

No. 21-13409

**In the United States Court of Appeals
For the Eleventh Circuit**

JUDITH ANNE HAYES, individually and on behalf of W.H., a minor, et al.,

Plaintiff-Appellant,

v.

GOVERNOR RONALD DION DESANTIS, in his official capacity as Governor
of the State of Florida, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of Florida
No. 1-21-cv-22863-KMM, Hon. K. Michael Moore

**BRIEF OF *AMICI CURIAE* FLORIDA CHAPTER OF AMERICAN
ACADEMY OF PEDIATRICS AND AMERICAN ACADEMY OF
PEDIATRICS IN SUPPORT OF PLAINTIFFS-APPELLANTS' MOTION
FOR AN INJUNCTION PENDING APPEAL**

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INTEREST OF *AMICI CURIAE*¹

The Florida Chapter of the American Academy of Pediatrics, (“FCAAP”) is a non-profit educational organization and professional society comprising more than 2500 members, including pediatricians, residents, and medical students from Florida. FCAAP 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.

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

In resolving Plaintiffs-Appellants' motion for an injunction pending appeal, the Court must consider, inter alia, the risk of irreparable injury to Plaintiffs and the public interest. *Touchston v. McDermott*, 234 F.3d 1130, 1132 (11th Cir. 2000) (en banc). Both factors weigh heavily in favor of an injunction here. 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 FLAAP's front-line pediatric practitioners, prove beyond any doubt that universal mask policies are safe, effective, and necessary.

ARGUMENT

I. **Children With Special Health Needs are Especially 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, 24% of the total child hospitalizations to date.⁵ Since the beginning of

² See *Children and COVID-19: State-Level Data Report, Summary of Findings*, AAP, <https://bit.ly/2Y5UTGq> (data available as of 9/30/21).

³ *Children and COVID-19: State Data Report* at Fig. 6, Children's Hosp. Ass'n & AAP (Oct. 7, 2021), <https://bit.ly/31AKM5O>.

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.

August, more children have died each week than in all but one previous week of the pandemic.⁶ Florida has been particularly hard hit; it has reported the most child cases of any state in the nation, and has the seventh-highest rate of cases per 100,000 children.⁷

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.⁸ COVID-19 infection can also lead to many secondary conditions, ranging from subacute to mild to severe, even when the initial symptoms are mild.⁹ Potential

⁶ *Id.* at Appx. Tab. 2C.

⁷ *Id.* at Appx. Tab. 3A. Note that these numbers understate the severity in Florida, because Florida reports only cases for children aged 14 or under; all but one other state report cases up to at least age 17.

⁸ 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>.

⁹ 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).

long-term symptoms include lung and respiratory issues, heart conditions, persistent loss of the sense of smell or taste, and neurodevelopmental impairment.¹⁰

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.¹¹ This includes children with, for example, lung conditions, breathing impairments, kidney disease, Down syndrome, and weakened immune systems¹²—all conditions suffered by one or more of the Plaintiffs.

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

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

¹⁰ *Post-COVID-19 Conditions in Children and Adolescents*, AAP (last updated July 28, 2021), <https://bit.ly/3B0LL49>.

¹¹ *Caring for Children and Youth with Special Health Needs During the COVID-19 Pandemic*, AAP (last updated Sept. 20, 2021), <https://bit.ly/3oqebRG>.

¹² *People with Certain Medical Conditions*, CDC, (last updated Aug. 20, 2021), <https://bit.ly/3D3vL1Z>.

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

masks as an infection control measure,¹⁴ operating safe schools during the COVID-19 pandemic,¹⁵ and caring for youth with special health needs during the COVID-19 pandemic.¹⁶ These Interim Guidances were drafted and reviewed by pediatricians with expertise in a wide variety of disciplines, and have been continually reviewed and updated since spring 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.

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." *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

¹⁴ *Face Masks*, AAP (last updated Aug. 8, 2021), <https://bit.ly/3D0INOY>.

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. 11.

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 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, 2021.¹⁷

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.”¹⁸ Cloth masks “block most large droplets (i.e., 20-30 microns and larger)” and “also block the exhalation of fine droplets.”¹⁹

¹⁷ *Interim Public Health Recommendations for Fully Vaccinated People—Summary of Recent Changes*, CDC (July 27, 2021), <https://bit.ly/3mmCmy6>.

¹⁸ *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).

¹⁹ *Id.*

“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.²⁰ 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.”²¹

Numerous studies have shown that increasing the rate of mask-wearing, including through universal mask policies in particular, significantly reduces the spread of COVID-19.²² In particular, studies have shown that masking and similar mitigation measures can limit transmission in schools.²³ Most recently, the CDC released three studies conducted during this school year, all of which found that “schools without a universal masking policy in place were more likely to have

²⁰ *Id.*

²¹ *Id.*

²² 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).

²³ 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).

COVID-19 outbreaks.”²⁴ The CDC found that pediatric COVID-19 cases increase nearly twice as quickly in schools lacking universal mask policies.²⁵ 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.”²⁶

Masking is even more important given Florida’s new policy prohibiting schools from requiring that children who are asymptomatic but have been in close contact with COVID-19 carriers be quarantined or even tested. Masks’ efficacy principally comes from “source control”—i.e., impeding the exhalation of viral

²⁴ 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>.

²⁵ *Studies Show More COVID-19 Cases*, *supra* n. 24.

²⁶ 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).

particles.²⁷ By increasing the likelihood that children with COVID-19 will be present in school, Florida's new policy significantly increases the need for masks and the risk that children—including particularly vulnerable children such as Plaintiffs—will contract COVID-19 if other students are unmasked.

III. Masks Are Not Harmful

Despite the overwhelming medical consensus on the need for universal mask policies, the Executive Order suggests that some “children with disabilities or health conditions ... would be harmed by ... face masking requirements.” Pls.’ Mot. at 4. This is incorrect. As shown by the AAP’s comprehensive review of the medical research, masking does not harm children. Masking has no significant effect on respiratory function,²⁸ does not meaningfully impede social and speech development,²⁹ and is not linked to emotional or psychological harm, particularly

²⁷ See *Science Brief*, *supra* n. 23.

²⁸ See, e.g., Ricardo Lubrano, et al., *Assessment of Respiratory Function in Infants and Young Children Wearing Face Masks During the COVID-19 Pandemic*, 4 J. Am. Med. Ass’n Netw. Open e210414 (2021), <https://bit.ly/3iHIGik>.

²⁹ See, e.g., *Do Masks Delay Speech and Language Development?*, AAP (last updated Aug. 26, 2021), <https://bit.ly/3B3c8GH>; see also Ashley L. Ruba & Seth D. Pollak, *Children’s emotion inferences from masked faces: Implications for social interactions during COVID-19*, PLoS One (Dec. 23, 2020), <https://bit.ly/2ZJk9Tv>.

when caregivers promote positive associations around mask-wearing.³⁰ In the rare cases where children truly have “medical or developmental conditions [that] prohibit use,” AAP’s guidance recommends accommodations to masking policies. Face Masks, *supra* n.14.³¹

IV. Denial of In-Person Education Is Harmful to Children

Finally, Plaintiffs are correct that remote education is not an equal substitute for in-person education on a long-term basis. Extensive literature has shown that the loss of in-person education can negatively affect children’s cognitive, educational, and social development, as well as children’s short and long-term mood, behavior, and mental health.³² Children with special needs suffer the

³⁰ See, e.g., *Interim Guidance on Supporting the Emotional and Behavioral Health Needs of Children, Adolescents, and Families During the COVID-19 Pandemic*, AAP (July 28, 2021), <https://bit.ly/3DwV9gU>; *Face Masks*, *supra* n. 14; *Supporting your child’s mental health during COVID-19 school returns*, UNICEF (Aug. 28, 2020), <https://uni.cf/3iX1FG2>.

³¹ In the District Court, the State argued that enjoining Executive Order 21-175 would not redress Plaintiffs’ injuries because some students would obtain medical exemptions. This misunderstands the purpose and function of a mask mandate. Because disabilities that truly prevent masking are rare, exceptions to accommodate an individual child’s legitimate medical needs are unlikely to seriously impair a mask policy’s power to inhibit transmission.

³² 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/3uVZWW5>; Dimitri A. Christakis, et al., *Estimation of U.S. Children’s Educational Attainment and Years of Life Lost Associated with Primary*

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.³³ For these reasons, “[e]verything possible must be done to keep students in schools in-person.” *COVID-19 Guidance for Safe Schools*, *supra* n. 15.

CONCLUSION

In sum, the balance of the equities and the public interest weigh heavily in favor of enjoining Executive Order 21-175 pending appeal.

School Closures During the Coronavirus Disease 2019 Pandemic, 3 J. Am. Med. Ass’n Network Open e2028786 (2020), <https://bit.ly/3BCcBjm>.

³³ See, e.g., Ramkumar Aishworiya & Ying Qi Kang, *Including Children with Developmental Disabilities in the Equation During this COVID-19 Pandemic*, 51 J. Autism & Dev. Disorders 2155 (2021), <https://bit.ly/3FqS9o6>; Amy Houtrow, et al., *Children with disabilities in the United States and the COVID-19 pandemic*, 13 J. Pediatric Rehabilitation Med., 415, 415-24 (2020), <https://bit.ly/3Fxuv9k>.

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CERTIFICATE OF SERVICE

I certify that on October 13, 2021, the above brief was filed using the court's CM/ECF system, which will notify all registered counsel.

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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 2,597 words and was prepared using Times New Roman, 14-point font.

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