

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

E.T., by and through her parents and next  
friends, *et al.*,

*Plaintiffs,*

v.

GOVERNOR GREG ABBOTT, in his  
official capacity as GOVERNOR OF  
TEXAS, *et al.*,

*Defendants.*

Case No. 1:21-cv-00717-LY

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**BRIEF OF *AMICI CURIAE* TEXAS PEDIATRIC SOCIETY AND AMERICAN  
ACADEMY OF PEDIATRICS IN SUPPORT OF PLAINTIFFS' PRETRIAL FILINGS  
AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

### **INTEREST OF *AMICI CURIAE*<sup>1</sup>**

The Texas Pediatric Society, the Texas Chapter of the American Academy of Pediatrics, (“TPS”) is a non-profit educational organization and professional society comprising more than 4,600 members, including pediatricians, residents, and medical students from Texas hospitals, community clinics, school-based health centers, and medical practices. TPS works to ensure that children in Texas are safe and healthy and that its members are well informed about medical research and best practices.

The American Academy of Pediatrics (“AAP”) was founded in 1930 and is a national, not-for-profit professional organization dedicated to furthering the interests of child and adolescent health. The AAP’s membership includes over 67,000 primary care pediatricians, pediatric medical subspecialists, and pediatric surgical specialists. Over the past year and a half, the AAP has devoted substantial resources to researching the scientific literature regarding how to treat COVID-19 and reduce its spread so that the AAP can provide up-to-date, evidence-based guidance for pediatricians and public health officials. This includes, among other things, interim guidance on the use of face masks as an infection control measure and on operating safe schools during the COVID-19 pandemic.

### **INTRODUCTION**

Over the past 18 months, *Amici* have worked ceaselessly to evaluate the dangers of and potential public health measures for reducing the deadly spread of COVID-19. COVID-19 poses grave risks to children, even more so to children with special health needs, and these risks are spreading rapidly with the rise of the Delta variant and the start of the school year. At the same time,

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<sup>1</sup> *Amici* certify that no party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money intended to fund this brief, and no person other than *Amici*, their members, and their counsel contributed money intended to fund this brief.

the AAP strongly recommends that everything possible must be done to keep students in school in-person, something that can be done safely only if all reasonable precautions are taken. The AAP has conducted a comprehensive review of the medical literature to determine what public health measures can effectively reduce the risk that COVID-19 poses to American’s children. That review and the experiences of the front-line pediatric practitioners who make up the TPS and AAP’s membership prove beyond any doubt that universal mask policies in schools significantly reduce the spread of COVID-19 in school populations where many children—including all children under the age of 12—are unvaccinated. Schools that lack such policies experience significantly higher rates of COVID-19 transmission.

*Amici* submit this brief in support of Plaintiffs’ pretrial filings and opposition to the State’s motion to dismiss. This brief provides an overview of the AAP’s recommendations, many of which are listed as trial exhibits, and explains why universal mask policies are so crucial in fighting COVID-19. It also addresses how the Challenged Orders substantially increase the risk of death and serious illness among Texas children and their families, with a particularly severe impact on children with disabilities, and force upon Plaintiffs and others a daily, untenable choice: either send a vulnerable child to a school where they have a high risk of contracting COVID-19, or keep them home from school where they will be denied the social, emotional, and educational development benefits of an in-person education.

## ARGUMENT

### I. Children With Special Health Needs are Especially Vulnerable to COVID-19.

The State effectively argues that an order preventing schools from taking basic COVID-19 precautions either does not pose a non-speculative harm to any child or does not harm Plaintiffs—children under the age of 12 with special health needs—more than other children. *See, e.g.*, Pl. Mot. to Dismiss at 10, 25. The States’ depiction is inaccurate: the risk of children

contracting COVID-19 is serious, and the risks to children with special health needs who contract COVID-19 is even more severe.

The AAP and the Children's Hospital Association have collaborated throughout the pandemic to collect and share all publicly available data from states on COVID-19 cases among children.<sup>2</sup> As of September 23, 2021, 5,725,680 total child COVID-19 cases have been reported in the United States, representing more than 16% of the total U.S. cases.<sup>3</sup> The prevalence of pediatric COVID-19 has skyrocketed since the school year began, with 23% of all child cases since the beginning of the pandemic diagnosed between August 13 and September 23.<sup>4</sup> This surge appears to be due to two principal factors: the resumption of in-person schooling (and particularly schooling in places without masks), and the emergence of the Delta variant, which is more than twice as contagious as previous variants.<sup>5</sup>

As the rate of COVID-19 has soared, so has the number of serious cases; just among the 24 states and 1 city that report child hospitalizations, more than 3,900 children were hospitalized due to COVID-19 between August 13 and September 23, more than 18% of the total child

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<sup>2</sup> See *Children and COVID-19: State-Level Data Report, Summary of Findings*, AAP, <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/children-and-covid-19-state-level-data-report/> (data available as of 9/23/21).

<sup>3</sup> *Id.*

<sup>4</sup> *Children and COVID-19: State Data Report* at Fig. 6, Children's Hosp. Ass'n & Am. Acad. of Pediatrics (Sept. 23, 2021), <https://downloads.aap.org/AAP/PDF/AAP%20and%20CHA%20-%20Children%20and%20COVID-19%20State%20Data%20Report%209.23%20FINAL.pdf>, (updated version of Trial Ex. 318).

<sup>5</sup> See *Delta Variant: What We Know About the Science*, CDC (Aug. 26, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/variants/delta-variant.html>.

hospitalizations to date.<sup>6</sup> Since the beginning of August, more children have died each week than in all but one previous week of the pandemic.<sup>7</sup>

As the hospitalization rate and CDC's position reflect, COVID-19 can cause severe symptoms and potentially fatal outcomes even in children. Among other things, COVID-19 infections can produce multisystem inflammatory syndrome in children (MIS-C), which involves clinically severe levels of fever, inflammation, and dysfunction or shock in multiple organ systems.<sup>8</sup> COVID-19 infection can also lead to many secondary conditions, ranging from subacute to mild to severe. Several studies have shown that long-term symptoms can occur in children and adolescents, even when the initial symptoms are mild.<sup>9</sup> Potential long-term symptoms include chest pain, cough, and exercise-induced dyspnea, or pulmonary emboli; myocarditis (i.e., inflammation of the heart muscle), shortness of breath, arrhythmia, and/or

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<sup>6</sup> See *Children and COVID-19: State Data Report*, *supra* n. 4, at Appx. Tab. 2B (updated version of Trial Ex. 318).

<sup>7</sup> *Id.* at Appx. Tab. 2C. The week ending December 3, 2020 is the only previous week in which as many child deaths were reported as even the *lowest* week since the beginning of August. *Id.* Notably, this was the week after Thanksgiving. This drives home the importance of promptly enjoining the Executive Order, to reduce the rate of COVID-19 in advance of the surge that will likely accompany the upcoming holidays.

<sup>8</sup> See *Multisystem Inflammatory Syndrome in Children (MIS-C) Associated with Coronavirus Disease 19 (COVID-19)*, CDC (May 14, 2020), <https://emergency.cdc.gov/han/2020/han00432.asp>; *Multisystem Inflammatory Syndrome in Children (MIS-C) Interim Guidance*, AAP (last updated Feb. 10, 2021), <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/multisystem-inflammatory-syndrome-in-children-mis-c-interim-guidance/>.

<sup>9</sup> See, e.g., Danilo Buonsenso, et al., *Preliminary evidence on long COVID in children*, *Acta Paediatrica* (Apr. 9, 2021), <https://doi.org/10.1111/apa.15870> (studying 129 children in Italy and reporting that 42.6% experienced at least one symptom more than 60 days after infection); Helen Thomson, *Children with long covid*, 249 *New Scientist* 10 (2021), <https://www.sciencedirect.com/science/article/abs/pii/S0262407921003031?via%3Dihub> (U.K. Office of National Statistics estimate that 12.9% of children 2-11 years of age and 14.5% of children 12-16 years of age experienced symptoms 5 weeks after infection).

fatigue, and heart failure, myocardial infarction, stroke, or sudden cardiac arrest; persistent loss of the sense of smell (anosmia) or taste (ageusia), which can affect the nutritional status and quality of life of children and adolescents and be particularly disruptive to the feeding behavior of very young children.<sup>10</sup> They can also lead to neurodevelopmental impairment, including significant acute injuries such as stroke or encephalitis and subtle but persistent sequelae in cognitive, language, academic, motor, mood, and behavioral domains; cognitive foginess or fatigue; physical fatigue; and mental or behavioral health impacts such as stress and adjustment disorders.<sup>11</sup>

Moreover, the uncontrolled spread of COVID-19 poses an even greater risk for children with special health needs. Children with certain underlying conditions who contract COVID-19 are more likely to experience severe acute biological effects and to require admission to the hospital or intensive care unit.<sup>12</sup> This includes children with, for example, Down syndrome, organ transplants, lung conditions, heart conditions, and weakened immune systems—all conditions suffered by one or more of the Plaintiffs.<sup>13</sup>

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<sup>10</sup> *Post-COVID-19 Conditions in Children and Adolescents*, AAP (last updated July 28, 2021), <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/post-covid-19-conditions-in-children-and-adolescents/>.

<sup>11</sup> *Id.*

<sup>12</sup> *Caring for Children and Youth with Special Health Needs During the COVID-19 Pandemic*, AAP (last updated Sept. 20, 2021), <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/caring-for-children-and-youth-with-special-health-care-needs-during-the-covid-19-pandemic/>, Trial Ex. 317.

<sup>13</sup> *People with Certain Medical Conditions*, CDC, (last updated Aug. 20, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

## II. Overview of the AAP's Research Efforts into School Safety During the Pandemic

One of the AAP's chief functions is to provide evidence-based guidance to America's pediatric professionals and public health officials, thereby helping its members and policymakers improve the health of all children. To do so, the AAP issues Policy Statements that report the most up-to-date, evidence-based expert consensus on key issues of pediatric practice and public health. These Policy Statements are written by recognized pediatrician experts who undertake a comprehensive review of the medical literature and available data on the topic at hand. They are then peer-reviewed by additional experts across the AAP and approved by the AAP's executive staff and board of directors.

Since the spring of 2020, as the COVID-19 pandemic began to sweep across the country, the AAP's top focus has been supporting practicing pediatricians and public health policymakers in treating COVID-19 and reducing its spread, particularly among children. The AAP has issued Interim Guidance Statements on several topics related to COVID-19, including guidance on when and how pediatricians should test patients for COVID-19;<sup>14</sup> on providing clinical care to patients with COVID-19;<sup>15</sup> on treating post-COVID conditions;<sup>16</sup> on how to safely provide routine medical care such as check-ups, screenings, laboratory exams, treatment, and

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<sup>14</sup> *COVID-19 Testing Guidance*, AAP (last updated July 8, 2021), <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-testing-guidance/>.

<sup>15</sup> *COVID-19 Interim Guidance*, AAP (last updated Aug. 2, 2021), <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/>.

<sup>16</sup> *Post-COVID-19 Conditions in Children and Adolescents*, AAP (last updated July 28, 2021), <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/post-covid-19-conditions-in-children-and-adolescents/>.

immunizations during the COVID-19 pandemic;<sup>17</sup> on supporting the emotional and behavioral health needs of children, adolescents, and families during the COVID-19 pandemic;<sup>18</sup> and—most relevant to this case—on the use of face masks as an infection control measure;<sup>19</sup> on operating safe schools during the COVID-19 pandemic that foster the overall health of children, adolescents, educators, staff, and communities;<sup>20</sup> and on caring for youth with special health needs during the COVID-19 pandemic.<sup>21</sup> The AAP has repeatedly reviewed and updated these Interim Guidance Statements to ensure that they reflect the best medical understanding and current scientific evidence regarding COVID-19, including its transmission and health effects.

### **III. Based on Extensive Research, the AAP Strongly Recommends that Schools Maintain Universal Mask Policies in Schools as an Infection Control Measure**

Beginning early in the pandemic, members of the AAP began receiving questions from families and school boards about how in-person education could be conducted safely during the pandemic. As pediatrician organizations, the AAP and TPS recognize and are seriously

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<sup>17</sup> *Guidance on Providing Pediatric Well-Care During COVID-19*, AAP (last updated Aug. 30, 2021), <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/guidance-on-providing-pediatric-well-care-during-covid-19/>.

<sup>18</sup> *Interim Guidance on Supporting the Emotional and Behavioral Health Needs of Children, Adolescents, and Families During the COVID-19 Pandemic*, AAP (last updated July 28, 2021), <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/interim-guidance-on-supporting-the-emotional-and-behavioral-health-needs-of-children-adolescents-and-families-during-the-covid-19-pandemic/>.

<sup>19</sup> *Face Masks*, AAP (last updated Aug. 11, 2021), <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/cloth-face-coverings/>, Trial Ex. 315.

<sup>20</sup> *COVID-19 Guidance for Safe Schools*, AAP (last updated July 18, 2021), <https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>, Trial Ex. 316.

<sup>21</sup> *Caring for Children and Youth with Special Health Needs*, *supra* n. 12, Trial Ex. 317.



concerned about the impact on children of not being able to attend school in person. This can negatively affect children’s cognitive, educational, and social development, as well as children’s short and long-term mood, behavior, and mental health. Children with special needs suffer the additional loss of access to educational support structures, school-based therapies, school meals, and school-based professionals who are often the front-line identifiers of special needs.<sup>22</sup>

Additionally, virtual learning is often more difficult to access for some children with special health care needs.<sup>23</sup> As a result, the AAP decided to develop Interim Guidance for pediatricians and school boards on considerations regarding safe and healthy schooling and recommendations for measures that can decrease the risk and facilitate in-person learning.

Based on the AAP’s expert review of the scientific literature and the guidance outlined by the World Health Organization (“WHO”), United Nations Children’s Fund (“UNICEF”), and Centers for Disease Control and Prevention (“CDC”), along with our members’ collective expertise as pediatricians and researchers, the AAP concluded that “[e]verything possible must be done to keep students in schools in-person.” *COVID-19 Guidance for Safe Schools*, *supra* n. 20. This is because “[s]chools and school-supported programs are fundamental to child and adolescent development and well-being and provide our children and adolescents with academic instruction; social and emotional skills, safety, reliable nutrition, physical/occupational/speech therapy, mental health services, health services, and opportunities for physical activity, among other benefits.” (*Id.*) By contrast, “[r]emote learning highlighted inequities in education, was

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<sup>22</sup> Amy Houtrow et al., *Children with disabilities in the United States and the COVID-19 pandemic*, 13 J. of Pediatric Rehabilitation Medicine, 415, 415-24 (2020), available at <https://content.iospress.com/articles/journal-of-pediatric-rehabilitation-medicine/prm200769>.

<sup>23</sup> *Caring for Children and Youth with Special Health Needs*, *supra* n. 12, Trial Ex. 317.

detrimental to the educational attainment of students of all ages, and exacerbated the mental health crisis among children and adolescents.” (*Id.*)

The initial AAP Interim Guidance, developed in the spring of 2020, was drafted and reviewed by a number of pediatricians with expertise in a wide variety of disciplines. The drafters reviewed dozens of articles and available data to determine whether and how children could safely attend school during the pandemic.

The result was the AAP Interim Guidances on Face Masks,<sup>24</sup> Safe Schools,<sup>25</sup> and Children with Special Health Needs.<sup>26</sup> These statements were first issued in the spring of 2020 and have been continually reviewed and updated since that time. By this point, the AAP’s experts have reviewed hundreds of articles related to the efficacy and safety of masks, as well as their effects (or lack thereof) on the cognitive, social, and psychological development of children. The following discussion is based principally on the current (summer 2021) iterations of these interim guidance documents.

Based on our review of the medical literature, the AAP has determined that “at this point in the pandemic, given what we know now about low rates of in-school transmission *when proper prevention measures are used*, together with the availability of effective vaccines for those age 12 years and up, that the benefits of in-person school outweigh the risks in almost all circumstances.” *COVID-19 Guidance for Safe Schools*, *supra* n. 20 (emphasis added). Among the prevention measures we recommend (such as immunization of all eligible individuals and adequate and timely COVID-19 testing), one of the most important is that “[a]ll students older

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<sup>24</sup> *Face Masks*, *supra* n. 19, Trial Ex. 315.

<sup>25</sup> *COVID-19 Guidance for Safe Schools*, *supra* n. 20, Trial Ex. 316.

<sup>26</sup> *Caring for Children and Youth with Special Health Needs*, *supra* n. 12, Trial Ex. 317.

**than 2 years and all school staff should wear face masks at school (unless medical or developmental conditions prohibit use).” *Id.* (emphasis added).**

The AAP’s strong recommendation of universal masking for students, teachers, and support staff in school has remained consistent from the beginning—because masks are a safe, effective, and critical infection control measure. This conclusion has been consistently reinforced by all relevant data and credible research regarding the transmission and health risks of COVID-19 and the effect of wearing masks on children’s education, health, and development.

After significant analysis, including analysis of the emerging Delta variant, the AAP reaffirmed its recommendation of universal masking in school settings on July 19, 2021. Eight days later, on July 27, 2021, the CDC followed suit, recommending “universal indoor masking for all teachers, staff, students, and visitors to schools, regardless of vaccination status.”<sup>27</sup>

With respect to children with special health needs, the recommendations with respect to masks are the same.<sup>28</sup> Schools should “maintain universal masking” and educate teachers and staff in proper mask use.<sup>29</sup> Universal masking reduces community transmission, thus reducing the likelihood that an infected person will come in contact with a child with special health needs, and reduces the likelihood of transmission to the child if an infected person does come into contact with an especially vulnerable child.<sup>30</sup> These steps should be universal and are separate

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<sup>27</sup> *Interim Public Health Recommendations for Fully Vaccinated People—Summary of Recent Changes*, CDC (July 28, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>.

<sup>28</sup> *Caring for Children and Youth with Special Health Needs*, *supra* n. 12, Trial Ex. 317.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

and apart from any Individual Education Plans that may be necessary for individual children.<sup>31</sup> In other words, masking should apply to everyone at the school, not solely to a particular vulnerable child. (Of course, schools should *also* continue to work with parents as necessary to update Individual Education Plans.)

There are several reasons for our (and the CDC's) recommendation of universal masking in school. The most important, the efficacy of masks in reducing transmission, is discussed in the next section. In addition:

- a. a significant portion of the student population is not eligible for vaccination;
- b. the need to protect unvaccinated students from COVID-19 and to reduce transmission;
- c. the lack of systems to monitor vaccine status among students, teachers and staff;
- d. the potential difficulty in monitoring or enforcing mask policies for those who are not vaccinated; in the absence of schools being able to conduct this monitoring, universal masking is the best and most effective strategy to create consistent messages, expectations, enforcement, and compliance without the added burden of needing to monitor vaccination status;
- e. the possibility of low vaccination uptake within the surrounding school community; and
- f. the continued concerns for variants that are more easily spread among children, adolescents, and adults.

*COVID-19 Guidance for Safe Schools, supra* n. 20, Trial Ex. 316.

#### **IV. In The Absence of Universal Mask Policies at Their Schools, Children Are at Increased Risk of Death and Serious Illness.**

The State argues that Plaintiffs have not alleged an imminent injury traceable to the Challenged Orders because whether plaintiffs will contract COVID-19 will depend not on the Challenged Orders but on other factors. Def. Mot. to Dismiss at 1-2. This is inconsistent with

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<sup>31</sup> *Id.*

AAP’s review of the research. The degree of COVID-19 risk faced by children attending in-person school is, indeed, traceable to whether the child’s school has a universal mask policy.

First, the research literature has confirmed that masks are an effective and safe method to measurably reduce the transmission of COVID-19. As the CDC has explained, masks “reduce the emission of virus-laden droplets . . . , which is especially relevant for asymptomatic or presymptomatic infected wearers who feel well and may be unaware of their infectiousness to others, and who are estimated to account for more than 50% of transmissions.” Cloth masks “not only effectively block most large droplets (i.e., 20-30 microns and larger) but they can also block the exhalation of fine droplets.” As a result, “[m]ulti-layer cloth masks can both block up to 50-70% of these fine droplets and particles,” with “[u]pwards of 80% blockage recorded in some studies. To a slightly lesser extent, masks also “help reduce inhalation of these droplets by the wearer”; multi-layer cloth masks can filter out “nearly 50% of fine particles less than 1 micron.”<sup>32</sup>

Numerous studies have shown that increasing the rate of mask-wearing, including through universal mask policies in particular, significantly reduces the spread of COVID-19.<sup>33</sup> In

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<sup>32</sup> *Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2*, CDC (May 7, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html> (citations omitted).

<sup>33</sup> *See, e.g.*, Jeremy Howard, et al., *An Evidence Review of Face Masks Against COVID-19*, 118 *Proc. of the Nat’l Acad. of Servs.* e2014564118 (Jan. 26, 2021), <https://www.pnas.org/content/118/4/e2014564118>; John T. Brooks & Jay C. Butler, *Effectiveness of Mask Wearing to Control Community Spread of SARS-CoV-2*, 325 *J. of Am. Med. Ass’n* 998 (Feb. 10, 2021), <https://jamanetwork.com/journals/jama/fullarticle/2776536>; Heesoo Joo, et al., *Decline in COVID-19 Hospitalization Growth Rates Associated with Statewide Mask Mandates—10 States, March–October 2020*, 70 *Morbidity & Mortality Weekly Rep.* 212 (Feb. 12, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7006e2.htm>; Derek K. Chu, et al., *Physical Distancing, Face Masks, and Eye Protection to Prevent Person-to-Person Transmission of SARS-CoV-2 and COVID-19: A Systematic Review and Meta-Analysis*, 395 *Lancet* 1973 (June 1, 2020), [12](https://www.thelancet.com/journals/lancet/article/PIIS0140-</a></p>
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particular, studies have shown that masking and similar mitigation measures can limit transmission in schools.<sup>34</sup> And just this past Friday, the CDC released three new studies conducted during this school year, all of which found that “schools without a universal masking policy in place were more likely to have COVID-19 outbreaks.”<sup>35</sup> The CDC found that pediatric

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[6736\(20\)31142-9/fulltext](https://pubmed.ncbi.nlm.nih.gov/33124541/); Christopher T. Leffler, et al., *Association of Country-wide Coronavirus Mortality with Demographics, Testing, Lockdowns, and Public Wearing of Masks*, 103 Am. J. Tropical Med. Hygiene 2400 (Oct. 26, 2020), <https://pubmed.ncbi.nlm.nih.gov/33124541/>; Miriam E. Van Dyke, et al., *Trends in County-Level COVID-19 Incidence in Counties With and Without a Mask Mandate—Kansas, June 1-August 23, 2020*, 69 Morbidity & Mortality Weekly Rep. 1777 (Nov. 27, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6947e2.htm>; Wei Lyu & George L. Wehby, *Community Use of Face Masks and COVID-19: Evidence from a Natural Experiment of State Mandates in the US*, 39 Health Aff. 1419 (June 16, 2020), <https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00818>.

<sup>34</sup> See, e.g., Patrick Dawson, et al., *Pilot Investigation of SARS-CoV-2 Secondary Transmission in Kindergarten Through Grade 12 Schools Implementing Mitigation Strategies—St. Louis County and City of Springfield, Missouri, December 2020*, 70 Morbidity & Mortality Weekly Rep. 449 (Mar. 26, 2021), [https://www.cdc.gov/mmwr/volumes/70/wr/mm7012e4.htm?s\\_cid=mm7012e4\\_w](https://www.cdc.gov/mmwr/volumes/70/wr/mm7012e4.htm?s_cid=mm7012e4_w); Darria L. Gillespie, et al., *The Experience of 2 Independent Schools With In-Person Learning During the COVID-19 Pandemic*, 91 J. Sch. Health 347 (Mar. 25, 2021), <https://onlinelibrary.wiley.com/doi/10.1111/josh.13008>; Rebecca B. Hershov, et al., *Low SARS-CoV-2 Transmission in Elementary Schools - Salt Lake County, Utah, December 3, 2020-January 31, 2021*, 70 Morbidity & Mortality Weekly Rep. 442 (Mar. 26, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7012e3.htm>; Amy Falk, et al., *COVID-19 Cases and Transmission in 17 K-12 Schools - Wood County, Wisconsin, August 31-November 29, 2020*, 70 Morbidity & Mortality Weekly Rep. 136 (Jan. 29, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7004e3.htm>; Fiona Russell et al., *COVID-19 in Victorian Schools: An Analysis of Child-Care and School Outbreak Data and Evidence-Based Recommendations for Opening Schools and Keeping Them Open*, Murdoch Children’s Rsch. Inst. & The Univ. of Melb. (Nov. 9, 2020), available at [https://www.mcri.edu.au/sites/default/files/media/documents/covid-19\\_in\\_victorian\\_schools\\_report.pdf](https://www.mcri.edu.au/sites/default/files/media/documents/covid-19_in_victorian_schools_report.pdf).

<sup>35</sup> *Studies Show More COVID-19 Cases in Areas Without School Masking Policies*, CDC (Sept. 24, 2021), <https://www.cdc.gov/media/releases/2021/p0924-school-masking.html>; see Megan Jehn, et al., *Association Between K–12 School Mask Policies and School-Associated COVID-19 Outbreaks—Maricopa and Pima Counties, Arizona, July–August 2021*, 70 Morbidity & Mortality Weekly Rep. (Early Release) (Sept. 24, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7039e1-H.pdf>; Samantha E. Budzyn, et al.,

COVID-19 cases increase *twice* as quickly in schools lacking universal mask policies.<sup>36</sup>

Notably, studies suggest that there is no substitute for universal masking requirements: while studies have found *universal masking requirements* effective at reducing transmission, as discussed above, mask *recommendations* have proven far less effective (if effective at all).<sup>37</sup> As the ABC Science Collaborative, a 13-state initiative coordinated by the Duke Clinical Research Institute at the Duke University School of Medicine, summed it up, “[p]roper masking is the most effective mitigation strategy to prevent COVID-19 transmission in schools when vaccination is unavailable or there are insufficient levels of vaccination among students and staff.”<sup>38</sup>

**V. The Challenged Orders Increase Risks to Plaintiffs and Effectively Deny Plaintiffs a Public Education.**

The gist of the State’s theory is that the State bears no responsibility for the risks that Plaintiffs face and have done nothing to deny Plaintiffs a public education. According to the

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*Pediatric COVID-19 Cases in Counties With and Without School Mask Requirements—United States, July 1–September 4, 2021*, 70 Morbidity & Mortality Weekly Rep. (Early Release) (Sept. 24, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7039e3-H.pdf>; Sharyn E. Parks, et al., *COVID-19–Related School Closures and Learning Modality Changes—United States, August 1–September 17, 2021*, 70 Morbidity & Mortality Weekly Rep. (Early Release) (Sept. 24, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7039e2-H.pdf>.

<sup>36</sup> Press Release, *Studies Show More COVID-19 Cases in Areas Without School Masking Policies*, CDC (Sept. 24, 2021), <https://www.cdc.gov/media/releases/2021/p0924-school-masking.html>.

<sup>37</sup> See Henning Bundgaard, et al., *Effectiveness of Adding a Mask Recommendation to Other Public Health Measures to Prevent SARS-CoV-2 Infection in Danish Mask Wearers*, *Annals of Internal Med.* (Nov. 18, 2020), <https://www.acpjournals.org/doi/pdf/10.7326/M20-6817>.

<sup>38</sup> ABC Science Collaborative, *The ABCs of North Carolina’s Plan*, <https://abcsciencecollaborative.org/the-abc-of-north-carolinas-plan-a/> (last visited Sept. 1, 2021); see also ABC Science Collaborative, *Final Report for NC School Districts and Charters in Plan A*, at 3 (June 30, 2021), available at <https://abcsciencecollaborative.org/wp-content/uploads/2021/06/ABCs-Final-Report-June-2021.06-esig-DB-KZ-6-29-21.pdf>.

State, all children are at risk of COVID-19 anyway, other factors may cause Plaintiffs to get COVID-19, and Plaintiffs may continue to attend school despite their increased risk of COVID-19 and the Challenged Orders. *See* Def. Mot. to Dismiss at 10-12, 24-25. This theory overlooks the State’s role here: the whole purpose of the Challenged Orders is to prevent school districts from imposing precisely the kind of universal masking policy that will reduce the risks to Plaintiffs so that they may *safely* obtain an in-person education.

By barring schools from imposing universal mask policies—through orders that both authorize and threaten enforcement actions against public officials that impose such policies—the Challenged Orders force upon parents an untenable choice. They can either send children, including especially medically vulnerable children such as Plaintiffs, to school where they face grave risks of contracting COVID-19 or keep children home, where they will not have access to an in-person education. For medically vulnerable children who have an increased risk of severe complications from COVID-19, barring schools from imposing the precise kind of masking policy shown to reduce their risk of contracting COVID-19 *is* a denial of safe access to in-person school and a failure to provide these children reasonable accommodations under the Americans with Disabilities Act and the Rehabilitation Act.

Indeed, other courts have found that the connection between masking and educational access so plain that universal masking policies may be *required* under the federal Americans with Disabilities Act and Rehabilitation Act. *See, e.g., S.B. v. Lee*, No. 21-CV-00317, 2021 WL 4346232 (E.D. Tenn. Sept. 24, 2021). Courts have recognized that indoor mask-wearing is “*the* most important of the CDC’s guidelines,” and “the primary way to mitigate the spread of COVID-19.” *Id.* at \*15 (internal quotation omitted). Even before the latest CDC studies, “the evidence show[ed] that the absence of a mask mandate is fueling infections . . . with frightening



celerity.” *Id.* at \*16. For this reason, evidence of a school board’s “failure to provide the reasonable accommodation that Plaintiffs request—a mask mandate—is by itself evidence of disability discrimination” that causes irreparable harm to children with special health needs. *Id.* at \*23, \*26.

### CONCLUSION

For these reasons and those stated in Plaintiffs’ filings, the public interest would be best served by enjoining the Challenged Orders.

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Respectfully submitted,

*s/ Jim Dunnam*

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**CERTIFICATE OF SERVICE**

I certify that on September 29, 2021, the above brief was filed using the court's CM/ECF system, which will notify all registered counsel.

Dated: September 29, 2021

Respectfully submitted,

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