DAVID N. WOLF (6688)
LANCE SORENSON (10684)
JEFFREY B. TEICHERT (7000)
Assistant Utah Attorneys General
OFFICE OF THE UTAH ATTORNEY GENERAL
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (385) 910-4521
Email: jeffteichert@agutah.gov
Counsel for Defendant Governor Spencer J. Cox

This motion requires you to respond. Please see the Notice to Responding Party.

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR 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.

GOVERNOR SPENCER J. COX'S MOTION TO DISMISS

Case No. 210904453

Honorable Vernice Trease

INTRODUCTION

The Court should dismiss Plaintiffs' claims because (1) the political question doctrine advises against the Court creating disease prevention policy; (2) Plaintiffs lack standing to defend the State School Board's authority; (3) Plaintiffs' claims are moot because the requested

relief would not result in a mask mandate and a readily available, highly effective vaccine renders the mandate unnecessary; and (4) Plaintiffs have constitutionally sufficient access to education without a mask mandate.

Plaintiffs seek an order from this Court striking down Utah Code §§ 26A-1-114(7)(d), (9)(a)(iii), and 53G-9-210(5) as unconstitutional and ask for injunctive relief requiring Salt Lake County to rescind Resolution 5888, terminating Public Health Order 2021-2. (Second Amended Complaint ¶¶ 109-16.)

In support of their claims, Plaintiffs contend that requiring schools to adopt a universal mask mandate creates a safer environment for students which, in turn, allows at-risk special needs students to return to in-person learning. But this case is not about the best masking or educational policies for Utah schools. Rather, this case is about who is empowered, in our constitutional system, to determine mask and educational policies for schools during a pandemic, and whether those who are authorized to set policy followed Utah's Constitution and statutes. The answers to those questions are clear: The Legislature, in whom constitutional authority resides to set both public health and education policy, may lawfully delegate the power to issue school masking orders to local health departments with oversight from local county councils.

FACTS

Plaintiffs collectively brought this action on behalf of 15 children whom they claim are uniquely vulnerable to Covid-19 because of disabilities. However, three of these children, E.L., S.P., and T.S., are not of age to be in kindergarten, (Second Amended Complaint §§ 2, 5-6), and another three, T.H., M.P., L.P., have no disabilities or special vulnerability to Covid-19. Children below the level of kindergarten were not included in the original public health order mandating masks in public schools. *Id.* § 34. S.P. is below kindergarten age and has an expressive language delay; and Plaintiffs do not assert that S.P. has any particular vulnerability to Covid-19. *Id.* § 5.

The remaining nine children are ages 5-11, *Id.* §§ 2-10, and are now eligible for vaccination. (The Governor asks the Court to take judicial notice of the widely known fact that the Center for Disease Control ("CDC") has approved a highly effective Covid-19 vaccine for children ages 5-12.)

On August 11, 2021, the Salt Lake County Department of Health issued Public Health Order 2021-2 ("Health Order"), imposing mandatory face coverings in K-6 public schools in Salt Lake County. *Id.* §§ 33-34. On August 12, 2021, exercising its authority under Utah Code §§ 26A-1-114(7)(d) and (9)(a)(iii), the Salt Lake County Council terminated the Health Order. *Id.* (Second Exhibit, Salt Lake County Council Resolution No. 5888). There is no assertion that the Health Department would re-issue any masking order under current circumstances.

LEGAL STANDARD

The Governor seeks dismissal of Plaintiffs' claims pursuant to Utah R. Civ. P. 12(b)(1),(6) and (7). Rule 12(b)(6) permits dismissal of a case for "failure to state a claim on which relief can be granted." "A district court should grant a rule 12(b)(6) motion when, assuming the truth of the allegations that a party has made and drawing all reasonable inferences therefrom in the light most favorable to that party, it is clear that [the party] is not entitled to relief." *Calsert v. Est. of Flores*, 2020 UT App 102, ¶ 9, 470 P.3d 464, 468 (internal citations and quotation marks omitted).

While accepting the well pled facts as true, the Court does not need to accept the legal conclusions contained therein. "A Rule 12(b)(6) motion to dismiss admits the facts alleged in the complaint but challenges Plaintiff's right to relief based on those facts. Accordingly, we accept Plaintiff's description of facts alleged in the complaint to be true, but we need not accept extrinsic facts not pleaded, nor need we accept legal conclusions in contradiction of the pleaded facts." *1600 Barberry Lane 8 LLC v. Cottonwood Residential OP LP*, 2019 UT App 146, ¶ 9,

449 P.3d 949, 954, cert. denied sub nom. *1600 Barberry Lane 8 L v. Cottonwood Residential*, 456 P.3d 388 (Utah 2019)(internal citations and quotations omitted)). "Mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal or summary judgment." *Rusk v. Univ. of Utah Healthcare Risk Mgmt*., 2016 UT App 243, ¶ 5, 391 P.3d 325, 327 (internal citation and quotation marks omitted).

"Utah Rule of Civil Procedure 12(b)(7) mandates the dismissal of an action for 'failure to join an indispensable party.' In this case, the Utah State School Board is an indispensable party for claims made by the Plaintiffs that the State School Board has exclusive constitutional authority to invoke a mask mandate. Dismissal under 12(b)(7) is only appropriate under the circumstances of Utah Rule of Civil Procedure 19." *Harvey v. Ute Indian Tribe of Uintah and Ouray Reservation*, 2018 UT 75, ⁋ 34, 416 P.3d 401. That rule, in turn, "necessitates a three-step analysis: 1) whether the party is necessary, 2) whether the party can be joined, and 3) whether the party is indispensable." *Id*. "[A] person is necessary if in the person's absence complete relief cannot be accorded among those already parties." *Id*. at ⁋ 35. The Utah Board of Education is, therefore, a necessary party because, without its presence, Plaintiffs cannot be accorded complete relief. The Board is also a necessary party because its absence "impair[s] or impede[s]" its "ability to protect [its] interest" as asserted by the Plaintiffs *Id*. Because Plaintiffs have failed to join the Utah Board of Education, their claims should be dismissed pursuant to Utah R. Civ. P. 12(b)(7).

Rule 12(b)(1) directs dismissal of a case where there is, "lack of jurisdiction over the subject matter." "[I]n Utah, as in the federal system, standing is a jurisdictional requirement." *Brown v. Div. of Water Rights of the Dep't of Natural Res*., 2010 UT 14, ⁋ 12, 228 P.3d 747. In order to establish standing, the Plaintiff must "show that he has suffered some distinct and

palpable injury that gives him a personal stake in the outcome of the legal dispute." *Jenkins v. Swan*, 675 P.2d 1145, 1148 (1983).

In reviewing a motion to dismiss, the Court need not rely only on the facts as alleged in the complaint but may also rely on all documents adopted by reference in the complaint, documents attached to the complaint, or facts that may be judicially noticed. *See* Utah R. Civ. P. 10(c). "[A] document that is referred to in the complaint and is central to the plaintiff's claim is not considered to be a matter outside the pleadings. If a defendant submits an indisputably authentic copy of such a document, the court may consider it without converting the rule 12(b)(6) motion into a motion for summary judgment." *Young Res. Ltd. P'ship v. Promontory Landfill LLC*, 2018 UT App 99, ¶ 25, 427 P.3d 457, 464–65 (internal citations and quotation marks omitted).

ANALYSIS

1. The Political Question Doctrine Advises Against the Court Creating Disease Prevention Policy

The political question doctrine allows a court to exercise its inherent authority to refrain from wading into a political question that is more properly resolved by the political branches of government. This is just such a case. Deciding whether to require masks in schools involves policy judgments regarding how to balance priorities and methods of avoiding infection with educational objectives, parental authority, student mental health, and personal freedom. For the reasons set forth in Part I of the Governor's Opposition to Plaintiffs' Motion for Preliminary Injunction ("Opposition"), the Court should dismiss Plaintiffs' claims.[1]

[1] To avoid repetition, Governor Cox incorporates by reference Part I of the Governor's Opposition.

2. The State Board of Education is an Indispensable Party to this Case and Plaintiffs Lack Standing to Assert its Interests

Plaintiffs contend that the challenged statutes violate the State School Board's constitutional authority. But the School Board is not a party to this case, and Plaintiffs lack standing to protect the School Board's authority. Accordingly, Plaintiffs' claims should be dismissed pursuant to Utah Rule of Civil Procedure 12(b)(1) and (7). Utah courts recognize traditional standing, requiring that the plaintiff be personally adversely affected before he has standing to prosecute an action. Although courts occasionally grant public interest standing where matters of great public interest and societal impact are concerned, courts rarely absolve a plaintiff of the requirement to show real and personal interest in the dispute. While Plaintiffs claim to have a personal interest in school mask policy, they have not alleged that the Board would, in fact, impose the mask mandate they request. Any assertion to the contrary is pure, unsupported speculation.[2] Accordingly, the Court should dismiss Plaintiffs' claim that the challenged statutes usurp the power of the state school board to issue directives to protect the public from the effects of Covid-19 as articulated in Part III.B.4. of the Governor's Opposition.

3. Plaintiffs' Claims are Moot Because the Requested Relief Would Not Result in a Mask Mandate and a Vaccine Renders the Mandate Unnecessary

A. Declaring the Challenged Statutes Unconstitutional and Invalidating the County Council's Action Would Not Result in a Mask Mandate

Plaintiffs ask this Court to strike down Utah Code §§ 26A-1-114(7)(d), (9)(a)(iii), and 53G-9-210(5) as unconstitutional, and order Salt Lake County to rescind Resolution 5888, which terminated Public Health Order 2021-2, in the interest of allowing the Health Department to impose a new school mask mandate, unchecked by the County Council. (Second Amended

[2] The Governor incorporates Part III.B.4. of the Opposition and refers the Court to those arguments.

Complaint ¶¶ 109-16.) However, Plaintiffs have not asserted that the Health Department would re-impose a mask mandate now that a vaccine is available for children. By its own terms, the Health Order expressly indicated the Health Department's intention to reevaluate the Order when a Covid-19 vaccine was available to children between 5 and 11 years of age:

> This Public Health Order takes immediate effect and ***will be reevaluated when a COVID-19 vaccine is available to children between 5 and 11 years of age*** unless extended, rescinded, superseded, or amended in writing, or otherwise as warranted.

(Public Health Order 2021-2 § 4)(emphasis added). It is pure speculation to suggest that the relief requested by the Plaintiffs would result in a mask mandate or address the harms they claim. Thus, Plaintiffs' request for an order invalidating the County Councils' decision or authority is moot, and this Court lacks jurisdiction to decide the merits of Plaintiffs' request for injunctive and declaratory relief.

A case is "moot [if] there remains no meaningful relief that [a] court could offer, such that anything [a court] might say about the issues would be purely advisory." *Utah Transit Authority v. Local 382 of Amalgamated Transit Union*, 2012 UT 75, ¶15, 289 P.3d 582. "The defining feature of a moot controversy is the lack of capacity for the court to order a remedy that will have a meaningful impact on the practical position of the parties." *Id*. at ¶ 24. "When a case is moot in this sense, the parties' interest in its resolution is purely academic. Their stake is parallel to that of a party seeking an advisory opinion." *Id*. Here, Plaintiffs do not contend that the Salt Lake County Health Department would impose another health order if given the authority to do so. Thus, even if the Court grants Plaintiffs' requested relief, there is no indication that it will have a meaningful impact on the practical position of the parties.

Plaintiffs ask this Court to grant extraordinary relief based on the theoretical possibility that the Health Department might issue a mask mandate. A highly effective vaccine for children

ages 5 to 11 is now available as the Order anticipated. Even without universal vaccination, Plaintiffs have not alleged that the Salt Lake County Health Department would issue another health order requiring masks to be worn in schools under these circumstances. Accordingly, Plaintiffs' claims are moot and must be dismissed.

B. Plaintiffs' Claims Are Moot Because a Highly Effective Vaccine is Available for Young Children and Parents Can Protect their Children Without Cooperation from Other Children

Plaintiffs stated in their Reply Memorandum in Support of Motion for Temporary Restraining Order Pursuant to U.R.C.P. 65A (Pl's Reply) (at 5), "In any event, Plaintiffs hope a vaccine will be approved for their children. And they would like nothing better than for the claims they raise to become moot. But this Court must decide whether to enjoin the defendants based on current circumstances." (Pl.'s Reply at 5). As Plaintiffs anticipated, their claims are moot because "current circumstances" have changed, and parents may now protect their children with a highly effective vaccine, recommended by the CDC, regardless of mask policy.

> Similar to what was seen in adult vaccine trials, vaccination was nearly ***91 percent effective in preventing COVID-19 among children*** aged 5-11 years. In clinical trials, vaccine side effects were mild, self-limiting, and similar to those seen in adults and with other vaccines recommended for children. The most common side effect was a sore arm.

CDC Recommends Pediatric COVID-19 Vaccine for Children 5 to 11 Years, Media Statement, Nov. 2, 2021 ("*CDC Statement*")(emphasis added), https://www.cdc.gov/media/releases/2021/s1102-PediatricCOVID-19Vaccine.html. The Governor asks the Court to take judicial notice of the facts articulated in the aforementioned quotation which come from a source that cannot reasonably be questioned and are generally known. Utah R. Evid. 201(b); *Defusion Co. v. Utah Liquor Control Comm'n*, 613 P.2d 1120, 1124 (Utah 1980). The CDC also indicated that the vaccine's side effects are mild and self-

limiting. (*CDC Statement.*) The vaccine is expected to, "reduce disruptions to in-person learning and activities by helping curb community transmission." *Id.* Because there is a highly effective method available to parents for protecting their own children against Covid-19, regardless of what other children do, there is no compelling reason for the Court to step in and promulgate policy governing health and education for Utah's children.

"Mootness . . . presents one of the several bases that may prevent a court from reaching the merits of a case." *Timothy v. Pia, Anderson, Dorius, Reynard & Moss, LLC*, 2019 UT 69, ¶ 15, 456 P.3d 731, 735 (quoting State v. Legg, 2018 UT 12, 417 P.3d 592). A case is moot if "circumstances change so that the controversy is eliminated." *Timothy v. Pia, Anderson, Dorius, Reynard & Moss, LLC*, 2019 UT 69, ¶ 15, 456 P.3d 731, 735 (quoting *Salt Lake Cty. v. Holliday Water Co*., 2010 UT 45, 234 P.3d 1105)(case became moot when appeal was pending, and judgment expired). "A court may order the action for injunction be dismissed when the questions involved have become moot as when the conduct sought to be enjoined has been discontinued." 42 Am. Jur. 2d Injunctions § 253 (citing *U.S. v. W.T. Grant Co*., 345 U.S. 629 (1953)).

> [I]nhering in that power is the concomitant power to deny relief altogether unless "the moving party [can] satisfy the court that relief is needed." *United States v. W.T. Grant Co*., 345 U.S. 629 (1953). After all, if events so overtake a lawsuit that the anticipated benefits of a remedial decree no longer justify the trouble of deciding the case on the merits, equity may demand not decision but dismissal. When it does, we will hold the case "prudentially moot."

Winzler v. Toyota Motor Sales U.S.A., Inc., 681 F.3d 1208, 1210 (10th Cir. 2012)(nationwide vehicle recall mooted lawsuit against manufacturer). This is precisely such a case where "events so overtake a lawsuit that the anticipated benefits of a remedial decree no longer justify the trouble of deciding a case on the merits." The availability of a vaccine for children who seek

protection renders a court-imposed universal masking order unnecessary and renders Plaintiffs' claims moot.

4. Plaintiffs Have Constitutionally Sufficient Access to Education Without a Mask Mandate

Plaintiffs claim they are denied constitutionally required access to education pursuant to Utah Constitution, Article 10 § 1, because Plaintiffs' children will refuse to attend school in person without a mask mandate. (Second Amended Complaint §§ 58, 95-108, 113-14.) However, in the *Bergstrom* case, Judge Adam Mow followed binding precedent and held that students are entitled to access the curriculum of the school but are not guaranteed their preferred modality of education. Accordingly, Judge Mow properly concluded that remote education provided through virtual means is constitutionally sufficient.[3] So, regardless of whether a mask mandate issues, or whether Plaintiffs choose to vaccinate their children, Plaintiffs have constitutionally sufficient access to education through the internet.

CONCLUSION

For the reasons set forth above, the Court should dismiss Plaintiffs' claims, with prejudice.

DATED: This 7th day of December 2021.

OFFICE OF THE UTAH ATTORNEY GENERAL

/s/ Jeffrey B. Teichert
DAVID N. WOLF
LANCE SORENSON
JEFFREY B. TEICHERT
Assistant Utah Attorneys General
Counsel for Defendant Governor Spencer J. Cox

[3] To avoid repetition, Governor Cox incorporates by reference Part III.B.2 of the Governor's Opposition.

Notice to responding party
You have a limited amount of time to respond to this motion. In most cases, you must file a written response with the court and provide a copy to the other party:

- within 14 days of this motion being filed, if the motion will be decided by a judge, or
- at least 14 days before the hearing, if the motion will be decided by a commissioner.

In some situations a statute or court order may specify a different deadline.

If you do not respond to this motion or attend the hearing, the person who filed the motion may get what they requested.

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Aviso para la parte que responde
Su tiempo para responder a esta moción es limitado. En la mayoría de casos deberá presentar una respuesta escrita con el tribunal y darle una copia de la misma a la otra parte:

- dentro de 14 días del día que se presenta la moción, si la misma será resuelta por un juez, o
- por lo menos 14 días antes de la audiencia, si la misma será resuelta por un comisionado.

En algunos casos debido a un estatuto o a una orden de un juez la fecha límite podrá ser distinta.

Si usted no responde a esta moción ni se presenta a la audiencia, la persona que presentó la moción podría recibir lo que pidió.

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CERTIFICATE OF SERVICE

I certify that on this 7th day of December, 2021, that a true and correct copy of **GOVERNOR SPENCER J. COX'S MOTION TO DISMISS**, and this *Certificate of Service*; were filed using the Court's electronic filing system. I further certify that true and correct copy of each document was served, via email, to the following:

Gregory G. Skordas
Gabriela Mena
SKORDAS AND CASTON, LLC
124 South 400 East, Suite 220
Salt Lake City, UT 84111
Telephone: (801) 531-7444
Facsimile: (801) 665-0128
gskordas@schhlaw.com
gmena@schhlaw.com
Counsel for Plaintiffs

Perrin Love
Tim Bodily
SALT LAKE COUNTY DISTRICT ATTORNEY'S OFFICE
35 East 500 South
Salt Lake City, UT 84111
Phone: (385) 468-7825
pelove@slco.org
tbodily@slco.org
Counsel for Salt Lake County Defendants.

Michael D. Zimmerman (3604)
Troy L. Booher (9419)
ZIMMERMAN BOOHER
Felt Building, Fourth Floor
341 South Main Street
Salt Lake City, UT 84111
mzimmerman@zbappeals.com
tbooher@zbappeals.com
Counsel for Amicus Curiae, Utah Chapter of the American Academy of Pediatrics and American Academy of Pediatrics

Samara Spence
Jeffrey B. Dubner
DEMOCRACY FORWARD FOUNDATION
P.O. Box 34553
Washington, DC 20043
sspence@democracyforward.org
jdubner@democracyforward.org
Co-Counsel for Amicus Curiae, Utah Chapter of the American Academy of Pediatrics and American Academy of Pediatrics

/s/ Phoenix Gatrell
Phoenix S. H. Gatrell, Paralegal