indeed, just recently, thirteen public health experts reviewing the literature on the effect of masking in schools concluded that "[w]ell-controlled real-world studies have not demonstrated any clear benefit of masking students." URGENCY OF NORMAL, *Children, COVID, and the Urgency of Normal* 18–19 (Jan. 26, 2022), https://bit.ly/3nXsZGI. All of that is likely why mask mandates have been rarely, if ever, used.

Nevertheless, the District mandated universal mask wearing at the start of the school year. *See* Scott Aff. Ex. A, at 3–4 [hereinafter Ex. A]. The District reaffirmed that the Mask Mandate would continue as recently as December 2021. *See* Scott Aff. Ex. B, at 3 [hereinafter Ex. B] (providing a copy of the District's in-person instruction and continuity of services plan); *see also* Scott Aff. Ex. C, at 3 [hereinafter Ex. C] (approving the plan). According to the District's *Safe Return to In-Person Instruction and Continuity of Services Plan* (the "Coronavirus Plan"), students 2 years old and older must wear a mask indoors—with cloth masks being allowed. *See* Ex. B, at 3. Exception are permitted only for those "who cannot wear a mask or cannot safely wear a mask because of a disability as defined by" federal law. *Id.* That does not mean, however, that every child with a disability or special needs will necessarily receive an exemption. *See* Rogles Aff. ¶ 5.

II. Procedural history

Missouri and Private Parents (who are taxpayers within the District) with children attending the District's schools sued to block the Mask Mandate. *See* Rogles Aff. ¶¶ 1–8; Salem Aff. ¶¶ 3–5. Plaintiffs now seek a temporary restraining order and preliminary injunction based on Count Two of the Petition to bar enforcement of the Mask Mandate.

ANALYSIS

Missouri Supreme Court Rule 92.02 governs the issuance of temporary restraining orders and preliminary injunctions. Granting a temporary restraining order requires a showing that "irreparable injury, loss, or damage will result in the absence of relief." Mo. Sup. Ct. R. 92.02(a)(1).

"When considering a motion for a preliminary injunction," Missouri courts "should weigh '[1] the movant's probability of success on the merits, [2] the threat of irreparable harm to the movant absent the injunction, [3] the balance between this harm and the injury that the injunction's issuance would inflict on other interested parties, and [4] the public interest.'" *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996) (quoting *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 928 (8th Cir. 1994)). "The likelihood of success on the merits is '[t]he most important of the [preliminary-injunction] factors.'" *Craig v. Simon*, 980 F.3d 614, 617 (8th Cir. 2020) (per curiam) (quoting *Shrink Mo. Gov't PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998)).

I. Plaintiffs are likely to succeed on the merits of Count 2.

The gravamen of Count 2 is this: The District lacks the power to issue the Mask Mandate. That is so because the Mask Mandate is a public health order issued in response to COVID-19. As the District's Coronavirus Plan states, "COVID-19 prevention strategies," which includes mandatory masking, "remain critical to protect people, including students, teachers, and staff, who are not fully vaccinated, especially in areas of moderate-to-high community transmission levels." Ex. B, at 2. That is, as the District's superintendent summarized, the masks are part of the District's "mitigation strategies to minimize transmission spread in our schools and our community." Ex. A, at 2.

But the authority to issue public health orders is one of those general police powers that belongs exclusively to the State of Missouri, *see*, *e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905), which has vested it in the Department of Health and Senior Services (DHSS), *see*, *e.g.*, § 192.020.1, RSMo; 19 C.S.R. 20-20.040; *City of Olivette v. St. Louis County*, 507 S.W.3d 637, 644 (Mo. Ct. App. 2017); *see also* §§ 192.005, .006, RSMo. That is, only DHSS may "make and enforce adequate orders … to prevent the spread of [infectious, contagious, communicable or dangerous] diseases." § 192.020.1, RSMo. The General Assembly has granted no such authority to the District. Indeed, where the General Assembly intends for school districts to have some role in public health, it says so. *See* § 167.181.4, RSMo (immunization recording and reporting requirements for school superintendents); § 210.003.4, RSMo (similar). It did not say so for public health orders, like the Mask Mandate. Chapter 192, RSMo—which provides DHSS authority to respond to diseases like COVID-19—gives counties and cities and their officials a narrow ability to exercise state authority, so long as it does not conflict with state law and DHSS regulation, *see* §§ 192.280–.310, but does not mention school districts. That "strong contrast" evidences the General Assembly's intent not to give school districts authority to issue public health rules like the Mask Mandate. *Six Flags Theme Parks, Inc. v. Dir.*, 179 S.W.3d 266, 270 (Mo. banc 2005) (quoting another source) (discussing how to apply *expressio unius est exclusio*).[2]

That is enough to justify relief here. Indeed, it is more than enough. School districts are not independent, sovereign actors; they "constitute [an] arm or instrumentality" of the State. *Sch.*

[2] The extensive legislation on public health differentiates this analysis from that in *State ex rel. O'Bannon v. Cole*, 119 S.W. 424, 428–30 (Mo. 1909), which held that a predecessor to § 167.191 (relating to the power to require a child to "be examined by a physician" to determine if that child has "any liability" of transmitting a contagious or infectious disease) did not limit a school district's power to require students to be vaccinated against smallpox in a district where there was a smallpox epidemic under the district's general grant of authority.

Dist. of Oakland v. Sch. Dist. of Joplin, 102 S.W.2d 909, 910 (Mo. 1937). So like all political subdivisions of this State, their "powers, duties, and obligations … must be found within the limits of the statutory provisions governing school districts." *State ex rel. Sch. Dist. of Springfield R-12 v. Wickliffe*, 650 S.W.2d 623, 625 (Mo. banc 1983). School districts thus possess only that power "clearly comprehended within the words of the statute or that may be derived therefrom by necessary implication … . Any doubt or ambiguity arising out of the terms of the grant must be resolved in favor of the people." *Wright v. Bd. of Educ. of St. Louis*, 246 S.W. 43, 45 (Mo. 1922); *see State ex rel. Sch. Dist. of City of Independence v. Jones*, 653 S.W.2d 178, 185 (Mo. banc 1983) ("[S]chool districts are not sovereigns, but creatures of the legislature whose only powers are those expressly granted by or necessarily implied from statute."); *see also St. Louis County v. River Bend Estates Homeowners' Ass'n*, 408 S.W.3d 116, 137 (Mo. banc 2013) ("[T]he county has 'no inherent powers but is confined to those expressly delegated by the sovereign and to those powers necessarily implied in the authority to carry out the delegated powers.") (quoting *Christian County v. Edward D. Jones & Co.*, 200 S.W.3d 524, 527 (Mo. banc 2006) (quoting another source)).

So even if the General Assembly had not expressly authorized DHSS to issue public health orders and had not omitted school districts when it created that authority, the District still could not claim that it had the power to issue the Mask Mandate. Rather, the District would need to point to a law providing it with authority to issue public health orders. *See Harfst v. Hoegen*, 163 S.W.2d 609, 613 (Mo. 1941) ("[B]y statute the school board has been given certain powers, and it behooves the board to point to a statute[] when its will and that of the parent conflict."). Importantly, general grants of authority will not do since it is well-established "[t]he State has not delegated the police power to school districts." *Kansas City v. Sch. Dist. of Kan. City*, 201 S.W.2d

930, 933 (Mo. 1947). Thus where, as here, the question is whether a school district may exercise a traditional police power—like the power to issue public health orders—the Legislature must have "*expressly* and *specifically* given" the power to the district. *Id.* at 934 (emphases added); *see Sch. Dist. of City of Independence*, 653 S.W.2d at 185; *Wright*, 246 S.W. at 45; *Kansas City v. Fee*, 160 S.W. 537, 538 (Mo. Ct. App. 1913).

And the District does not point to any such authority. To the contrary, the District's Policies and Procedures acknowledges the primacy of DHSS in the area of public health. For example, Policy 3053 requires "that all students attending the district schools shall be in compliance with *state* laws and regulations requiring immunization." Scott Aff. Ex. D, at 130 [hereinafter Ex. D] (emphasis added). And Policy 3054 says that "control measures for communicable strains and other diseases dangerous to public health will be implemented in accordance with *state laws and the Department of Health*." *Id.* at 131 (emphasis added).

To be sure, during the December 20, 2021, meeting of the District's Board, the discussion indicated that the Board believes § 167.191, RSMo, authorizes the Mask Mandate.[3] But § 167.191, RSMo, says nothing about a school district's ability to issue district-wide, prophylactic public health orders. The statute has four parts. Two have nothing to do with school districts—

[3] FFSDTV, *Board of Education Special Meeting December 20, 2020*, at 17:00–18:00, YOUTUBE (Dec. 20, 2021), https://youtu.be/wfJuX0mRLi8. There appears to be a typo in the video's title; the year should be 2021, not 2020. The video was streamed on December 20, 2021. And, roughly around the 5 minute and 10 second mark, the Board's chair references the fact that notice for the meeting was posted on December 17, 2021.

FFSDTV "is the official channel of the Ferguson-Florissant School District" and provides "news and information from around the district." FFSDTV, *About*, YOUTUBE (last viewed Jan. 31, 2021), https://bit.ly/341jXl7. The Court may take judicial notice of the recording of December 20, 2021, Board meeting. *See Wrenn v. City of Kansas City*, 908 S.W.2d 747, 750 n.5 (Mo. Ct. App. 1995) (taking judicial notice of "the audiotaped recording of the … hearing before the Board," because "the facts to be noticed appear with such certainty that controversy is unlikely, and because the proceeding is clearly interconnected with this one").

they make it "unlawful for any child to attend any of the public schools of this state while afflicted with any contagious or infectious disease, or while liable to transmit such disease after having been exposed to it" and make it a misdemeanor for parents to send a child to school "found [by a physician] to be afflicted with any contagious or infectious disease, or liable to transmit the disease" or for parents to refuse to allow a child to be examined by a physician to determine if the child is so afflicted or so liable to transmit. *Id.* The other two parts provide only a narrow authority to school boards—school boards "may require any child to be examined by a physician" "[f]or the purpose of determining the diseased condition, or the liability of transmitting the disease" and school boards may "exclude" children "so long as there is any liability of such disease being transmitted by the pupil" or if the student's parents "refuse[] to have an examination made by a physician" at the school's request. *Id.*; *see also State ex rel. O'Bannon v. Cole*, 119 S.W. 424, 429 (Mo. 1909) (summarizing a previous law with similar language).

Nothing about that suggests the District may impose a masking requirement on the *entire* student body without regard as to whether they are "afflicted" or "liable to transmit" COVID-19. To start, the statutory language focuses on individual students, not the entire student population and staff of a school district; section 167.191 refers to "child" in the singular, it does not say "children" or "students" or "student body." As the Supreme Court said of a very similarly worded predecessor statute, the law deals "wholly with *a* case where *a child* is actually diseased, or has been exposed to a disease … ." *O'Bannon*, 119 S.W. at 429 (emphases added); *see also id.* ("The first part of the statute, as said, deals with a concrete case of a diseased or exposed child."). District Policy 3054 acknowledges that. It says, "*A student*"—singular—"shall not attend school … while afflicted with any contagious or infectious disease, or while liable to transmit such a disease after being exposed." Ex. D, at 131 (emphasis added).

Nor does § 167.191 clearly authorize schools to condition school attendance on mask-wearing. Indeed, the law says nothing about attendance at all. It just authorizes schools to "exclude" certain students to prevent them from spreading a contagious or infectious disease. Nothing in the statute indicates that it empowers school districts to allow students who are potentially liable to transmit a disease to attend school if they follow school-designed health and safety rules. The statute certainly says nothing about the power of schools to condition the attendance of healthy children on those children following a prophylactic health order.

In short, there is nothing ambiguous or complex about § 167.191, RSMo. Its terms are plain and plainly limited. The law does not come close to authorizing the District's universal, prophylactic, public-health-oriented Mask Mandate.

Nor may the District rely on general grants of authority, such as those found §§ 162.261, 162.471, 171.011, RSMo. The first two laws—§§ 162.261 and 162.471—vest "government and control" over school districts in school boards. Such a general grant of power does no more than give the school board control over the operations of the District. *See Enright v. Kansas City*, 536 S.W.2d 17, 19 (Mo. banc 1976); *Willett v. Reorganized Sch. Dist. No. 2 of Osage Cty.*, 602 S.W.2d 44, 47 (Mo. Ct. App. 1980). It does not "expressly and specifically give to" the District a general police power to regulate what its students must wear in the name of public health. *Smith v. Bd. of Educ. of City of St. Louis*, 221 S.W.2d 203, 205 (Mo. banc 1949). Similarly, § 171.011, RSMo, is just a grant of housekeeping authority. All it says is that "school board[s] ... may make all needful rules and regulations for the organization, grading and government in the school district."

None of those statutes says anything about the authority of school districts to issue public health orders, like the Mask Mandate, in response to a global pandemic like COVID-19. For each, their general grant of authority must give way to the specific public health decision-making scheme

the General Assembly created in chapter 192, RSMo, because "[t]he special statute controls over the general statute." *State ex rel. Normandy Sch. Dist. v. Small*, 356 S.W.2d 864, 871–72 (Mo. banc 1962) (concluding that any authority a school board had to sell school property by virtue of the fact it had "government and control" over a district gave way to a specific statute involving disposition of school property); *see also*, *e.g.*, *Greenbriar Hills Country Club v. Dir.*, 935 S.W.2d 36, 38 (Mo. banc 1996) ("When the same subject matter is addressed in general terms in one statute and in specific terms in another, the more specific controls over the more general."); *Cmty. Fire Prot. Dist. of St. Louis Cty. v. Bd. of Educ. Pattonville Consol. Sch. Dist. R-3*, 315 S.W.2d 873, 877 (Mo. Ct. App. 1958) (concluding a Fire District could regulate school building construction "because the Legislature, by granting specific power to the Fire District to ordain fire prevention measures is deemed to have denied contrary power to the School District").

Illustrating that fact is *O'Bannon*, which involved statutes containing language similar to § 171.011 as well as the "government and control" language found in §§ 162.261 and 162.471. *See* 119 S.W. at 426. *O'Bannon* held that school districts, when faced with a smallpox epidemic, could require smallpox vaccination as a condition of attendance. *See* 119 S.W. at 429–30. But that conclusion arose in the context of a very different statewide public health regime than is present today. For example, the *O'Bannon* court said, "That the school board has the power to absolutely suspend the school during epidemics of contagious or infectious diseases, we think can hardly be questioned." *Id.* at 426. But under § 192.020, RSMo, "only the director of the Department of Health and Senior Services or the director's designated representative shall have the authority to close a public or private school or other place of public or private assembly." 19

C.S.R. 20-20.050(3).[4] And at the time of *O'Bannon*, §§ 167.181 and 210.003, RSMo—which govern immunization of schoolchildren, the topic at issue in the case—did not exist.

Likewise, the analogue to DHSS at the time of *O'Bannon*, the State Board of Health, lacked DHSS's powers. The State Board of Health, while having "general supervision over the health and sanitary interests of the citizens of the state," lacked the power to achieve that end; it could only "*recommend* to the general assembly sanitary laws, and to cities and county courts the adoption of any rules they may deem wise or expedient for the protection and preservation of the health of the citizens thereof, and they were also empowered to administer oaths and to take testimony in all matters relating to their duties and powers." *State ex rel. Granville v. Gregory*, 83 Mo. 123, 133 (1884) (quotations omitted) (emphasis added). The law had not changed when *O'Bannon* came out. *See* Op. No. 37, Mo. Att'y Gen. at 3 (Oct. 28, 1960). Since that time, however, the General Assembly enacted § 192.020 and empowered the State health agency[5]—now DHSS—to "*make and enforce* adequate orders, findings, rules and regulations to prevent the spread of such diseases and to determine the prevalence of such diseases within the state" and "to *make* such orders, findings, rules and regulations as will prevent the entrance of infectious, contagious and communicable diseases into the state." "This is a much broader power than that possessed by the State Board of Health in 1909." Op. No. 37, Mo. Att'y Gen. at 4 (Oct. 28, 1960).

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[4] DHSS rescinded 19 C.S.R. 20-20.050(3) on December 22, 2021, in order to comply with the judgment in *Robinson v. DHSS*, No. 20AC-CC00515 (Cole Cty. Cir. Ct.). *See* MO. SEC'Y OF STATE, *Terminated and Suspended Administrative Rules* (last visited Jan. 28, 2022). That does not change the analysis because *Robinson* did not address this part of the regulation. Instead, the court there held that the ability of a local public health official to issue health directives, based on his or her opinion that doing so is necessary to protect the public health, violated the non-delegation doctrine. *See* Judgment at 9–10, *Robinson* (No. 20AC-CC00515). *Robinson* never questioned that § 192.020 vests authority to shut down schools in DHSS, not the District's Board.

[5] And cities and counties to a limited extent as well so long as they act through their elected officials and to the extent their exercise of that state authority is consistent with state law and DHSS regulations. *See* §§ 192.280–.310, RSMo.

And it is a power that places the ability to respond to "infectious, contagious, and communicable diseases" like COVID-19 with DHSS. § 192.020, RSMo.

Taken together, legislative changes have overtaken *O'Bannon*'s reading of school districts' general grant of power. *See State ex rel. Gentry v. Curtis*, 4 S.W.2d 467, 470 (Mo. banc 1928) (acknowledging "the state's right to withdraw the police power or any part thereof from local authorities"). There is now clearly "an intent upon the part of the Legislature to exclude" school boards from making pandemic-related public health orders like the Mask Mandate that was absent when the Court handed down *O'Bannon*. *O'Bannon*, 119 S.W. at 429.[6]

* * *

In short, the General Assembly plainly vested authority to make public health orders, like the Mask Mandate, in DHSS, not in local school boards. Underlining that is the fact the District has not, for it cannot, point to any state law providing it with such authority. Thus, the Plaintiffs are likely to succeed on Count 2.

II. The remaining *Gabbert* factors justify preliminary relief.

As outlined above, Plaintiffs are likely to succeed on their legal claims that the Mask Mandate is illegal. That is the most important factor in determining whether a preliminary relief is appropriate. *See Craig*, 980 F.3d at 617. The remaining *Gabbert* factors (the threat of

[6] Bolstering that conclusion is the fact that *O'Bannon* is an outlier even for its time—indeed, the Court seemed to recognize that, refusing to "go beyond the facts of the case." *O'Bannon*, 119 S.W. at 429. For comparison, in *McCutchen v. Windsor*, 55 Mo. 149 (1874), the Missouri Supreme Court concluded that the 19th Century equivalent of school boards could not discharge a teacher at will because "[t]he only power delegated to [them] is to employ legally qualified teachers." *Id.* at 152. While that case did not involve § 171.011, RSMo, the statute at issue provided a broad power "to manage and control [the district's] local interests and affairs" as well as the specific power to hire teachers. *Id.* (quoting the law). Given the numerous statutes specifically dealing with public health, and specifically vesting that authority in DHSS, this case is more like *McCutchen* than *O'Bannon*.

irreparable harm absent the injunction, the balance of harms, and the public interest) also favor Plaintiffs.

A. Plaintiffs will suffer irreparable harm absent relief.

To start, the District's defiance of State law is simply an attempt to thwart the efficacy of the State's duly-enacted policy of vesting in DHSS the power to issue public health orders to respond to a pandemic. That imposes irreparable harm on Missouri. "Any time" the State is prevented "from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). When a State cannot effectuate the policies embodied in its laws, it "necessarily suffers the irreparable harm of denying the public interest in the enforcement of its law." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020); *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997).

The District's Mask Mandate also unlawfully restricts the personal liberty and freedom of its schoolchildren.[7] "The United States Supreme Court has held being subject to an

[7] Plaintiff Parents raise this issue on behalf of their children who attend schools in the district. *See* Rogles Aff. ¶¶ 4, 7–8; Salem Aff. ¶ 4–6. The State, through its attorney general, may do so to vindicate its interest in enforcing Missouri law and its *parens patriae* interest in preventing injury to its population. *See* § 27.060, RSMo; *see State ex rel. Hawley v. Pilot Travel Ctrs., LLC*, 558 S.W.3d 22, 30 (Mo. banc 2018) ("The attorney general has the authority 'to seek enforcement of the legislature's statutory purposes.'") (quoting *Fogle v. State*, 295 S.W.3d 504, 510 (Mo. App. 2009)); *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 607 (1982) (holding that the State has a *parens patriae* interest in preventing an injury to a "substantial segment of its population," especially where "the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers").

unconstitutional statute, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Rebman v. Parson*, 576 S.W.3d 605, 612 (Mo. banc 2019) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). The same is true of being subject to an unlawful mask mandate—an unconstitutional restriction on personal freedom constitutes *per se* irreparable injury to the parents and schoolchildren of Missouri.[8]

But the Mask Mandate does more than restrict the liberty of those subject to it. The mandate also undermines the constitutional right children in the district have to a free public education and the system Missouri set in place to vindicate that right. The General Assembly created the District to fulfill the legislature's constitutional duty to "establish and maintain free public schools for the gratuitous instruction of all persons in this state … ." MO. CONST. art. IX, § 1(a). The District is thus required to "discharg[e]" that "constitutionally intrusted governmental functional." *Sch. Dist. of Oakland*, 102 S.W.2d at 785. By unlawfully imposing the Mask Mandate, the District created an unnecessary barrier to children—like Plaintiff Parents' children—who have "a fundamental right" "to attend the public school established in their district for them," *State ex rel. Roberts v. Wilson*, 297 S.W. 419, 420 (Mo. Ct. App. 1927); *see also Washington v. Ladue School District Board of Education*, 564 F. Supp. 2d 1059, 1063 (E.D. Mo. 2008), and undermines the General Assembly's system for providing children the means of enjoying that right, *see School District of Oakland*, 102 S.W.2d at 785. Ms. Rogles's child, for example, has special needs, and so masking is hard for the child and exacerbates her speech difficulties. Rogles Aff. ¶ 7. As a result, Ms. Rogles chose to keep her child out of school "[r]ather than subject [her]

[8] To be clear, nothing in this motion prevents parents or schoolchildren from *voluntarily* deciding to wear masks at school and during school activities—that decision is their own to make. But under Missouri law, once a mask mandate has expired or been lawfully terminated, the school district cannot continue to *command* parents and schoolchildren to do so—it must respect their freedom to make such decisions for themselves.

special needs child to forced masking." *Id.* ¶¶ 6–7. As a result, her child is missing out on "the in-person education [Ms. Rogles] believes is so vital to her development." *Id.* ¶ 8; *see also* Salem Aff. ¶ 6. The Parents suffer the harm of having the District deprive their children of a constitutional right, and, as taxpayers of the District, the harm of paying for the deprivation.

Aside from infringing on numerous legal interests the Plaintiffs have, the District's Mask Mandate imposes positive harm on the children subject to it—that is, the children of the Plaintiff Parents and the children that Missouri has a sovereign and *parens patriae* interest in protecting. For one, the Mask Mandate denies children access to in-person instruction if they do not wear masks. "Most studies" done pre-pandemic "found that the impact of attending a virtual charter school" as compared to traditional in-person schools "was negative." Megan Kuhfeld et al., *Projecting the Potential Impact of COVID-19 School Closures on Academic Achievement*, 49 EDUC. RESEARCHER 549, 552 (2020). Furthermore, "[n]early 50% of low-income families and 42% of families of color lacked sufficient devices at home to access distance learning, according to an Education Trust poll." *Id.* Data in Missouri bear that out. According to the Missouri Department of Elementary and Secondary Education (DESE), proficiency rates in almost all areas declined in the 2020-21 results compared to 2018-19. OFFICE OF COLL. & CAREER READINESS, DESE, MISSOURI ASSESSMENT PROGRAM 2020-21, at 11 (Sept. 2021). Those declines exacerbated a noticeable disparity in educational proficiency between African-American children and others, as well as between children who are in poverty (determined by whether a student receives a free or reduced price lunch) and others. *Id.* at 22–23. Currently the District has a significant portion of students in both groups. *See* DESE, *District Report Card* (last viewed Jan. 31, 2022), https://bit.ly/3uj06si (for school year 2021). The Mask Mandate thus risks worse educational outcomes for those groups.

Nor can a child avoid harm by wearing a mask and going to school. "[T]he short-term and long-term consequences of [masking children] are not well understood ... . Initial data, however, are not reassuring." Margery Smelkinson, Leslie Biene, & Jeanne Noble, *The Case Against Masks at School*, THE ATLANTIC (Jan. 26, 2022), https://bit.ly/3r5NMtE. Specifically, universal masking may impair educational, social, and emotional development for children while affirmatively hurting them:

- "Recent prospective studies from Greece and Italy found evidence that masking is a barrier to speech recognition, hearing, and communication, and that masks impede children's ability to decode facial expressions, dampening children's perceived trustworthiness of faces."
- "Research has also suggested that hearing-impaired children have difficulty discerning individual sounds; opaque masks, of course, prevent lip-reading."
- Anecdotes from teachers, parents, and speech pathologists that "masks can make learning difficult for some of America's most vulnerable children, including those with cognitive delays, speech and hearing issues, and autism."
- "Masks may also hinder language and speech development."
- "Masks may impede emotion recognition … particularly in children."
- Masks also are uncomfortable for children.

Smelkinson et al., *supra*.

Indeed, students say as much. A study on mask use in 25,930 schoolchildren found that 68% "complained about impairments caused by wearing the masks," including "irritability (60%), headache (53%), difficulty concentrating (50%), less happiness (49%), reluctance to go to school/kindergarten (44%), malaise (42%), impaired learning (38%) and drowsiness/fatigue

(37%)." Silke Schwarz et al., *Coronakinderstudien co-Ki: Erste Ergebnisse Eines Deutschlandweiten Registers zur Mund-Nasen-Bedeckung (Maske) bei Kindern*, 169 MONATSSCHRIFT KINDERHEILKUNDE 353, 355 (2021). And, as the experience of Ms. Rogles's child shows, the difficulties of mask-wearing are even greater for children with special needs. *See* Rogles Aff. ¶ 5. As a result of her special needs, Ms. Rogles' child "has difficulty wearing a mask properly, which is extremely uncomfortable for her" and wearing a mask worsens the speech difficulties with which she must contend. *Id.* ¶ 7.

In short, the Mask Mandate imposes *per se* irreparable harm because it is unlawful and infringes on numerous constitutional rights. It also imposes irreparable harm by limiting the educational opportunities of children in the District, including the Parents' children.

B. The District will suffer no harm from an injunction and the public interest justify relief.

Because the District is a governmental entity, whether preliminary relief will irreparably harm the District and whether such relief is in the public interest merge. *See*, *e.g.*, *Nken v. Holder*, 556 U.S. 418, 435 (2009).

This analysis begins and ends with the Mask Mandate's apparent unlawfulness. As courts have affirmed numerous times en route to enjoining unlawful COVID-19 orders, such injunctions do not harm the defendant and are squarely in the public interest: "Any interest [the District] may claim in enforcing an unlawful" and unconstitutional mandate "is illegitimate." *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 619 (5th Cir. 2021); *see Nat'l Fed'n of Indep. Business v. OSHA*, 142 S. Ct. 661, 666 (2022); *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489–90 (2021); *Missouri v. Biden*, 2021 WL 5998204, at *7 (E.D. Mo. Dec. 20, 2021); *see also Make Liberty Win v. Ziegler*, 478 F.Supp.3d 805, 812 n.6 (W.D. Mo. 2020) (holding that "a

governmental entity 'has no legitimate interest in enforcing an unconstitutional ordinance'") (quoting *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006)).

Additionally, any perceived benefit of masking is substantially reduced by the fact that cloth masks, which the Mask Mandate permits, do little to prevent the spread of COVID-19. *See*, *e.g.*, URGENCY OF NORMAL, *supra*; Smelkinson et al., *supra*; Alex J. Rouhandeh, *Some Doctors Urging to 'Retire the Cloth,' Push Hospital-Grade Masks Amid Omicron Surge*, NEWSWEEK (Dec. 27, 2021), https://www.newsweek.com/some-doctors-urging-retire-cloth-push-hospital-grade-masks-amid-omicron-surge-1663495; *Full transcript: Dr. Scott Gottlieb on "Face the Nation,"* January 2, 2022, CBSNEWS (Jan. 22, 2022), https://www.cbsnews.com/news/full-transcript-dr-scott-gottlieb-face-the-nation-january-2-2022/. Little to no reason thus exists to believe that enjoining enforcement of the Mask Mandate would prevent the spread of COVID-19—a disease that is already circulating in the population. And if parents or schoolchildren believe a mask would be beneficial, the Plaintiffs' requested relief does not prevent them from wearing one.

Moreover, even if masks provide a benefit, that benefit is basically zero for schoolchildren. That is because COVID-19 does not pose a serious risk to children between the ages of 0 and 17,[9] especially since "all indications point to a lesser severity of" the now-dominant omicron variant

[9] For example, the CDC recently released a study showing that hospitalizations of individuals in that age group makes up the minority of all COVID-19 hospitalizations, representing only 4.2 percent of all hospitalizations during the recent omicron wave. *See* A. Danielle Iuliano et al., *Trends in Disease Severity and Health Care Utilization During the Early Omicron Variant Period Compared with Previous SARS-CoV-2 High Transmission Period—United States 2020-January 2022*, Jan. 2022, at 3, 4 tbl.1. And that is likely an inflated number, as the study's data counted those hospitalized with "incidental SARS-CoV-2 infections," not just those hospitalized for COVID-19. *Id.* at 6.

Further underscoring the fact children are less likely to suffer severe negative health outcomes from COVID-19, that same study did not measure the number of children who received ventilation or died from COVID-19 because those outcomes were so rare. *Id.* at 4. DHSS data indicates that only eight children between the ages of 0 and 17 have died with a COVID-19 diagnosis in Missouri. DHSS, *Demographics* (last visited Jan. 28, 2022), https://bit.ly/3Ay8tkS.

compared to other variants. *See* Kevin Breuninger, *Fauci Says All Indications Suggest that Omicron is Less Severe Than Delta, But Warns Against Complacency*, CNBC (Dec. 29, 2021), https://cnb.cx/3ru9F4J (quoting Dr. Fauci); *see also* A. Danielle Iuliano et al., *Trends in Disease Severity and Health Care Utilization During the Early Omicron Variant Period Compared with Previous SARS-CoV-2 High Transmission Period—United States 2020-January 2022*, Jan. 2022, at 5 ("[D]isease severity appears to be lower than compared with previous high disease-transmission periods."). Even if the Court optimistically assumes that masks prevent the substantial transmission of COVID-19, the degree of risk students face is so slight that there is little reason to believe that the Mask Mandate will provide any benefit by preventing any serious illness or severe health outcomes. As a result, the harms, known and unknown, that the Mask Mandate will have and the injury the State suffers by allowing the District to exercise power it does not possess outweigh those extremely marginal benefits.

Indeed, some District officials implicitly agree. Board President, Dr. Sheila Powell-Walker, chose not to wear a mask at the January 12, 2022, meeting of the District's Board despite being surrounded by her colleagues. *See* Scott Aff. Ex. E. She apparently weighed the risks and benefits of wearing a mask, and found they came out against wearing a mask. All Missouri and the Parents ask is that the children who attend school in the District have the same freedom.

CONCLUSION

Plaintiffs respectfully request the Court to grant their motion for a temporary restraining order and preliminary injunction and:

- Enjoin the District from enforcing the Mask Mandate;
- Instruct the District to post a sign on its website and on its buildings noting that enforcement of the Mask Mandate has been enjoined.

Dated: January 31, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on January 31, 2022, a true and correct copy of the foregoing was filed with the Court's electronic filing system to be served by electronic methods on counsel for all parties entered in the case, and that a true and correct copy was also served by electronic mail and first-class mail upon counsel for Defendants.

/s/ James S. Atkins