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**pro hac vice application forthcoming*

THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

CONCERNED COALITION, a Utah 501(c)(4) Not for Profit Corporation; A.B. as general guardian on behalf of E.L., a minor; A.W. as general guardian on behalf of E.W., a minor; H.N. and D.N. as general guardians on behalf of L.N., a minor; J.P. as general guardian on behalf of R.P. and S.P., minor children; L.H. as general guardian on behalf of C.H. and T.H., minor children; N.J. and S.J. as general guardian on behalf of C.J. and A.J., minor children; S.S. as general guardian on behalf of D.S. and T.S., minor children; K.W. as general guardian on behalf of O.W., a minor; and C.P., and C.P, as general guardians on behalf of minor children M.P., L.P., and D.P.,

Plaintiffs,

v.

SPENCER J. COX, in his official capacity as GOVERNOR OF UTAH; and SALT LAKE COUNTY,

Defendants.

BRIEF OF *AMICI CURIAE* UTAH CHAPTER OF AMERICAN ACADEMY OF PEDIATRICS AND AMERICAN ACADEMY OF PEDIATRICS IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Case No. 210904453
Honorable Vernice Trease

INTEREST OF *AMICI CURIAE*[1]

The Utah Chapter of the American Academy of Pediatrics, ("UT AAP") is a non-profit educational organization and professional society comprising more than 700 members, including pediatricians, residents, and medical students from Utah hospitals, community clinics, and school-based health centers. UT AAP works to support the optimal health of children by addressing the needs of children, their families, their communities, and their health care providers.

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

The public interest is a paramount consideration in adjudicating Plaintiffs' motion for a preliminary injunction. As the U.S. Supreme Court has explained, "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."

[1] *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.

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Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008); *see also Hunsaker v. Kersh*, 1999 UT 106, ¶ 7 (1999) (equitable factors include risk of irreparable injury absent the injunction, balance of equities, and public interest). Here the public interest and balance of equities weigh strongly in favor of an injunction barring enforcement of H.B. 1007, which blocks schools from implementing universal mask policies as necessary to protect their students and staff from COVID-19. H.B. 1007, 64th Leg., Special Sess. (Utah 2021). Universal mask policies substantially reduce the risk of death and serious illness among Utah's school-age population and their families, and in particular among children with medical conditions such as Plaintiffs. H.B. 1007 puts Plaintiffs and all other parents to an untenable choice: either send children to schools where they have a high risk of contracting COVID-19, or keep them home from school with the attendant harm to their social, emotional, and educational development.

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. This comprehensive review and the experiences of the front-line pediatric practitioners who make up the UT AAP and AAP's membership prove two relevant facts beyond any doubt: universal mask policies in schools significantly reduce the spread of COVID-19 and protect all children, particularly the medically vulnerable; and remote or virtual learning negatively impacts children compared to in-person learning, particularly for children with disabilities. This brief provides an overview of the literature the AAP has reviewed, explains why universal mask policies are so crucial in fighting COVID-19, and details the harms that children suffer from being unnecessarily forced into remote or virtual schooling.

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ARGUMENT

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

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.[2] As of September 30, 2021, 5,899,148 total child COVID-19 cases have been reported in the United States, representing more than 16% of the total U.S. cases.[3] Utah alone has reported 61,596 child cases of COVID-19.[4] The prevalence of pediatric COVID-19 has skyrocketed since the school year began, with 27% of all child cases since the beginning of the pandemic diagnosed between August 13 and September 30.[5] 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.[6] While the overall national rate has declined slightly in the past few weeks as more schools have begun taking recommended precautions, the number of weekly cases among children remains higher than all but three weeks prior to the start of the school year.[7]

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[2] *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 9/30/21).

[3] *Id.*

[4] *Children and COVID-19: State Data Report* at Tab. 3B, Children's Hosp. Ass'n & Am. Acad. of Pediatrics (Sept. 30, 2021), https://downloads.aap.org/AAP/PDF/AAP%20and%20CHA%20-%20Children%20and%20COVID-19%20State%20Data%20Report%209.30%20FINAL.pdf.

[5] *Id*. at Fig. 6.

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

[7] *Children and COVID-19: State Data Report*, *supra* n. 4, at Fig. 6.

Indeed, as shown in a study recently reported by the CDC, schools that lack universal mask policies are 3.5 times more likely to experience outbreaks of COVID-19.[8]

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 4,500 children were hospitalized due to COVID-19 between August 13 and September 30, more than 20% of the total child hospitalizations to date.[9] Since the beginning of August, more children have died each week than in all but one previous week of the pandemic.[10]

As the hospitalization rate reflects, 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.[11] 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

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[8] 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.

[9] *Id*. at Appx. Tab. 2B.

[10] *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.

[11] *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/.

adolescents, even when the initial symptoms are mild.[12] 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 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.[13] 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 fogginess or fatigue; physical fatigue; and mental or behavioral health impacts such as stress and adjustment disorders.[14]

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.[15] This includes children with, for example, Down syndrome, lung

[12] *See, e.g.*, Danilo Buonsenso, et al., *Preliminary evidence on long COVID in children*, Acta Paediatrica (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).

[13] *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/.

[14] *Id*.

[15] *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/.

conditions, heart conditions, and weakened immune systems—all conditions suffered by one or more of the Plaintiffs.[16]

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;[17] on providing clinical care to patients with COVID-19;[18] on treating post-COVID conditions;[19] on how to safely provide

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[16] *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.

[17] *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/.

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

[19] *Post-COVID-19 Conditions in Children and Adolescents*, *supra* n. 13.

routine medical care such as check-ups, screenings, laboratory exams, treatment, and immunizations during the COVID-19 pandemic;[20] on supporting the emotional and behavioral health needs of children, adolescents, and families during the COVID-19 pandemic;[21] and—most relevant to this case—on the use of face masks as an infection control measure;[22] on operating safe schools during the COVID-19 pandemic that foster the overall health of children, adolescents, educators, staff, and communities[23]; and on caring for youth with special health needs during the COVID-19 pandemic.[24] 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. The Importance of In-Person Learning and the Harm of Remote Education

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 UT AAP recognize and are seriously concerned about the impact on children of being away from in-person. Extensive literature has shown that this can negatively affect children's cognitive, educational, and social development,

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[20] *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/.

[21] *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/.

[22] *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/.

[23] *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/.

[24] *Caring for Children and Youth with Special Health Needs*, *supra* n. 15.

as well as children's short and long-term mood, behavior, and mental health.[25] 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.[26] At the same time, as noted above, COVID-19 poses grave risks for children. 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 this 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

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[25] *See, e.g.*, Jorge V. Verlenden, et al., *Association of Children's Mode of School Instruction with Child and Parent Experiences and Well-Being During the COVID-19 Pandemic—COVID Experiences Survey, United States, October 8–November 13, 2020*, 70 Morbidity & Mortality Weekly Rep. 369 (2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7011a1.htm?s_cid=mm7011a1_w; Dimitri A. Christakis, et al., *Estimation of U.S. Children's Educational Attainment and Years of Life Lost Associated with Primary School Closures During the Coronavirus Disease 2019 Pandemic*, 3 J. Am. Med. Ass'n Network Open e2028786 (2020), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2772834; Meira Levinson, et al., *Reopening Primary Schools During the Pandemic*, 383 N. Engl. J. Med. 981 (2020), https://www.nejm.org/doi/full/10.1056/NEJMms2024920; Megan Kuhfeld, et al., *Projecting the Potential Impact of COVID-19 School Closures on Academic Achievement*, 49 Educ. Researcher 549 (2020), https://journals.sagepub.com/doi/full/10.3102/0013189X20965918; Emma Dorn, et al., *COVID-19 and Student Learning in the United States: The Hurt Could Last a Lifetime*, McKinsey & Co. (June 1, 2020), https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime.

[26] Ramkumar Aishworiya & Ying Qi Kang, *Including Children with Developmental Disabilities in the Equation During this COVID-19 Pandemic*, 51 J. of Autism & Dev. Disorders 2155 (2021), https://link.springer.com/article/10.1007%2Fs10803-020-04670-6; Amy Houtrow, et al., *Children with disabilities in the United States and the COVID-19 pandemic*, 13 J. of Pediatric Rehabilitation Med., 415, 415-24 (2020), *available at* https://content.iospress.com/articles/journal-of-pediatric-rehabilitation-medicine/prm200769.

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. 23. 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 detrimental to the educational attainment of students of all ages, and exacerbated the mental health crisis among children and adolescents." *Id.* This is especially true for students with disabilities; "[t]he impact of loss of instructional time and related services, including mental health services, as well as occupational, physical, and speech/language therapy during the period of school closures and remote learning is significant for students with disabilities." *Id.*

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The State's argument that Plaintiffs are not harmed because distance learning options are available, State's Br. at 22-25, is thus incorrect. Losing the opportunity to *safely* attend school in person is an unmistakable injury, proven by a year of nationwide experience.

IV. Based on Extensive Research, the AAP Strongly Recommends that Schools Maintain Universal Mask Policies During the COVID-19 Pandemic.

Because of the importance of in-person learning, the AAP researched and drafted its Interim Guidances on Face Masks,[27] Safe Schools,[28] and Children with Special Health Needs.[29] The initial AAP Interim Guidances, developed in the spring of 2020, were drafted and reviewed by a number of pediatricians with expertise in a wide variety of disciplines. The drafters

[27] *Face Masks*, *supra* n. 22.
[28] *COVID-19 Guidance for Safe Schools*, *supra* n. 23.
[29] *Caring for Children and Youth with Special Health Needs*, *supra* n. 15.

reviewed dozens of articles and available data to determine whether and how children could safely attend school during the pandemic. These statements have been continually reviewed and updated since they were first issued. 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. 23 (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 than 2 years and all school staff should wear face masks at school (unless medical or developmental conditions prohibit use)**." *Id.* (emphasis added).

Although AAP has modified other recommendations where indicated by new research or the changing nature of the pandemic, 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."[30]

With respect to children with special health needs, the mask recommendations are the same.[31] Schools should "maintain universal masking" and educate teachers and staff in proper mask use.[32] 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.[33] These steps should be universal and are separate and apart from any Individual Education Plans that may be necessary for individual children.[34] 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, including:

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;

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[30] *Guidance for Fully Vaccinated People—Summary of Recent Changes*, CDC (July 28, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html.
[31] *Caring for Children and Youth with Special Health Needs*, *supra* n. 15.
[32] *Id.*
[33] *Id.*
[34] *Id.*

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. 23.

Most importantly, the research literature reviewed by the AAP has confirmed that masks are an effective 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."[35]

[35] *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).

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.[36] In particular, studies have shown that masking and similar mitigation measures can limit transmission in schools.[37] And just recently, the CDC released three new studies conducted

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[36] *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 (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 (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 (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 (2020), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31142-9/fulltext; 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 (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 (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 (2020), https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00818.

[37] *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 Springield, Missouri, December 2020*, 70 Morbidity & Mortality Weekly Rep. 449 (2021), 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 (2021), https://onlinelibrary.wiley.com/doi/10.1111/josh.13008; Rebecca B. Hershow, 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 (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 (2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7004e3.htm; Fiona Russell et al., *COVID-19 in*

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."[38] The CDC found that pediatric COVID-19 cases increase *twice* as quickly in schools lacking universal mask policies.[39] 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."[40]

Indeed, masking is so effective that courts have found that it may be *required* in schools under the federal Americans with Disabilities Act and Rehabilitation Act. *See, e.g.*, *S.B. v. Lee*,

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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. (2020), *available at* https://www.mcri.edu.au/sites/default/files/media/documents/covid-19_in_victorian_schools_report.pdf.

[38] *Studies Show More COVID-19 Cases in Areas Without School Masking Policies*, *supra* n. 8; *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. 1372 (2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7039e1.htm; Samantha E. Budzyn, et al., *Pediatric COVID-19 Cases in Counties With and Without School Mask Requirements—United States, July 1–September 4, 2021*, 70 Morbidity & Mortality Weekly Rep. 1377 (2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7039e3.htm; 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. 1374 (2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7039e2.htm.

[39] *Studies Show More COVID-19 Cases in Areas Without School Masking Policies*, *supra* n. 8.

[40] ABC Science Collaborative, *The ABCs of North Carolina's Plan*, https://abcsciencecollaborative.org/the-abcs-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 (emphasis added).

No. 21-CV-00317, 2021 WL 4346232 (E.D. Tenn. Sept. 24, 2021); *see also Disability Rights South Carolina v. McMaster*, No. 21-cv-02728, Doc. 80 (D. S.C. Sept. 28, 2021) (enjoining state law barring school mask policies); *Arizona Sch. Bd. Ass'n v. Arizona*, No. CV2021012741, Doc. Code 926 (Super. Ct. of Ariz. Sept. 22, 2021) (same); *G.S. v. Lee*, No. 21-cv-02552, 2021 WL 4268285 (W.D. Tenn. Sept. 17, 2021) (enjoining state law limiting school mask policies). 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." *S.B.*, 2021 WL 4346232 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.

V. Enjoining H.B. 1007 Is in the Public Interest.

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H.B. 1007 removes school boards' ability to take basic, widely recommended precautions recommended by the AAP and the CDC. In the face of the grave risks to children—and the straightforward steps that H.B. 1007 blocks school officials from taking—the public interest favors a preliminary injunction.

The State attempts to justify H.B. 1007 by reference to the "liberty of all students" and the alleged harms of mask policies, including and risks that mask policies may depress attendance, contribute to mental health issues, or interfere with learning and socialization. State Br. at 23. Student liberty does not justify allowing some students to expose others—and in particular the medically vulnerable such as Plaintiffs—to a serious and potentially deadly illness, any more than it justifies allowing students to engage in any other behavior that puts people at grave risk. *Cf. Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) ("The right to practice religion freely does not include the liberty to expose the community or the child to

communicable disease or the latter to ill health or death.”). As for the remaining supposed harms, they are not supported by science:

Mental health, anxiety, and risk of non-attendance: Mask-wearing is not linked to emotional or psychological harm, particularly when caregivers promote positive associations around mask-wearing.[41] While children can develop secondary anxieties about wearing a mask, this is no different from the possibility of developing secondary anxieties about eating, attending school, or any other activity. The risk of developing secondary anxiety, disordered behavior, or refusal to attend school related to masking may be especially high when parents or community members perpetuate false claims that masks are harmful. But there is nothing intrinsic about mask-wearing that makes it particularly harmful, whether physically, socially, or emotionally.

Cognitive development, learning, and socialization: There is currently “no known evidence that use of face masks interferes with speech or language development.”[42] Not being able to see part of a person’s face is not a significant impediment to social and speech development—as the experience of children who are blind from birth confirms. “[V]isually

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[41] *Interim Guidance on Supporting the Emotional and Behavioral Health Needs of Children, Adolescents, and Families During the COVID-19 Pandemic,* supra n. 21; *Face Masks*, *supra* n. 22 (providing recommendations for “help[ing] my child get used to wearing a mask”); *Supporting your child’s mental health during COVID-19 school returns*, UNICEF (last updated Oct. 1, 2021), https://www.unicef.org/coronavirus/supporting-your-childs-mental-health-during-covid-19-school-return (“Approach this conversation with empathy, saying that you know she is feeling anxious about coronavirus, but that it’s healthy to talk about our worries and emotions. Children may also get upset or frustrated if they are finding it hard to wear masks, especially when running or playing. You can reassure your children that lots of adults are working hard to help keep your family safe, but emphasize that it’s important we all follow the recommended measures to take care of more vulnerable members of our community.”).

[42] *Do Masks Delay Speech and Language Development?*, AAP (last updated Aug. 26, 2021), https://healthychildren.org/English/health-issues/conditions/COVID-19/Pages/Do-face-masks-interfere-with-language-development.aspx.

impaired children develop speech and language skills at the same rate as their peers."[43] Indeed, being unable to see speakers' mouths for a portion of the day may help children use other clues to understand and learn language and non-verbal communication, such as gestures, changes in tone of voice, and the like.[44] Crucially, the AAP does not recommend that children wear masks 24 hours a day, or that their parents do so. In the home, children's experiences will presumably be largely or entirely maskless, providing ample opportunity for interacting with people without masks. Some children with preexisting developmental disabilities may have difficulty wearing masks. In many cases, this can be overcome with coaching,[45] although in some cases there could be particular aspects of a child's developmental needs that counsel against using masks in certain situations. Here again, the AAP's guidance recommends allowing for accommodations when necessary.[46]

In sum, while fears about mask wearing are understandable, universal mask policies are the most effective and safe way to reduce the risk that children, including Plaintiffs, will acquire

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[43] *Id.*

[44] *Id.*; *see also* Ashley L. Ruba & Seth D. Pollak, *Children's emotion inferences from masked faces: Implications for social interactions during COVID-19*, PLoS One (2020), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0243708 (finding that "while there may be some challenges for children incurred by others wearing masks, in combination with other contextual cues, masks are unlikely to dramatically impair children's social interactions in their everyday lives").

[45] *See, e.g.*, Maithri Sivaraman, et al., *Telehealth mask wearing training for children with autism during the COVID-19 pandemic*, 54 J. Applied Behav. Analysis 70 (2020), https://pubmed.ncbi.nlm.nih.gov/33241588/; Madelynn A. Lillie, et al., *Increasing passive compliance to wearing a facemask in children with autism spectrum disorder*, 54 J. Applied Behav. Analysis 582 (2021), https://pubmed.ncbi.nlm.nih.gov/33740281/; Mary Halbur, et al., *Tolerance of face coverings for children with autism spectrum disorder*, 54 J. Applied Behav. Analysis 600 (2021), https://pubmed.ncbi.nlm.nih.gov/33772777/.

[46] *See* Face Masks, *supra* n. 22.

a grave and dangerous illness at school. H.B. 1007 bans schools from implementing such policies. The balance of equities thus weighs heavily in favor of the requested injunction.

CONCLUSION

For these reasons and those stated in Plaintiffs' filings, the public interest would be served by enjoining H.B. 1007.

DATED this 6th day of October, 2021.

ZIMMERMAN BOOHER

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**Pro hac vice* motion forthcoming

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