**THE CIRCUIT COURT OF JACKSON COUNTY**
**SIXTEENTH JUDICIAL CIRCUIT OF MISSOURI**

| | |
|---|---|
| THE STATE OF MISSOURI ex rel. ERIC S. SCHMITT;<br><br>CASSI FERRIS;<br><br>KRISTIN GRUBBS;<br><br>MORGAN JONES;<br><br>JENNIFER MUMMA; and<br><br>MICHAEL MUMMA;<br><br>*Plaintiffs*,<br><br>v.<br><br>LEE'S SUMMIT R-VII SCHOOL DISTRICT;<br><br>*Defendant*. | No. _____ |

**PETITION**

1. School districts do not have the authority to impose, at their whim, public health orders for their schoolchildren. That is doubly true when the public health order, in this case, facemasks, creates a barrier to education that far outweighs any speculative benefit.

2. Instead, school districts only have the power to issue those health rules that the General Assembly provides them—and the General Assembly did not give school districts the authority to condition in-person attendance on compliance with an arbitrary mask mandate.

3. That makes sense. The theory that mandatory masking in schools prevents the spread of COVID-19 by preventing the transmission of its causative agent, the SARS-CoV-2 virus,

has no empirical or rational basis; and rejects basic principles of sound public health decision-making, medical science, and statistical analysis.

4. Indeed, far from providing any benefit, masking students imposes positive harms—physical, emotional, and developmental—on schoolchildren.

5. Since school districts lack the power to impose mask mandates, like the one at issue here, decisions about masking of children to prevent the spread of COVID-19 are reserved to parents, not to school districts. That follows from the fundamental truth that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Soc'y of the Sisters of the Holy Name of Jesus & Mary*, 268 U.S. 510, 535 (1925).

6. Missouri Attorney General Eric S. Schmitt seeks to protect the welfare of Missouri's children and the liberty and constitutional rights of the people of Missouri.

7. Attorney General Schmitt brings this action to prevent unlawful, unconstitutional, arbitrary, capricious, and unreasonable conduct by the Defendant.

8. Plaintiffs Cassi Ferris, Kristin Grubbs, Morgan Jones, Jennifer Mumma, and Michael Mumma are parents with children who attend schools in Defendant Lee's Summit R-VII School District (the "District"). They bring this action to protect their children against the District's unlawful mask mandate and to vindicate their rights as taxpayers.

## JURISDICTION AND VENUE

9. This Court has jurisdiction under Mo. Const. art V, § 14(a), § 527.010, RSMo, *et seq.*, § 536.150, RSMo, § 536.050, RSMo., and other applicable law.

10. Venue is proper in this Court under §§ 508.010.2(2) and 508.050, RSMo.

## PARTIES

11. Plaintiff State of Missouri is a sovereign State of the United States of America.

12. Eric S. Schmitt is the 43rd Attorney General of the State of Missouri. Attorney General Schmitt is authorized to "institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved." § 27.060, RSMo.

13. Attorney General Schmitt sues to vindicate Missouri's sovereign interest in controlling the exercise of sovereign power over individuals and entities within its borders; Missouri's sovereign interest in ensuring the enforcement of Missouri law within Missouri's borders; and Missouri's quasi-sovereign and *parens patriae* interest in the freedom, health, and physical, psychological, educational, and economic well-being of a significant segment of its populace. This interest includes, but is not limited to, preventing the spread of the COVID-19 virus within the state as well as protecting the health and welfare of the State's residents from arbitrary, capricious, unreasonable, unlawful, and ultimately harmful public health policies.

14. Attorney General Schmitt sues to vindicate Missouri's sovereign interest in ensuring that its political subdivisions do not exercise authority vested in them under state law in a fashion that violates the Missouri Constitution or Missouri law.

15. Attorney General Schmitt sues to vindicate Missouri's interest in ensuring that the children of the State receive an appropriate education.

16. Plaintiffs Cassi Ferris, Kristin Grubbs, Morgan Jones, Jennifer Mumma, and Michael Mumma are parents with children who attend schools in the District. They sue to

vindicate their interests, as parents, in preventing their children from being subject to an unlawful and arbitrary mandate.

17. Together, Cassi Ferris, Kristin Grubbs, Morgan Jones, Jennifer Mumma, Michael Mumma are the "Private Plaintiffs." The Private Plaintiffs, along with the State of Missouri, are the "Plaintiffs."

18. The Private Plaintiffs also sue as taxpayers:

a. Plaintiffs are taxpayers of the district.

b. On information and belief, the District is expending public funds to implement and to enforce the illegal Mask Mandate. This includes, but is not limited to, expending funds to disseminate information about the Mask Mandate, to enforce the Mask Mandate (including by setting up virtual learning to enforce related quarantine rules), and to drum-up public support for the Mask Mandate.

19. Defendant Lee's Summit R-VII School District is responsible for providing a free, public education to the children within its district. It is a public school district and is a political subdivision of the State of Missouri.

## FACTUAL ALLEGATIONS

20. Plaintiffs incorporate the allegations in all preceding paragraphs by reference.

### I. The District's mask mandate

21. On August 5, 2021, the Lee's Summit R-7 School District Board of Education voted unanimously to mandate masks while indoors at all District facilities beginning August 9, 2021. *See* Ex. A, B at 1.

22. On October 21, 2021, the Board of Education voted to "continue the mask mandate" until the November board meeting. *See* Ex. C at 5.

23. On November 18, 2021, the Board of Education voted to "extend the mask mandate" for all students at pre-K and elementary school buildings through December 21, 2021 but allowed masks to be optional at all other District facilities. *See* Ex. D at 4.

24. At those times, a statewide emergency declaration under Chapter 44 was in effect relating to COVID-19 and Missouri's recovery efforts.

25. On January 6, 2022, the Board of Education voted to "reinstate a mask requirement for all district facilities" starting January 7, 2022 and extending through February 3, 2022. *See* Ex. E, F.

26. This mandate is currently in force and is the "Mask Mandate."

27. The Mask Mandate required "universal and correct wearing of masks." *See* Ex. F at 1. On information and belief, there are no or are limited exceptions to that requirement.

28. While the Mask Mandate does not define what constitutes a "mask," it specifically allows students to comply by wearing a cloth, "medical-grade," or "paper" mask. *See* Ex. F at 4, 7.

29. On information and belief, the District does not provide for any exceptions to the Mask Mandate, and the Mask Mandate does not exempt vaccinated or previously infected students;

30. The District also established a set of quarantine and isolation rules. *See* Ex. F at 8.

## II. Public Health Decision-Making

31. Public health decision-making requires considering a number of factors, some of which are quantitative (*e.g.*, disease severity, characteristics of the virus), some of which are qualitative (*e.g.*, a community's trust in public health officials and anticipated reactions), and some that blend these factors.

32. Public health decision-making recognizes that many public health decisions are made in the absence of complete information, and understands that decisions must be continuously updated in light of new information.

33. Public health decision-making understands that public health decisions considers not just the effect of a decision on the transmission of a disease but also the social and economic effects a decision may have on the public at large.

34. In short, rational public health decision-making is a holistic process that requires consideration of innumerable factors, many of which defy ready quantification.

## III. SARS-CoV-2 and COVID-19 characteristics

35. SARS-CoV-2 is a virus that causes COVID-19, which is an influenza-like illness. Like the flu, COVID-19 is a respiratory illness spread primarily through droplets and small, aerosolized particles.

36. COVID-19, as a global pandemic, has affected the entire State of Missouri.

37. The extent of transmission of COVID-19 ebbs and flows based on a number of factors, including seasonality and the presence of new variants of SARS-CoV-2. On information and belief, omicron is the dominant SARS-CoV-2 variant in Missouri.

38. Doctors report that the omicron variant of SARS-CoV-2 appears to be mild and much less virulent than prior variants and the original virus. For example, Dr. Anthony Fauci (director of the National Institute of Allergy and Infectious Diseases) recently commented that "all indications point to a lesser severity of omicron versus delta." 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.

39. Regardless of variant, COVID-19 is not a serious health risk for the vast majority of the population—and especially for children and young adults. Rather, the risk of serious

negative health outcomes from COVID-19 goes up with age. Thus, children—especially healthy children—do not face a significant risk of serious illness or death if they catch COVID-19.

40. It is likely that the vast majority of people in Missouri have some form of immunity to COVID-19 either due to vaccination or prior infection. Current evidence indicates that natural immunity (*i.e.*, immunity from prior infection), is durable and protects against reinfection and severe health outcomes. Current evidence suggests that vaccine-mediated immunity, while inferior to natural immunity, provides protection against severe, negative health outcomes for at least a season.

41. Furthermore, there is no evidence that children drive the spread of COVID-19. Bearing that out is evidence that schools are not sources of COVID-19 transmission/outbreaks in a community, but rather transmission of COVID-19 in school reflects patterns of community transmission.

## IV. Masks fail to provide adequate protection and offer a false sense of security.

42. Doctors appear to agree that it is time to "retire the cloth mask." Former commissioner of the FDA, Dr. Scott Gottlieb, has said, "Cloth masks aren't going to provide a lot of protection, that's the bottom line. This is an airborne illness. We now understand that, and a cloth mask is not going to protect you from a virus that spreads through airborne transmission." Full Transcript: Dr. Scott Gottlieb on 'Face the Nation,' January 2, 2022, CBS NEWS (Jan. 2, 2022), https://cbsn.ws/3558jWB. Indeed even masking advocates admit that "[c]loth masks are little more than facial decorations. There's no place for them in light of Omicron." Kristen Rogers, *Why You Should Upgrade Your Mask As the Omicron Variant Spreads*, CNN HEALTH (Dec. 24, 2021), https://cnn.it/3GL4h3s.

43. That is consistent with the data. Cloth and surgical masks are not effective at preventing the spread of COVID-19. Many studies show no distinguishable difference between

places with mask mandates and those without them. And studies claiming that masks are effective at preventing the spread of COVID-19 are generally of poor quality and are unreliable. Indeed, mask wearing may even be counterproductive in preventing the spread of disease.

44. Furthermore, there are documented harms associated with long-term wearing of masks. Studies, for example, have found that children who wear masks in schools suffer physical discomfort (*e.g.*, headaches), mental and emotional pain (*e.g.*, less happiness or irritability), and are less capable at school. Masks could also impair the educational and emotional development of children.

45. In short, mask mandates—especially for school children—represent a reversal of a long-held consensus on the merits of community masking, and rests on assumptions and premises that reject the fundamental tenets of modern medicine, statistical analysis, and public health decision-making. They do so while failing a cost-benefit analysis and imposing real, tangible harm.

**COUNT ONE – DECLARATION THAT THE MASK MANDATE IS VOID**

46. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

47. The District is a political subdivision within the meaning of § 67.265.1, RSMo.

48. The Mask Mandate, or a substantially similar requirement, has been in place since August 2021 at the very least.

49. At the time the Mask Mandate was issued, there was a statewide emergency declaration in place with respect to COVID-19.

50. The Mask Mandate restricts access to "schools, or other places of public or private gathering or assembly," § 67.265.1(1), RSMo, because it limits access to schools to only masked individuals or to individuals who fall under an exception to the mask requirement.

51. On information and belief, students who refuse to comply with the Mask Mandate will be excluded from school property, face discipline, and may be sent home.

52. On information and belief, students who refuse to comply with the Mask Mandate will not be allowed in school and may be required to use virtual instruction.

53. The Mask Mandate expired when the Board of Education failed to authorize it within a thirty-day period of a prior authorization.

54. For those reasons, and others, the Mask Mandate is a prohibited order. *See* § 67.265.1(1), .5, RSMo.

**COUNT TWO – MASK MANDATE IS UNLAWFUL**

55. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

56. Plaintiffs challenge the validity of the Mask Mandate, and seek a declaration that it is unlawful and *ultra vires*.

57. By law, "[i]t shall be the general duty and responsibility of the department of health and senior services to safeguard the health of the people in the state and all its subdivisions." § 192.020.1, RSMo.

58. DHSS has not delegated, and indeed could not delegate, that authority to school districts.

59. The local health authority has not issued an order requiring schoolchildren to wear masks.

60. The local health authority cannot issue an order requiring schoolchildren to wear masks.

61. Neither the Missouri Constitution nor the General Assembly has granted the School District a general police power to enact law for the public welfare.

62. Neither the General Assembly, DHSS, nor the School Board has delegated to the superintendent a general power to issue public health orders like the Mask Mandate.

63. In fact, Missouri statutes require DHSS to set health policy in schools. This indicates that only DHSS may provide appropriate measures to safeguard the public health. *See* § 167.181, RSMo (DHSS promulgates mandatory vaccination requirements for schoolchildren); § 167.182, RSMo (DHSS develops informational brochure on HPV).

64. Missouri law thus does not authorize Defendants to impose a Mask Mandate.

65. The District does not have authority to impose a Mask Mandate for public health reasons.

66. For those reasons, the Mask Mandate is an unlawful order and Missouri's schoolchildren should not be subject to it.

**COUNT THREE – THE MASK MANDATE IS UNREASONABLE, ARBITRARY, AND CAPRICIOUS**

67. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

68. Plaintiffs challenge the validity of the Mask Mandate, and seek a declaration that that it is unreasonable, arbitrary, and capricious.

69. School Districts are "agencies" within the definition under the Missouri Administrative Procedure Act. *See P.L.S. ex rel. Shelton v. Koster*, 360 S.W.3d 805, 818 (Mo. Ct. App. 2011). School Districts may not exercise their power in an "unreasonable, arbitrary, capricious or unlawful manner." *Magenheim v. Bd. of Educ. of Sch. Dist. of Riverview Gardens*, 347 S.W.2d 409, 417 (Mo. App. 1961).

70. The Mask Mandate requires all schoolchildren (defined as all children who are of the age to attend K-12 school) attending schools in the District to wear a mask with few exceptions when they are at school. That decision is arbitrary and capricious.

71. Government action is arbitrary, capricious, and unreasonable when it is based on *post hoc* rationalization, when it fails to consider an important part of the problem it is addressing, and when it fails to consider less restrictive alternatives before infringing on citizens' liberty. *See, e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905, 1909 (2020); *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015). "[A]n agency which completely fails to consider an important aspect or factor of the issue before it may also be found to have acted arbitrarily and capriciously." *Barry Serv. Agency Co. v. Manning*, 891 S.W.2d 882, 892 (Mo. App. W.D. 1995) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)). In addition, agencies must consider whether there are less restrictive policies that would achieve their goals. *See Regents of the Univ. of Calif.*, 140 S. Ct. at 1912 (quoting *State Farm Mut. Auto.*, 463 U.S. at 51).

72. On information and belief, the District failed to consider fully the potential social and economic consequences of the Mask Mandate, including the effect of the mandate on schools and the community.

73. On information and belief, the District failed to fully consider key characteristics of COVID-19, including severity of disease among different age and risk groups, availability and effectiveness of control measures and treatment options, and the fact that many people have immunity either because of vaccination or prior infection.

74. On information and belief, the District failed to consider the fact that the Omicron variant is less likely to cause severe illness and death.

75. On information and belief, the District failed to grapple with a large swath of relevant science, data, statistics, studies, or alternatives. That includes failing to grapple with the weakness of the evidence supporting community masking as a mitigation measure, and the

significant evidence showing that masking does very little or nothing to prevent the spread of COVID-19.

76. On information and belief, the District failed to consider the harms masking impose on schoolchildren.

77. The factors listed above are not an exhaustive list. Ultimately, the Mask Mandate represents an irrational analysis of the costs and benefits of mandating community masking. For those reasons, and more, the Mask Mandate is unreasonable, arbitrary, and capricious.

**COUNT FOUR – VIOLATION OF MISSOURI CONSTITUTION, ART. IX, § 1(a)**

78. Plaintiffs incorporate by reference the allegations in all preceding paragraphs.

79. Article IX, § 1(a) of the Missouri Constitution provides schoolchildren a right to a free public education.

80. Since the Mask Mandate arbitrarily prohibits schoolchildren from attending class in-person in the District, serves no legitimate public health purpose, and is unlawful, it violates the rights of schoolchildren in the District to a free public education.

81. To the extent the District provides virtual learning, that is no substitute for in-person instruction and cannot remedy the constitutional violation.

**CONCLUSION**

WHEREFORE, Plaintiff respectfully requests that this Court:

a. Declare that the Mask Mandate is unconstitutional, unlawful, and/or *ultra vires*;

b. Declare that the Mask Mandate is arbitrary, capricious, unreasonable, and invalid;

c. Declare that the District's Mask Mandate is a prohibited order under § 67.265, RSMo;

d. Enjoin the District and its officers, employees, and agents from enforcing the Mask Mandate or any similar order that has the effect, directly or indirectly, of implementing the Mask Mandate;

e. Grant relief by injunction, certiorari, mandamus, prohibition, or other appropriate action against the District and its officers, employees, and agents, providing that the Mask Mandate is unlawful, arbitrary, capricious, unreasonable, and invalid;

f. Enter a final judgment in Plaintiff's favor on all Counts in this Petition; and

g. Grant such other and further relief as the Court deems just and proper under the circumstances.

Dated: January 21, 2022

Respectfully submitted,

**ERIC S. SCHMITT**
**Attorney General of Missouri**

*/s/ James S. Atkins*
James S. Atkins, MO Bar #61214
Michael E. Talent, MO Bar #73339
Todd A. Scott, MO Bar #56614
Missouri Attorney General's Office
Post Office Box 899
Jefferson City, MO 65102
Tel: 573-751-7890
Fax: 573-751-0774
Jay.Atkins@ago.mo.gov
*Counsel for Plaintiff State of Missouri*

*/s/ Jennifer M. Cross*

Jennifer M. Cross, MO Bar #56664
2348 S.W. Deer Run Road
Lee's Summit, MO 64082
Tel: 816-536-2097
Email: jencross@att.net
*Counsel for Private Plaintiffs*