IN THE CIRCUIT COURT OF JEFFERSON COUNTY
STATE OF MISSOURI

SHANNON OTTO, et al., *Plaintiffs*, v. JEFFERSON COUNTY HEALTH DEPARTMENT, *Defendant*.	No. 21JE-CC00682

BRIEF OF ATTORNEY GENERAL ERIC S. SCHMITT AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS' REQUEST FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. Statement of Interest of Missouri's Attorney General as *Amicus Curiae*.

Eric S. Schmitt is the duly elected Attorney General of the State of Missouri. As Attorney General, acting on behalf of the State, he seeks to enforce the Legislature's statutory purposes and represents the interests of parents and schoolchildren who are subject to unlawful quarantine orders and other restrictions by Jefferson County and other political subdivisions. *See* § 27.060, RSMo; *see State ex rel. Hawley v. Pilot Travel Centers, 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"). Attorney General Schmitt files this brief as *amicus curiae* as of right to support the proper enforcement of Missouri law and to prevent the ongoing violation of Missouri law by Missouri's political subdivisions, including Jefferson County and its Health Department.

See Mo. Sup. Ct. R. 84.05(f)(4) ("Consent to the filing of suggestions or a brief of an amicus curiae need not be had when the suggestions or brief are presented by the attorney general…").

The Missouri General Assembly enacted § 67.265, RSMo, by overwhelming majorities of both Houses on June 15, 2021, and it is both the law and the binding public policy of the State of Missouri. Yet political subdivisions and local health officers have systematically ignored its requirements and violated the statute, leading to the enforcement of dozens of unlawful public-health orders across the State of Missouri. Jefferson County is no different. Attorney General Schmitt submits this amicus brief supporting the plaintiffs' request for TRO and preliminary injunction, because the public health order challenged by Plaintiffs is manifestly unlawful under § 67.265, RSMo.

II. The Jefferson County Department of Health's Quarantine Order Is Unlawful Under § 67.265, RSMo.

"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. Missouri State High Sch. Activities Assoc.*, 40 F.3d 926, 928 (8th Cir. 1994)). Here, Plaintiffs are likely to succeed on the merits because the Jefferson County Health Department's quarantine order for students is unlawful under § 67.265, RSMo.

Plaintiffs challenge the validity of Jefferson County Health Department's student quarantine requirements for public schools, which were issued on August 11, 2021, and purportedly "updated" on September 9, 2021. *See* Pet. Exs. C, E in Case No. 21JE-CC00682 (the "Challenged Order"). For the reasons stated herein, the Challenged Order is unlawful because it

is a public health "order" within the meaning of § 67.265.1, RSMo, and it automatically expired without being extended within 30 days by simple majority vote of the political subdivision's governing body, as required by § 67.265.1(1), RSMo.

A. The Challenged Order Is a Public Health "Order" Subject to Section 67.265.

Section 67.265.1 defines the "orders" that are subject to its requirements, and it provides: "For purposes of this section, the term **'order'** shall mean [1] a public health order, ordinance, rule, or regulation [2] issued by a political subdivision, including by a health officer, local public health agency, public health authority, or the political subdivision's executive, as such term is defined in section 67.750, [3] in response to an actual or perceived threat to public health for the purpose of preventing the spread of a contagious disease." § 67.265.1, RSMo (bold in original). Under this definition, there are three basic requirements for an "order": [1] it must be a "public health order, ordinance, rule, or regulation," *id.*; [2] it must be "issued by a political subdivision," including by a "local public health agency," *id.*; and (3) it must be issued "in response to an actual or perceived threat to public health for the purpose of preventing the spread of a contagious disease." *Id.* The Challenged Order plainly satisfies all three prongs of this definition.

First, the Challenged Order meets the first prong of this definition because it is both a public health "order" and a public health "rule." *Id.* In interpreting the statute's terms, the Court must rely on the "plain and ordinary meaning" of the statute as "derived from the dictionary." *Cox v. Dir. of Revenue*, 98 S.W.3d 548, 550 (Mo. banc 2003) ("This Court ascertains the legislature's intent by considering the plain and ordinary meaning of the words in the statute. Absent a definition in the statute, the plain and ordinary meaning is derived from the dictionary."); *see also Dickemann v. Costco Wholesale Corp.*, 550 S.W.3d 65, 68 (Mo. banc 2018) ("Absent express definition, statutory language is given its plain and ordinary meaning, as typically found in the

dictionary.") (quoting *State v. Brookside Nursing Ctr., Inc*., 50 S.W.3d 273, 276 (Mo. banc 2001)); *State ex rel. Nixon v. Karpierz*, 105 S.W.3d 487, 490 n.10 (Mo. banc 2003) ("The plain and ordinary meaning of statutory language is generally derived from the dictionary where no definition is provided.").

Here, as set forth in the dictionary, the word "order" means "a rule or regulation made by a competent authority," or "an authoritative mandate usu. from a superior to a subordinate: injunction, instruction." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1588 (2002) ("WEBSTER'S THIRD"). The dictionary defines the word "rule" to mean "a prescribed, suggested, or self-imposed guide for conduct or action: a regulation or principle." *Id.* at 1986. The Health Department's mandatory quarantine policy for schools fits squarely within these dictionary definitions. It purports to be "prescribed, suggested, or self-imposed guide[s] for conduct or action," that purports to be "made by a competent authority," and to provide "instruction[s]" for schools and students. *Id.* at 1588, 1986. Indeed, the Health Department's order makes this clear in its repeated use of "authoritative" language, *id.*. *See, e.g.*, Pet. Ex. E, at 1 (requiring that "prevention strategies are strictly adhered to" in schools, and directing that "it is critical that schools use and layer prevention strategies," including onerous quarantine requirements for unmasked students); Pet. Ex. E, at 17 ("Close contacts who are not fully vaccinated should be referred for COVID-19 testing. Regardless of test result, they should quarantine at home for 14 days after exposure."); *id.* at 18 (providing an exception to these onerous quarantine requirements "for the exclusion of students in the K-12 indoor classroom who are within 3 to 6 feet of an infected student with masking").

Second, the Challenged Order was "issued by a political subdivision … including by a … local public health agency, [or] public health authority." §67.265.1, RSMo. Jefferson County is

a "political subdivision" of the State of Missouri. *See, e.g., Kansas City Chiefs Football Club, Inc. v. Dir. of Revenue*, 602 S.W.3d 812, 814 (Mo. 2020) (noting that a "county" is "a political subdivision of the State"). The Challenged Order was issued by Jefferson County Health Department, which is the local public health agency for Jefferson County. *See* Pet. Ex. E, at 1. It was therefore issued by a "political subdivision, including by a … local public health agency" of the political subdivision. § 67.265.1, RSMo.

Third, the Challenged Order was issued "in response to an actual or perceived threat to public health for the purpose of preventing the spread of a contagious disease." § 67.265.1, RSMo. The Health Department's order rests upon the premise that COVID-19 is a "contagious disease" that presents "an actual or perceived threat to the public health," *id.*, and it was evidently issued "[f]or the purpose of preventing the spread of" COVID-19, which is "a contagious disease." *Id.* Indeed, the whole point of quarantining students is ostensibly to prevent the spread of COVID-19.

For these reasons, the Challenged Order meets the statutory definition of "order" in § 67.265.1, which renders it subject to the other requirements of the statute.

B. The Challenged Order Falls Within Section 67.265.1(1), Because It Was Issued During a Public Health Emergency and Restricts Access to Schools.

The Challenged Order also falls within the plain terms of § 67.265.1(1), RSMo, and thus it automatically expired after 30 days because it was not extended within that time by a vote of the political subdivision's governing body—*i.e.*, Jefferson County Council.

As relevant here, Section 67.265.1(1) provides: "Any order issued during and related to an emergency declared pursuant to chapter 44 that directly or indirectly … places restrictions on … access to any one or more … schools … shall not remain in effect for longer than thirty calendar days in a one hundred eighty-day-period … and shall automatically expire at the end of the thirty

days … unless so authorized by a simple majority vote of the political subdivision's governing body to extend such order or approve a similar order." § 67.265.1(1), RSMo.

Thus, to fall within the ambit of § 67.265.1(1), the public health authority's action must be [1] an "order," that was [2] "issued during and related to an emergency declared pursuant to chapter 44," and it must [3] "directly or indirectly … place[] restrictions on … access to any one or more … schools." § 67.265.1(1), RSMo. Any order that meets these three criteria "shall not remain in effect for longer than thirty calendar days," and "shall automatically expire at the end of the thirty days" unless it is authorized by a simple majority vote the political subdivision's governing body. *Id.* Here, the challenged order readily satisfies all three criteria.

First, the Challenged Order is an "order" under the statute. As noted above, "order" is defined "[f]or purposes of this section" in § 67.265.1. As discussed above, the Challenged Order constitutes an "order" within the meaning of that statutory definition. *See supra*, Part A.

Second, the Challenged Order was "issued during and related to an emergency declared pursuant to chapter 44." § 67.265.1(1), RSMo. The Challenged Order was "issued" on August 11, 2021. *See* Pet. Ex. E. To "issue" means "to cause to appear or become available by officially putting forth or distributing or granting or proclaiming or promulgating: cause to appear through issuance." WEBSTER'S THIRD, at 1201. Thus, Defendants "issued" the order when they first promulgated it or "cause[d]" it "to appear." *Id.* That occurred on August 11, 2021. Pet. Ex. E. On August 11, Governor Parson's Executive Order 20-02 was in effect. Executive Order 20-02 declared a general state of emergency statewide in Missouri due to the COVID-19 pandemic. *See* Executive Order 20-02 (March 13, 2020), *at* https://www.sos.mo.gov/library/reference/orders/2020/eo2. It is indisputable that this was "an emergency declared pursuant to chapter 44." § 67.265.1(1). The Challenged Order was thus

issued "*during* … an emergency declared pursuant to chapter 44," *id.*, because it issued on August 11 when Executive Order 20-02 was in effect. Pet. Ex. E. And the Mask Mandate plainly "related to" that "emergency," because it purports to provide COVID-19 mitigation measures that are intended to allay the effects of the same "emergency declared pursuant to chapter 44" in Executive Order 20-02. Therefore, the Mask Mandate "issued during and related to an emergency declared pursuant to chapter 44" within the statute's unambiguous meaning. § 67.265.1(1).

The fact that JCHD purported to "update" the policy on September 9, *see* Pet. Ex. C, makes no difference, because an "update" is merely a change to a preexisting policy, not an entirely new policy. As noted above, the policy that was "updated" on September 9 was originally "issued" on August 11, when Executive Order 20-02 was in effect. *See* WEBSTER'S THIRD, at 1201 (defining "issue" as "to cause to appear through issuance"). In any event, even if September 9 were the relevant date that the policy "issued"—which it is not—the statutory criterion would still be satisfied. On August 27, 2021, Governor Parson declared a more limited state of emergency related to COVID-19 by issuing Executive Order 21-09. That Executive Order states: "I hereby declare that a state of emergency exists relative to staff shortages in the State's healthcare system and ***the State's recovery efforts from the COVID-19 public health threat***." Executive Order 21-09 (Aug. 27, 2021), *at* https://www.sos.mo.gov/library/reference/orders/2021/eo9 (emphasis added). Reopening schools and returning children to normal in-person learning—and regaining educational ground that was lost during the disruptions of the previous school year—are critical parts of "the State's recovery efforts from the COVID-19 public health threat." *Id.* Therefore, JCHD's quarantine requirements, which purport to demand that schools "strictly adhere[] to" them so that "K-12 schools can safely open for in-person instruction and remain open," Pet. Ex. C, plainly "relate to" the State's "recovery efforts from the COVID-19 public health threat."

Executive Order 22-09. The term "relate to" is a "very broad term," by which quarantine requirements for students "relate to" recovery efforts from the pandemic such as reopening schools. *See, e.g., Goings v. Missouri Dep't of Corr.*, 6 S.W.3d 906, 908 (Mo. 1999) (holding that "related to" is a "very broad term" that is broader than "caused by" or "the result of"); *Mikel v. McGuire*, 264 S.W.3d 689, 692 (Mo. App. 2008) (same).

Third, the order plainly "restricts … access" to schools, by providing that students subject to its quarantine requirements may not enter them. *See* WEBSTER'S THIRD, at 1937 (defining "restrict" as "to set bounds or limits to," as "to check free activity, motion, progress, or departure of"); *id.* at 11 (defining "access" as "permission, liberty, or ability to enter, approach, communicate with, or pass to and from"). A quarantine requirement "set[s] bounds or limits" and "checks free activity" for students seeking "permission, liberty, or ability to enter" schools, by excluding them from school during the required quarantine periods. *Id.* Indeed, the whole point of quarantine requirements is to prevent infected or possibly infected students from having access to schools. *See* Pet. Ex. C, at 17 (requiring students who are "[c]lose contacts" to students who test positive to "quarantine at home for 14 days after exposure"); WEBSTER'S THIRD, at 1859 (defining "quarantine" as "to isolate as a precaution against contagious disease: detain in quarantine"). Thus, it is indisputable that the quarantine order "places restrictions on … access to … schools." § 67.265.1(1), RSMo.

Thus, the Challenged Order is subject § 67.265.1(1), because it was issued during and related to the COVID-19 public health emergency, and it restricts access to schools in Jefferson County. Accordingly, the Challenged Order "shall not remain in effect for longer than thirty calendar days in a one hundred eighty-day-period, including the cumulative duration of similar orders issued concurrently, consecutively, or successively," and it "shall automatically expire at

the end of the thirty days … unless so authorized by a simple majority vote of the political subdivision's governing body to extend such order or approve a similar order." § 67.265.1(1), RSMo. Here, the "the political subdivision's governing body," *i.e.*, the Jefferson County Council, has not voted to "extend such order or approve a similar order." *Id.* Because it has not done so, the order "automatically expired" as a matter of law on September 11, 2021, thirty calendar days after it was first issued, and neither it nor any similar order may be imposed by the political subdivision for the remainder of the 180-day period. *Id.*; *see also* § 67.265.5, RSMo ("No political subdivision of this state shall make or modify any orders that have the effect, directly or indirectly, of a prohibited order under this section."). The Challenged Order is expired, unlawful, and void.

III. The Balancing of Harms and the Public Interest Strongly Favor an Injunction Against Enforcement of an Unlawful Order.

As noted above, the remaining factors equitable factors to consider at the preliminary-injunction stage are: "[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.'" *Gabbert*, 925 S.W.2d at 839. All these factors favor Plaintiffs.

First, "the threat of irreparable harm to the movant absent the injunction," *id.*, is very great. It is black-letter law that the State has a strong interest in ensuring that its statutes are followed and enforced, and suffers irreparable injury when it cannot do so. "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 the State is blocked from implementing its statutes, "the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its

law." *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013); *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). By disregarding the requirements of § 67.265, JCHD is preventing the State from implementing its statutory policies, enacted by overwhelming majorities of its General Assembly. The refusal of the State's political subdivisions to comply with duly enacted state law imposes *per se* injury upon the State, in addition to the injuries alleged by Plaintiffs themselves. *See id.*

In addition, the unlawful quarantine policies impact the personal freedom of thousands of schoolchildren and parents in Jefferson County, and they do so in violation of Missouri law. As the Supreme Court of Missouri recently reaffirmed, "being subject to an 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 quarantine policy—an unconstitutional restriction on personal freedom constitutes *per se* irreparable injury to the parents and schoolchildren of Missouri. *Id.*

By contrast, an injunction that merely requires Jefferson County to comply with § 67.265 will impose no cognizable injury on the County. *See Gabbert*, 925 S.W.2d at 839 (directing the court to balance the irreparable harm to plaintiffs against "the injury that the injunction's issuance would inflict on other interested parties"). Defendants have no valid interest in enforcing any mandate on Missouri citizens that violates duly enacted state law. *See, e.g., 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)). Indeed, for a political subdivision to impose a quarantine policy on its public-school students that violates state law is not just

unlawful—it is unconstitutional, because it exceeds the constitutional authority of the political subdivision. *See State ex rel. Hazelwood Yellow Ribbon Comm. v. Klos*, 35 S.W.3d 457, 469 (Mo. App. 2000). Complying with Missouri's law and Constitution is not an irreparable injury.

Finally, for similar reasons, the public interest strongly favors enjoining Jefferson County to comply with § 67.265. As a duly enacted state statute, § 67.265 "is in itself a declaration of public interest and policy." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937). This point applies with particular force here, because § 67.265 was enacted by nearly unanimous bipartisan majorities in both the Missouri House and the Missouri Senate. This democratic enactment—whose purpose and effect is to promote further democratic engagement and public accountability at the local level—gives the people a more direct say in decisions of political subdivisions that directly impact their lives. The public interest strongly favors such democratic accountability, and it favors enforcing the clear provisions of Missouri law.

CONCLUSION

For the reasons stated, the Attorney General of Missouri, as *amicus curiae*, respectfully requests that this Court grant the Plaintiffs their requested relief of a temporary restraining order and preliminary injunction.

Dated: October 25, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 25, 2021, 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.

/s/ D. John Sauer