SUPREME COURT OF ARIZONA

ARIZONA SCHOOL BOARDS ASSOCIATION, INC., et al. Plaintiffs/Appellees, v. STATE OF ARIZONA, a body politic, Defendant/Appellant.	Arizona Supreme Court No. CV-21-0234-T/AP Court of Appeals, Division One No. 1 CA-CV 21-0555 Maricopa County Superior Court No. CV2021-012741

AMICUS BRIEF OF ARIZONA CHAPTER OF AMERICAN ACADEMY OF PEDIATRICS AND AMERICAN ACADEMY OF PEDIATRICS IN SUPPORT OF PLAINTIFFS/APPELLEES

(Submitted with Party Consent)

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INTEREST OF *AMICI CURIAE*[1]

The Arizona Chapter of the American Academy of Pediatrics ("AZAAP") is a non-profit educational organization and professional society comprising more than 1,100 members, including pediatricians, residents, and medical students from Arizona's hospitals, community clinics, and school-based health centers. AZAAP promotes the optimal health and development of children and adolescents of Arizona, in partnership with their families and communities, and supports the pediatricians who care for them.

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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[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.

INTRODUCTION

The State argues that the question of whether universal mask policies are necessary to maintain a safe educational environment is a matter of "great societal debate." Appellant Br. at 12. It is not. The science on masks in schools during the COVID-19 pandemic is clear. Universal school mask policies substantially reduce the risk of death and serious illness among Arizona's school-age population and their families. Schools that lack such policies experience significantly higher rates of COVID-19 transmission, and effectively deny a safe education to all children, but particularly the medically vulnerable.

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. COVID-19 poses grave risks to children, and these risks are spreading rapidly with the rise of the Delta variant and the start of the school year. 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 AZAAP's front-line pediatric practitioners, prove beyond any doubt that universal mask policies are safe, effective, and necessary. This brief provides an overview of the literature the AAP has reviewed and explains why universal mask policies are so crucial in fighting COVID-19.

ARGUMENT

I. Children are Vulnerable to COVID-19.

As of October 7, 2021, 6,047,371 total child COVID-19 cases have been reported in the United States, representing more than 24% of the total U.S. cases.[2] The prevalence of pediatric COVID-19 has skyrocketed since the school year began, with more than a quarter of all child cases diagnosed in the eight weeks between August 13 and October 7.[3] 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.[4]

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 5,206 children were hospitalized due to COVID-19 between August 13 and October 7, representing 24% of the total child hospitalizations to date.[5] Since the beginning of August, more children have died each week than in all but one previous week of the pandemic.[6] Arizona has been particularly hard hit. Currently,

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[2] *See Children and COVID-19: State-Level Data Report*, *Summary of Findings*, AAP, https://bit.ly/2Y5UTGq (data available as of 10/7/21).

[3] *Children and COVID-19: State Data Report* at Fig. 6, Children's Hosp. Ass'n & AAP (Oct. 7, 2021), https://bit.ly/3lAKM5O.

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

[5] *See Children and COVID-19: State Data Report*, *supra* n. 3, at Appx. Tab. 2B.

[6] *Id.* at Appx. Tab. 2C.

Arizona ranks 10th in the nation in cumulative child COVID-19 cases (with over 1,108,830 cases) and has the 9th highest number of cumulative cases per 100,000 children.[7] Over 2,896 Arizona children have been hospitalized from COVID-19, and 40 have died.[8]

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.[9] COVID-19 infection can also lead to many secondary conditions, which range from subacute to mild to severe, even when the initial symptoms are mild.[10] Potential long-term symptoms include lung and respiratory issues, heart conditions, persistent loss of the sense of smell or taste, and neurodevelopmental impairment.[11] The risks are even greater for children with

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[7] *Id.* at Appx. Tab. 3.

[8] *Id.* at Appx. Tabs. 5A, 6A.

[9] *See Multisystem Inflammatory Syndrome in Children (MIS-C) Associated with Coronavirus Disease 19 (COVID-19)*, CDC (May 14, 2020), https://bit.ly/2ZQhhV1; *Multisystem Inflammatory Syndrome in Children (MIS-C) Interim Guidance*, AAP (last updated Feb. 10, 2021), https://bit.ly/2ZQ14za.

[10] *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).

[11] *Post-COVID-19 Conditions in Children and Adolescents*, AAP (last updated July 28, 2021), https://bit.ly/3B0LL49.

certain underlying conditions who contract COVID-19; these children are more likely to experience severe symptoms and require admission to the hospital or intensive care unit.[12]

II. Universal Mask Policies Reduce the Risk of COVID-19 Transmission.

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, the AAP's top focus has been supporting 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,[13] including the use of face masks as an infection control measure,[14] operating safe schools during the COVID-

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

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

[14] *Face Masks*, AAP (last updated Aug. 8, 2021), https://bit.ly/3D0lNOY.

19 pandemic,[15] and caring for youth with special health needs during the COVID-19 pandemic.[16] 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. By this point, the AAP's experts have reviewed hundreds of articles related to the efficacy and safety of masks.

As pediatrician organizations, the AAP and AZAAP are also seriously concerned about the impact on children of being away from in-person education. Extensive literature has shown that 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.[17] Children with special needs suffer the additional loss of access to educational support structures, school-based therapies,

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[15] *COVID-19 Guidance for Safe Schools*, AAP (last updated July 18, 2021), https://bit.ly/3D4uR5r.

[16] *Caring for Children and Youth with Special Health Needs During the COVID-19 Pandemic*, *supra* n. 12.

[17] *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://bit.ly/3FNQCsw; 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://bit.ly/3lDrInm; Meira Levinson, et al., *Reopening Primary Schools During the Pandemic*, 383 N. Engl. J. Med. 981 (2020), https://bit.ly/3AN0sqY; Megan Kuhfeld, et al., *Projecting the Potential Impact of COVID-19 School Closures on Academic Achievement*, 49 Educ. Researcher 549 (2020), https://bit.ly/3j0ONyK; 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://mck.co/3BJvhhd.

school meals, and school-based professionals who are often the front-line identifiers of special needs.[18] 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 AAP's review of the scientific literature, along with AAP's members' collective expertise as pediatricians and researchers, the AAP concluded 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. 15 (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).

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[18] 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://bit.ly/3FJRQF9; 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://bit.ly/3lN66Fj.

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 Centers for Disease Control ("CDC") to recommend "universal indoor masking for all teachers, staff, students, and visitors to schools, regardless of vaccination status" on July 27, 2021.[19]

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 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."[20] Cloth masks "block most large droplets (i.e., 20-30 microns and larger)" and "also block the exhalation of fine droplets."[21] "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.[22] To a slightly lesser extent, masks also "help reduce inhalation of these droplets by the

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[19] *Interim Public Health Recommendations for Fully Vaccinated People—Summary of Recent Changes*, CDC (July 27, 2021), https://bit.ly/3mmCmy6.

[20] *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).

[21] *Id.*

[22] *Id.*

wearer"; multi-layer cloth masks can filter out "nearly 50% of fine particles less than 1 micron."[23]

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.[24] In particular, studies have shown that masking can limit transmission in schools.[25] Most recently, the CDC released three studies conducted during this school year (one of which looked specifically at Arizona schools), which each found that "schools without a universal masking policy in place were more likely to have COVID-19 outbreaks."[26] The CDC found that pediatric

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[23] *Id.*

[24] *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).

[25] *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).

[26] 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. 1372 (2021), https://bit.ly/3Fsbbun; 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://bit.ly/3mCTGio; 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://bit.ly/3uSkYoJ.

COVID-19 cases increase nearly twice as quickly in schools lacking universal mask policies.[27] The Arizona study specifically assessed the association between school mask policies and school-associated COVID-19 outbreaks for 98% of the K-12 public schools in Maricopa and Pima Counties open from July 15 through August 31 2021.[28] During this period, there were 191 COVID-19 school-associated outbreaks, and schools without universal mask policies experienced 3.5 times as many outbreaks than schools that have such policies.[29] As the ABC Science Collaborative, a 13-state initiative coordinated by 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."[30]

Indeed, masking is so effective that other courts have found that it may be required in schools under the federal Americans with Disabilities Act and Rehabilitation Act. *See*, *e.g.*, *The Arc of Iowa, et al. v. Reynolds, et al.*, No. 21-cv-00264, 2021 WL 4737902 (D. Iowa, Oct. 8, 2021); *S.B. v. Lee*, 2021 WL 4346232, ___ F.Supp.3d ___ (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); *G.S. v. Lee*, 2021 WL 4268285,

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[27] *Studies Show More COVID-19 Cases*, *supra* n. 26.

[28] Jehn, *supra* n. 26.

[29] *Id*.

[30] 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).

___ F.Supp.3d ___ (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).

III. Prohibiting Schools from Requiring Masks Does Not Further Any Legitimate State Purpose.

Given the devastating threat posed by the COVID-19 pandemic and the overwhelming scientific consensus that universal mask policies are a safe and effective way to reduce its spread, there is no compelling or even rational and legitimate state purpose[31] in the State's bill banning schools from adopting universal mask policies, nor in prohibiting public schools from requiring masks while allowing private schools to do so. Whatever the interest a state has in "protecting parental autonomy and parents' rights to make decisions concerning the education of their children," Appellant Br. at 12-13, parental rights do not "include the liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Id*. at 170.

[31] Contrary to the State's argument, Appellant Br. at 12, the strict scrutiny test applies to Plaintiffs' Equal Protection claim. *See* Compl. ¶ 160. However, the choice of test is not dispositive here, as the State's asserted rationale is insufficient under any standard.

While parents have a right to make many decisions concerning the education of their children, they do not have the right to demand access to schools in a way that places the lives and health of other children (as well as teachers, school staff, and the broader community) at risk. As Plaintiffs and their experts explained below, the presence of unmasked children in school significantly increases the risk that even masked children will acquire COVID-19. There is no parental right to expose other children to virulent communicable diseases. The sole putative interest that the State asserts is thus entirely insubstantial.

CONCLUSION

In sum, the issue of school mask policies is a clear-cut scientific one, not a political one. Prohibiting schools from adopting universal mask policies, or in prohibiting public schools from requiring masks while allowing private schools to do so, lacks any legitimate state purpose and places children at risk of grave illness. For these and the reasons stated in Plaintiffs-Appellees' brief, the Court should affirm the decision below.

DATED this 15th day of October, 2021.

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