

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

DISABILITY RIGHTS SOUTH  
CAROLINA, et al.,

*Plaintiffs-Appellees,*

vs.

HENRY MCMASTER, in his official  
capacity as Governor of the State of  
South Carolina, et al.,

*Defendants-Appellants.*

Case No. 21-2070

**BRIEF OF AMICI CURIAE SOUTH CAROLINA CHAPTER OF  
AMERICAN ACADEMY OF PEDIATRICS AND AMERICAN ACADEMY  
OF PEDIATRICS IN SUPPORT OF PLAINTIFFS-APPELLEES'  
OPPOSITION TO DEFENDANTS-APPELLANTS' EMERGENCY  
MOTION FOR INJUNCTION PENDING APPEAL AND FOR  
ADMINISTRATIVE STAY**

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

The South Carolina Chapter of the American Academy of Pediatrics, (“SCAAP”) is a non-profit educational organization and professional society comprising more than 750 members, including pediatricians, residents, and medical students from South Carolina. SCAAP works to support the optimal health of children by addressing their needs and the needs of 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.

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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 SCAAP and AAP submit this brief pursuant to Federal Rule of Appellate Procedure 29.

## **INTRODUCTION**

The State's request for a stay of the district court's injunction of Proviso 1.108 pending appeal suggests that school mask requirements are a matter of scientific debate. They are not. Universal school mask policies protect all children, particularly the medically vulnerable such as Plaintiffs-Appellees, and schools that lack such policies experience significantly higher rates of COVID-19 transmission.

Over the past 18 months, *Amici* have worked ceaselessly to evaluate the dangers of COVID-19 and potential public health measures for reducing its deadly spread. The AAP has conducted a comprehensive review of the medical literature to determine what public health measures can effectively reduce the grave risk that COVID-19 poses to American's children. The result, and the experiences of the AAP's and SCAAP's the front-line pediatric practitioners, 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.

## ARGUMENT

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

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>2</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>3</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>4</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 hospitalizations to date.<sup>5</sup> Since the

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<sup>2</sup> See *Children and COVID-19: State-Level Data Report, Summary of Findings*, AAP, <https://bit.ly/2Y5UTGq> (data available as of 9/23/21).

<sup>3</sup> *Children and COVID-19: State Data Report* at Fig. 6, Children's Hosp. Ass'n & AAP (Sept. 23, 2021), <https://bit.ly/3D8JwwD>.

<sup>4</sup> See *Delta Variant: What We Know About the Science*, CDC (Aug. 26, 2021), <https://bit.ly/2Y5VeZI>.

<sup>5</sup> See *Children and COVID-19: State Data Report*, *supra* n. 3, at Appx. Tab. 2B.

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

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>7</sup> COVID-19 infection can also lead to many secondary conditions, ranging from subacute to mild to severe, even when the initial symptoms are mild.<sup>8</sup> Potential long-term symptoms include lung and respiratory issues, heart conditions, persistent loss of the sense of smell or taste, and neurodevelopmental impairment.<sup>9</sup>

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<sup>6</sup> *Id.* at Appx. Tab. 2C.

<sup>7</sup> See *Multisystem Inflammatory Syndrome in Children (MIS-C) Associated with Coronavirus Disease 19 (COVID-19)*, CDC, <https://bit.ly/2ZQhhV1>; *Multisystem Inflammatory Syndrome in Children (MIS-C) Interim Guidance*, AAP, <https://bit.ly/2ZQ14za>.

<sup>8</sup> See, e.g., Danilo Buonsenso, et al., *Preliminary evidence on long COVID in children*, 7 *Acta Paediatrica* 2208 (2021) (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) (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).

<sup>9</sup> *Post-COVID-19 Conditions in Children and Adolescents*, AAP (last updated July 28, 2021), <https://bit.ly/3B0LL49>.

The risks are even greater for children with certain underlying conditions who contract COVID-19, who are more likely to experience severe symptoms and require admission to the hospital or intensive care unit.<sup>10</sup> This includes children with, for example, lung conditions, heart conditions, and weakened immune systems<sup>11</sup>—all conditions suffered by one or more of the Plaintiffs.

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

One of the AAP's chief functions is to provide evidence-based guidance to America's pediatric professionals and public health officials. 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, the AAP's top focus has been supporting practicing pediatricians and public health policymakers in treating COVID-19 and

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<sup>10</sup> *Caring for Children and Youth with Special Health Needs During the COVID-19 Pandemic*, AAP (last updated Sept. 20, 2021), <https://bit.ly/3oqebRG>.

<sup>11</sup> *People with Certain Medical Conditions*, CDC, (last updated Aug. 20, 2021), <https://bit.ly/3D3vL1Z>.

reducing its spread, particularly among children. The AAP has issued Interim Guidance Statements on several topics related to COVID-19,<sup>12</sup> including the use of face masks as an infection control measure;<sup>13</sup> operating safe schools during the COVID-19 pandemic;<sup>14</sup> and caring for youth with special health needs during the COVID-19 pandemic.<sup>15</sup> These Interim Guidances were drafted and reviewed by a number of pediatricians with expertise in a wide variety of disciplines, and have been continually reviewed and updated since spring of 2020. 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.

As pediatrician organizations, the AAP and SC AAP recognize that not being able to attend school in person can negatively affect children's cognitive, educational, and social development, as well as children's short- and long-term mood, behavior, and mental health. Based on the AAP's expert review of the

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<sup>12</sup> See *COVID-19 Interim Guidance*, AAP (last updated Sept. 13, 2021), <https://bit.ly/3mehgSs>.

<sup>13</sup> *Face Masks*, AAP (last updated Aug. 8, 2021), <https://bit.ly/3D0INOY>.

<sup>14</sup> *COVID-19 Guidance for Safe Schools*, AAP (last updated July 18, 2021), <https://bit.ly/3D4uR5r>.

<sup>15</sup> *Caring for Children and Youth with Special Health Needs During the COVID-19 Pandemic*, *supra* n. 10.

scientific literature and the guidance outlined by the World Health Organization, United Nations Children’s Fund, and Centers for Disease Control and Prevention (“CDC”), along with AAP’s 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. 15. “[A]t 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.” *Id.* (emphasis added). Among the recommended prevention measures (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 in original).

This conclusion has been consistently reinforced by all relevant data and credible research, leading the AAP to reaffirm its recommendation of universal masking in school settings on July 19, 2021 and the CDC to recommend “universal

indoor masking for all teachers, staff, students, and visitors to schools, regardless of vaccination status” on July 27, 2021.<sup>16</sup>

While there are several reasons for the AAP’s (and the CDC’s) recommendation of universal masking in school, *see COVID-19 Guidance for Safe Schools, supra* n. 15, the most important is that the research literature has confirmed that masks are both effective and safe. 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.”<sup>17</sup> Cloth masks “block most large droplets (i.e., 20-30 microns and larger)” and “also block the exhalation of fine droplets.”<sup>18</sup> “Multi-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.<sup>19</sup> To a slightly lesser extent, masks

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<sup>16</sup> *Interim Public Health Recommendations for Fully Vaccinated People—Summary of Recent Changes*, CDC (July 28, 2021), <https://bit.ly/3mmCmy6>.

<sup>17</sup> *Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2*, CDC (May 7, 2021), <https://bit.ly/3utvxOA> (citations omitted).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

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>20</sup>

The State’s supposition that other COVID-19 mitigation measures sufficiently protect Plaintiffs-Appellees from COVID-19 is incorrect. *See* State Mot. at 15-16. 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 secondary transmission in schools when COVID-19 is circulating and when vaccination is unavailable, or there is insufficient uptake.”<sup>21</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>22</sup> In particular, studies have shown that masking and similar mitigation

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<sup>20</sup> *Id.*

<sup>21</sup> ABC Science Collaborative, *Final Report for NC School Districts and Charters in Plan A*, at 3 (June 30, 2021), <https://bit.ly/3B32GDq> (emphasis added).

<sup>22</sup> *See, e.g.*, Jeremy Howard, et al., *An Evidence Review of Face Masks Against COVID-19*, 118 Proc. Nat’l Acad. of Servs. e2014564118 (2021); John T. Brooks & Jay C. Butler, *Effectiveness of Mask Wearing to Control Community Spread of SARS-CoV-2*, 325 J. Am. Med. Ass’n 998 (2021); 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); 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).

measures can limit transmission in schools.<sup>23</sup> Most recently, 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>24</sup> The CDC found that pediatric COVID-19 cases increase nearly twice as quickly in schools lacking universal mask policies.<sup>25</sup>

### **III. Leaving the District Court’s Injunction of Proviso 1.108 in Place Pending Judicial Review Is in the Public Interest.**

Despite the overwhelming medical consensus on the need for universal mask policies, the State argues that masks are actually *harmful* because masks might become wet and dirty or cause delays in social development. State Mot. at 15. These claims lack any scientific basis.

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<sup>23</sup> See generally *Science Brief: Transmission of SARS-CoV-2 in K-12 Schools and Early Care and Education Programs—Updated*, CDC (July 9, 2021), <https://bit.ly/3uxgJyo> (collecting citations).

<sup>24</sup> Press Release, *Studies Show More COVID-19 Cases in Areas Without School Masking Policies*, CDC (Sept. 24, 2021), <https://bit.ly/3kYtuyU>; 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://bit.ly/3uwVdKh>; 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.* (Early Release) (Sept. 24, 2021), <https://bit.ly/3uIQ8il>; 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://bit.ly/3ipDVtD>.

<sup>25</sup> *Studies Show More COVID-19 Cases*, *supra* n. 25.

***Bacterial Buildup:*** The AAP, like the CDC, recommends that masks be kept clean and washed daily, and replaced when they become visibly soiled or wet.<sup>26</sup> But this does not weigh against universal mask policies. With proper guidance from parents and teachers, most children are able to keep their masks clean. If maintained properly, cloth masks pose no added risk for breathing in pathogens, nor is there any evidence that masks trap any type of pathogen.

***Cognitive, social, and speech development:*** While understandable, this fear is unfounded. There is currently “no evidence that use of face masks prevents or delays speech or language development.”<sup>27</sup> 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 impaired children develop speech and language skills at the same rate as their peers.”<sup>28</sup> 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

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<sup>26</sup> *Guidance Related to Childcare During COVID-19*, AAP, <https://bit.ly/39UAhDp>; see also *Your Guide to Masks*, CDC (Aug. 13, 2021), <https://bit.ly/3oqg152>.

<sup>27</sup> *Do Masks Delay Speech and Language Development?*, AAP, <https://bit.ly/3B3c8GH>.

<sup>28</sup> *Id.*

communication, such as gestures, changes in tone of voice, and the like.<sup>29</sup>

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.

In sum, the balance of equities thus weighs heavily in favor of leaving the district court's injunction in place.

### CONCLUSION

For these reasons and those stated in Plaintiffs-Appellees' filings, the public interest would be served by denying the State's motion for a stay pending appeal.

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<sup>29</sup> *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://bit.ly/2ZJk9Tv>.

Dated: October 1, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on October 1, 2021, the above brief was filed using the court's CM/ECF system, which will notify all registered counsel.

Dated: October 1, 2021

Respectfully submitted,

*s/ Jeffrey B. Dubner*

Counsel for *Amici*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rules of Appellate Procedure 27(d)(2), 32(a)(5), and 32(g)(1), I certify that this brief has 2,524 words and was prepared using Times New Roman, 14-point font.

*s/ Jeffrey B. Dubner*

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**UNITED STATES COURT OF APPEALS  
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**MOTION OF SOUTH CAROLINA CHAPTER OF AMERICAN  
ACADEMY OF PEDIATRICS AND AMERICAN ACADEMY OF  
PEDIATRICS FOR LEAVE TO FILE AS *AMICI CURIAE* IN SUPPORT OF  
PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-  
APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING  
APPEAL AND FOR ADMINISTRATIVE STAY**

Proposed *Amici* move for leave to file the attached amicus brief in support of Plaintiffs-Appellees' opposition to Defendants-Appellants' emergency motion for an injunction pending appeal and an administrative stay.

*Amici* are the leading professional organization of American pediatricians, pediatric medical subspecialists, and pediatric surgical specialists, both nationally and in South Carolina. Collectively, they represent more than 67,000 pediatricians, more than 750 of whom practice in South Carolina. *Amici* seek to file this brief to provide information regarding the importance and efficacy of maintaining universal mask policies in schools, and the overwhelming public interest in maintaining the temporary restraining order and preliminary injunction issued by the District Court.

Federal Rule of Appellate Procedure 29(a)(2) allows amicus briefs to be filed "by leave of court or if the brief states that all parties have consented to the filing." A motion for leave must state "(A) the movant's interest; and (B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(a)(3).

Although this Court does not appear to have published any opinions on the standard for considering a motion for leave to file an amicus brief, it is well-settled that whether to grant a motion for leave to participate as *amicus curiae* is "within the sound discretion of the courts." *United States v. Michigan*, 940 F.2d 143, 165

(6th Cir. 1991) (citing *N. Sec. Co. v. United States*, 191 U.S. 555 (1903)). Courts consider whether “the proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice.” *Id.*; see also *Prairie Rivers Network v. Dynegy Midw. Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020) (Scudder, J., in chambers) (“[T]he court looks at whether the submission will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not found in the briefs of the parties.” (internal quotation omitted)).

As the leading membership organization of American pediatricians both nationally and in South Carolina, proposed *amici* have a strong interest in protecting the health of their patients and reducing community spread of COVID-19, which has strained medical resources in South Carolina and around the country. The attached brief reflects the American Academy of Pediatrics’ (“AAP”) constant work over the past 18 months to understand how to treat and reduce the spread of COVID-19, as well as how to provide safe education that fosters children’s development despite the pandemic. It provides the findings of AAP’s comprehensive review of the medical literature, along with the collective experiences of the vast majority of practicing pediatricians in the United States. Accordingly, it will provide “insights, facts, or data that are not found in the briefs of the parties,” *Prairie Rivers Network*, 976 F.3d at 763, and therefore be “useful” to the Court’s consideration, *Michigan*, 940 F.2d at 165. Additionally, because it is

being filed the same day as the deadline provided for Plaintiffs' opposition, it is timely and will not delay the resolution of Defendants-Appellants' motion. *See* Fed. R. App. P. 29(a)(6).

For these reasons, several district courts hearing similar matters have granted motions of the AAP and state chapters of the AAP for leave to file as *amici curiae* to provide the courts information on the AAP's recommendations and the importance and efficacy of maintaining universal mask policies in schools. *E.T. v. Abbott*, Doc. No. 59 (W.D. Tex. Sept. 30, 2021) (granting leave for the AAP and the Texas chapter of the AAP to file as *amici* in case involving claims that state violated the Americans with Disabilities Act for curbing school mask policies); *Arc of Iowa, et al. v. Reynolds, et al.*, Doc. No. 58 (S.D. Iowa, 4:21-cv-00264) (Sept. 29, 2021) (same, AAP and Iowa chapter); *G.S., by and through his parents and next friends, Brittany and Ryan Schwaigert, et al. v. Lee, et al.*, Doc. No. 46 (W.D. Tenn., 2:21-cv-02552) (Sept. 8, 2021) (same, AAP and Tennessee chapter).

Proposed *amici* reached out to the parties to request their consent to the proposed filing. Plaintiffs-Appellees consented, while Defendants-Appellees indicated that they took no position regarding the request but "reserve[d] the right to respond to the forthcoming motion and proposed brief, if necessary, after reviewing the same."

Accordingly, proposed *amici* respectfully request that the Court grant leave to file the attached proposed brief.

Dated: October 1, 2021

Respectfully submitted,

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Counsel for *Amici*

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*s/ Jeffrey B. Dubner*

Counsel for *Amici*

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
APPEARANCE OF COUNSEL FORM

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COUNSEL FOR: \_\_\_\_\_

\_\_\_\_\_ as the
(parties name)

appellant(s) appellee(s) petitioner(s) respondent(s) amicus curiae intervenor(s) movant(s)

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