

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

CYNTHIA STEPIEN on behalf of herself and her minor child; STAMATIA DIMATOS SCHRECK, on behalf of herself and her three minor children; RYAN CODY, on behalf of himself and his minor child J.C.; KELLY FORD on behalf of herself and her minor child A.F.; GABE MCMAHON; M.F.; M.K.N.; K.B.; B.W.; L.R.; J.V.P.; V.P.; D.M.; B.M.; A.M.; and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

PHILIP D. MURPHY, Governor; ANGELICA ALLEN-McMILLAN, Commissioner of Education; JUDITH M. PERSICHILLI, Commissioner of Health,

Defendants.

Hon. Kevin McNulty, U.S.D.J.

Case No. 2:21-cv-13271-KM-JSA

Civil Action

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**BRIEF OF *AMICI CURIAE* NEW JERSEY CHAPTER OF THE
AMERICAN ACADEMY OF PEDIATRICS AND AMERICAN
ACADEMY OF PEDIATRICS IN OPPOSITION TO PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTIVE RELIEF**

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<i>Winter v. Nat. Res. Def. Council, Inc.</i> , 555 U.S. 7 (2008).....	3
Other Authorities	
ABC Science Collaborative, <i>The ABCs of North Carolina’s Plan</i> , https://bit.ly/3nhUYkr (last visited Nov. 15, 2021).....	14
ABC Science Collaborative, <i>Final Report for NC School Districts and Charters in Plan A</i> , at 3 (June 30, 2021), available at https://bit.ly/3cgHMWs	14
<i>About the COVID-19 Vaccine: Frequently Asked Questions</i> , AAP (Nov. 12, 2021), https://bit.ly/3ouUqHl	15
Amy Falk, et al., <i>COVID-19 Cases and Transmission in 17 K-12 Schools - Wood County, Wisconsin, August 31-November 29, 2020</i> , 70 Morbidity & Mortality Weekly Rep. 136 (2021), https://bit.ly/3qFvxeD	13
Ashley L. Ruba & Seth D. Pollak, <i>Children’s emotion inferences from masked faces: Implications for social interactions during COVID- 19</i> , PLoS One (2020), https://bit.ly/3Fpxc1	17
<i>Caring for Children and Youth with Special Health Needs During the COVID-19 Pandemic</i> , AAP (last updated Sept. 20, 2021), https://bit.ly/3DlqkvU	8
<i>Children and COVID-19: State Data Report</i> at Appx. Tab. 2A, Children’s Hosp. Ass’n & Am. Acad. of Pediatrics (Nov. 11, 2021), https://bit.ly/3HwUsH7	4
<i>Children and COVID-19: State-Level Data Report</i> , AAP, https://bit.ly/31RMDLR	3, 4

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<i>Children and COVID-19 Vaccinations Trends</i> , AAP, at 6 (Nov. 3, 2021), https://bit.ly/3njT56G	15
Christina Maxouris, <i>December Is the Deadliest Month in the US Since the Coronavirus Pandemic Began—and Projections for January Are “Nightmarish,” Expert Says</i> , CNN Health (Dec. 27, 2020), https://cnn.it/3oO1BKX	15
Christopher T. Leffler, et al., <i>Association of Country-wide Coronavirus Mortality with Demographics, Testing, Lockdowns, and Public Wearing of Masks</i> , 103 Am. J. Tropical Med. Hygiene 2400 (2020), https://bit.ly/2YMIszO	13
<i>COVID-19 Guidance for Safe Schools</i> , AAP (last updated Nov. 2, 2021), https://bit.ly/3DkCrcM	8, 9, 10, 11
<i>COVID-19 Interim Guidance</i> , AAP (last updated Nov. 2, 2021), https://bit.ly/3Djk1Jx	8
<i>COVID-19 Testing Guidance</i> , AAP (last updated Nov. 15, 2021), https://bit.ly/3cfroFQ	7
<i>COVID-19 Vaccines for Children and Teens</i> , CDC (Nov. 4, 2021), https://bit.ly/3ouCoEY	15
Danilo Buonsenso, et al., <i>Preliminary evidence on long COVID in children</i> , Acta Paediatrica (2021), https://bit.ly/2YMGcsj	6
Darria L. Gillespie, et al., <i>The Experience of 2 Independent Schools With In-Person Learning During the COVID-19 Pandemic</i> , 91 J. Sch. Health 347 (2021), https://bit.ly/3kAEtxR	13
<i>Delta Variant: What We Know About the Science</i> , CDC (Aug. 26, 2021), https://bit.ly/3kDI7sc	4
Derek K. Chu, et al., <i>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</i> , 395 Lancet 1973 (2020), https://bit.ly/3keJ1YU	12

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<i>Do Masks Delay Speech and Language Development?</i> , AAP, https://bit.ly/3x5lqkp	16, 17
<i>Face Masks</i> , AAP (last updated Aug. 11, 2021), https://bit.ly/30p9qOD	8, 18
Fiona Russell et al., <i>COVID-19 in Victorian Schools: An Analysis of Child-Care and School Outbreak Data and Evidence-Based Recommendations for Opening Schools and Keeping Them Open</i> , Murdoch Children’s Rsch. Inst. & The Univ. of Melb. (2020), <i>available at</i> https://bit.ly/31TpNU6	13
<i>Guidance on Providing Pediatric Well-Care During COVID-19</i> , AAP (last updated Aug. 30, 2021), https://bit.ly/3Dqxlf6	8
Heesoo Joo, et al., <i>Decline in COVID-19 Hospitalization Growth Rates Associated with Statewide Mask Mandates—10 States, March–October 2020</i> . 70	12
Helen Thomson, <i>Children with long covid</i> , 249 <i>New Scientist</i> 10 (2021), https://bit.ly/3DquZgo	6
<i>Interim Guidance on Supporting the Emotional and Behavioral Health Needs of Children, Adolescents, and Families During the COVID-19 Pandemic</i> , AAP (last updated July 28, 2021), https://bit.ly/3qGi5r2	8, 18
<i>Interim Public Health Recommendations for Fully Vaccinated People—Summary of Recent Changes</i> , CDC (Oct. 15, 2021), https://bit.ly/3mmCmy6	10
Jackie Salo, <i>Former FDA Head Warns of Post-Thanksgiving Spike in COVID-19 Cases</i> , <i>N.Y. Post</i> (Nov. 14, 2021).....	15, 16
Jeremy Howard, et al., <i>An Evidence Review of Face Masks Against COVID-19</i> , 118 <i>Proc. of the Nat’l Acad. of Servs.</i> e2014564118 (2021), https://bit.ly/3ndJVsl	12

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	Page
John T. Brooks & Jay C. Butler, <i>Effectiveness of Mask Wearing to Control Community Spread of SARS-CoV-2</i> , 325 J. of Am. Med. Ass’n 998 (2021), https://bit.ly/3Fi8Hh7	12
Madelynn A. Lillie, et al., <i>Increasing passive compliance to wearing a facemask in children with autism spectrum disorder</i> , 54 J. Applied Behavioral Analysis 582 (2021), https://bit.ly/3oNpQZB	17
Maithri Sivaraman, et al., <i>Telehealth mask wearing training for children with autism during the COVID-19 pandemic</i> , 54 J. Applied Behavioral Analysis 70 (2021), https://bit.ly/3Dv5YR0	17
Mary Halbur, et al., <i>Tolerance of face coverings for children with autism spectrum disorder</i> , 54 J. Applied Behavioral Analysis 600 (2021), https://bit.ly/3HD7dQt	17
Megan Jehn, et al., <i>Association Between K–12 School Mask Policies and School-Associated COVID-19 Outbreaks—Maricopa and Pima Counties, Arizona, July–August 2021</i> , 70 Morbidity & Mortality Weekly Rep. 1372 (2021), https://bit.ly/3uwVdKh	14
Miriam E. Van Dyke, et al., <i>Trends in County-Level COVID-19 Incidence in Counties With and Without a Mask Mandate—Kansas, June 1–August 23, 2020</i> . 69 Morbidity & Mortality Weekly Rep. 1777 (2020), https://bit.ly/31SbU8H	13
Morbidity & Mortality Weekly Rep. 212 (2021), https://bit.ly/3cgPrEd ;	12
<i>Multisystem Inflammatory Syndrome in Children (MIS-C) Associated with Coronavirus Disease 19 (COVID-19)</i> , CDC (May 14, 2020), https://bit.ly/3niE5WG	5
<i>Multisystem Inflammatory Syndrome in Children (MIS-C) Interim Guidance</i> , AAP (last updated Feb. 10, 2021), https://bit.ly/3Cp8Nlu	5

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	Page
Patrick Dawson, et al., <i>Pilot Investigation of SARS-CoV-2 Secondary Transmission in Kindergarten Through Grade 12 Schools Implementing Mitigation Strategies—St. Louis County and City of Springfield, Missouri, December 2020</i> , 70 Morbidity & Mortality Weekly Rep. 449 (2021), https://bit.ly/3HsAL3w	13
<i>Post-COVID-19 Conditions in Children and Adolescents</i> , AAP (last updated July 28, 2021), https://bit.ly/3cuLhJj	8
Rebecca B. Hershow, et al., <i>Low SARS-CoV-2 Transmission in Elementary Schools - Salt Lake County, Utah, December 3, 2020-January 31, 2021</i> , 70 Morbidity & Mortality Weekly Rep. 442 (2021), https://bit.ly/3cb48ZE	13
<i>Respiratory Protection vs. Source Control—What’s the Difference?</i> , CDC (Sept. 8, 2020), https://bit.ly/3pn0y6s	12
Samantha E. Budzyn, et al., <i>Pediatric COVID-19 Cases in Counties With and Without School Mask Requirements—United States, July 1–September 4, 2021</i> , 70 Morbidity & Mortality Weekly Rep. 1377 (2021), https://bit.ly/3uIQ8il	14
<i>Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2</i> , CDC (May 7, 2021), https://bit.ly/3utvxOA	11
<i>Science Brief: Transmission of SARS-CoV-2 in K-12 Schools and Early Care and Education Programs—Updated</i> , CDC (Nov. 16, 2021), https://bit.ly/2YRMJCe	13
Sharyn E. Parks, et al., <i>COVID-19–Related School Closures and Learning Modality Changes—United States, August 1–September 17, 2021</i> , 70 Morbidity & Mortality Weekly Rep. 1374 (2021), https://bit.ly/3ipDVtD	14
<i>Studies Show More COVID-19 Cases in Areas Without School Masking Policies</i> , CDC (Sept. 24, 2021), https://bit.ly/3kYtuyU	14
<i>Supporting your child’s mental health during COVID-19 school returns</i> , UNICEF (Aug. 28, 2020), https://uni.cf/3ny9QLG	18

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<i>Weekly Updates by Select Demographic and Geographic Characteristics</i> , CDC (data available as of Nov. 10, 2021), https://bit.ly/3wLRp9f	15
Wei Lyu & George L. Wehby, <i>Community Use of Face Masks and COVID-19: Evidence from a Natural Experiment of State Mandates in the US</i> , 39 Health Aff. 1419 (2020), https://bit.ly/3Ho9VJw	13

INTEREST OF *AMICI CURIAE*¹

The New Jersey Chapter of the American Academy of Pediatrics, (“NJAAP”) is a non-profit educational organization and professional society comprising approximately 1,900 members, including pediatricians, residents, and medical students from New Jersey. NJAAP 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

Over the past 20 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 risk that COVID-19 poses to America's children. This comprehensive review and the experiences of the front-line pediatric practitioners who make up the NJAAP and AAP's membership prove three relevant facts beyond any doubt: (i) COVID-19 poses grave risks to children, risks that escalated significantly with the rise of the Delta variant; (ii) universal mask policies in schools significantly reduce the spread of COVID-19 and protect all children; and (iii) masks do not harm children.

Recognizing these facts, Governor Murphy issued a universal mask policy so that New Jersey schools could safely conduct in-person classes despite the Delta variant of COVID-19. *See* N.J. Exec. Order 251 (Aug. 23, 2021). Plaintiffs here seek to enjoin this policy based on, among other things, the misguided and scientifically unsupported assumption that masks are somehow harmful to children's emotional well-being or development. This assumption is demonstrably wrong. This brief provides an overview of the scientific literature rebutting this claim and explains why universal mask policies are so crucial in fighting COVID-19.

The public interest is a paramount consideration in adjudicating Plaintiffs' motion for a preliminary injunction. *See Pharmacia Corp. v. Alcon Lab'ys, Inc.*, 201 F. Supp. 2d 335, 385 (D.N.J. 2002). As the Supreme Court of the United States has explained, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Here, there is no question about where the public interest points: the balance of the equities and the public interest weigh against an injunction. Universal mask policies substantially reduce the risk of death and serious illness among New Jersey's school-age population and their families, without any meaningful harm to mask-wearers. The Court should decline to prevent the State of New Jersey from protecting its students and community.

ARGUMENT

I. COVID-19 Is a Serious Childhood Illness.

Plaintiffs' brief ignores the seriousness of pediatric 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 These data fully support a universal mask policy in New Jersey's schools.

² *See Children and COVID-19: State-Level Data Report*, AAP, <https://bit.ly/31RMDLR> (data available as of Nov. 11, 2021).

As of November 11, 2021, more than 6,600,000 total child COVID-19 cases have been reported in the United States, representing nearly 17% of the total U.S. cases and 27% of reported weekly cases (despite children under the age of 18 making up 22.2% of the U.S. population).³ The prevalence of pediatric COVID-19 has skyrocketed since the school year began, with nearly a third of all child cases since the beginning of the pandemic 20 months ago diagnosed in the three months between August 13 and November 11.⁴ 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.⁵

As the rate of COVID-19 has soared, so has the number of serious cases; just among the 24 states and one city that report child hospitalizations, more than 7,000 children were hospitalized due to COVID-19 between August 13 and November 11, more than 28% of the total child hospitalizations to date.⁶ Before August 13, no more than 16 children had died from COVID-19 in any week of the pandemic; since

³ *Id.*

⁴ *Children and COVID-19: State Data Report* at Appx. Tab. 2A, Children's Hosp. Ass'n & Am. Acad. of Pediatrics (Nov. 11, 2021), <https://bit.ly/3HwUsH7>.

⁵ *See Delta Variant: What We Know About the Science*, CDC (Aug. 26, 2021), <https://bit.ly/3kDI7sc>.

⁶ *See Children and COVID-19: State Data Report*, *supra* n. 4, at Appx. Tab. 2B.

August 13, that number was matched or eclipsed for 11 straight weeks.⁷ New Jersey has reported at least 144,163 COVID-19 cases among children, and at least eight children have died from COVID-19 in the State.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).⁹ MIS-C involves clinically severe levels of fever, inflammation, and dysfunction or shock in multiple organ systems (including cardiac, renal, respiratory, hematologic, gastrointestinal, dermatologic, and/or neurological). Among other severe symptoms, it can cause coronary artery enlargement; aneurysm; meningitis; colitis; hepatitis; symptoms akin to toxic shock syndrome; thrombosis; acute kidney injury; stroke; encephalitis; congestive heart failure; and pulmonary embolism.

COVID-19 infection can also lead to many secondary conditions, ranging from subacute to severe. Several studies have shown that long-term symptoms can

⁷ *Id.* at Appx. Tab. 2C.

⁸ *Id.* at Appx. Tabs. 3B, 6B.

⁹ See *Multisystem Inflammatory Syndrome in Children (MIS-C) Associated with Coronavirus Disease 19 (COVID-19)*, CDC (May 14, 2020), <https://bit.ly/3niE5WG>; *Multisystem Inflammatory Syndrome in Children (MIS-C) Interim Guidance*, AAP (last updated Feb. 10, 2021), <https://bit.ly/3Cp8Nlu>.

occur in children and adolescents.¹⁰ Indeed, even cases with mild initial symptomatology can produce significant long-term effects. These include persistent respiratory symptoms ranging from chest pain, cough, and exercise-induced dyspnea to pulmonary emboli; myocarditis (i.e., inflammation of the heart muscle), shortness of breath, arrhythmia, and/or fatigue, potentially leading to 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; neurodevelopmental sequelae, both including the consequences of significant acute injuries such as stroke or encephalitis and subtle but persistent sequelae in cognitive, language, academic, motor, mood, and behavioral domains; cognitive fogging or fatigue; physical fatigue; and mental or behavioral health impacts such as stress and adjustment disorders.

¹⁰ See, e.g., Danilo Buonsenso, et al., *Preliminary evidence on long COVID in children*, *Acta Paediatrica* (2021), <https://bit.ly/2YMGcsj> (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://bit.ly/3DquZgo> (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).

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

A. Overview of AAP’s Evidence-Based Guidance on 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. 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 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;¹¹ on providing clinical care to

¹¹ *COVID-19 Testing Guidance*, AAP (last updated Nov. 15, 2021), <https://bit.ly/3cfroFQ>.

patients with COVID-19;¹² on treating post-COVID conditions;¹³ on how to safely provide routine medical care such as check-ups, screenings, laboratory exams, treatment, and immunizations during the COVID-19 pandemic;¹⁴ on caring for youth with special health needs during the COVID-19 pandemic;¹⁵ on supporting the emotional and behavioral health needs of children, adolescents, and families during the COVID-19 pandemic;¹⁶ and—most relevant to this case—on the use of face masks as an infection control measure¹⁷ and on operating safe schools during the COVID-19 pandemic that foster the overall health of children, adolescents, educators, staff, and communities.¹⁸ These Interim Guidance Statements were drafted and reviewed by a number of pediatricians with expertise in a wide variety

¹² *COVID-19 Interim Guidance*, AAP (last updated Nov. 2, 2021), <https://bit.ly/3Djk1Jx>.

¹³ *Post-COVID-19 Conditions in Children and Adolescents*, AAP (last updated July 28, 2021), <https://bit.ly/3cuLhJj>.

¹⁴ *Guidance on Providing Pediatric Well-Care During COVID-19*, AAP (last updated Aug. 30, 2021), <https://bit.ly/3Dqxlfe>.

¹⁵ *Caring for Children and Youth with Special Health Needs During the COVID-19 Pandemic*, AAP (last updated Sept. 20, 2021), <https://bit.ly/3DlqkvU>.

¹⁶ *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://bit.ly/3qGi5r2>.

¹⁷ *Face Masks*, AAP (last updated Aug. 11, 2021), <https://bit.ly/30p9qOD>.

¹⁸ *COVID-19 Guidance for Safe Schools*, AAP (last updated Nov. 2, 2021), <https://bit.ly/3DkCrcM>.

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 NJAAP 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 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 "all local, state, and federal policy considerations for school COVID-19 plans should start with a goal of keeping students safe, physically present, and emotionally supported in school."¹⁹ "[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 eligible, . . . the benefits of in-person

¹⁹ *Id.*

school outweigh the risks in almost all circumstances.”²⁰ 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).”²¹

This conclusion has been consistently reinforced by all relevant data and credible research, leading 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, 2021.²² Just this month, after reviewing all scientific evidence to date on the transmission and prevention of COVID-19 during the current school year, AAP reaffirmed its recommendation of universal masking.²³

²⁰ *Id.* (emphasis added).

²¹ *Id.* (emphasis in original).

²² *Interim Public Health Recommendations for Fully Vaccinated People—Summary of Recent Changes*, CDC (Oct. 15, 2021), <https://bit.ly/3mmCmy6>.

²³ *COVID-19 Guidance for Safe Schools*, *supra* n. 18.

B. Universal Masking Policies Are Highly Effective at Reducing Transmission of COVID.

While there are several reasons for the AAP's (and the CDC's) recommendation of universal masking in school,²⁴ the most important is that the research has confirmed that masks are both effective and safe. Masks “reduce the emission of virus-laden droplets . . . , which is especially relevant for asymptomatic or pre-symptomatic 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.”²⁵ Cloth masks “block most large droplets (i.e., 20-30 microns and larger)” and “also block the exhalation of fine droplets.”²⁶ “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.²⁷ 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.”²⁸

²⁴ *See id.* (identifying eight bases for AAP's mask recommendation).

²⁵ *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).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

This difference between masks' ability to block *exhalation* and *inhalation* of viral particles explains why it is so important for mask policies to be universal. Masks' primary benefit is as "source control," preventing infected carriers from spreading viral particles widely. As the CDC has explained, "masks are not designed to reduce the particles that the wearer will inhale The purpose of wearing a mask is to help reduce the spread of COVID-19 by reducing the spread of the virus through respiratory droplets from asymptomatic individuals."²⁹ Because wearing a mask provides only limited protection against contracting COVID-19 if the wearer is near one or more unmasked carriers, universal masking is needed as source control for COVID-19 carriers (who may be asymptomatic and not know they are shedding viral particles), thereby protecting vulnerable individuals.

Numerous studies have shown that increasing the rate of mask-wearing, including through universal mask policies in particular, significantly reduces the spread of COVID-19.³⁰ In particular, studies have shown that masking and similar

²⁹ *Respiratory Protection vs. Source Control—What's the Difference?*, CDC (Sept. 8, 2020), <https://bit.ly/3pn0y6s>.

³⁰ 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://bit.ly/3ndJVsl>; 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://bit.ly/3Fi8Hh7>; 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://bit.ly/3cgPrEd>; Derek K. Chu, et al., *Physical Distancing, Face Masks, and*

mitigation measures can limit transmission in schools.³¹ Most recently, the CDC released three studies conducted during this school year, all of which found that “school districts without a universal masking policy in place were more likely to

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://bit.ly/3kEj1YU>; 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://bit.ly/2YMIszO>; 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://bit.ly/31SbU8H>; 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://bit.ly/3Ho9VJw>.

³¹ 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 Springfield, Missouri, December 2020*, 70 *Morbidity & Mortality Weekly Rep.* 449 (2021), <https://bit.ly/3HsAL3w>; 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://bit.ly/3kAEtxR>; Rebecca B. Hershov, 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://bit.ly/3cb48ZE>; 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://bit.ly/3qFvxeD>; Fiona Russell et al., *COVID-19 in 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://bit.ly/31TpNU6>; see generally *Science Brief: Transmission of SARS-CoV-2 in K-12 Schools and Early Care and Education Programs—Updated*, CDC (Nov. 16, 2021), <https://bit.ly/2YRMJCe>.

have COVID-19 outbreaks.”³² As the ABC Science Collaborative, a 13-state initiative coordinated by the Duke Clinical Research Institute at the Duke University School of Medicine, said: “[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.”³³

To the extent Plaintiffs argue that the need for a mask policy has been vitiated by the recent authorization of vaccines for five- to -eleven-year-olds, this misunderstands the current state of the pandemic. While pediatric vaccines are now *available* for children as young as five years old, few if any children between five and eleven have been fully vaccinated to date. Even children who received their first shot immediately after the CDC permitted vaccinating this age group on November

³² 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/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.* 1377 (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.* 1374 (2021), <https://bit.ly/3ipDVtD>.

³³ ABC Science Collaborative, *The ABCs of North Carolina’s Plan*, <https://bit.ly/3nhUYkr> (last visited Nov. 15, 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://bit.ly/3cgHMWs>.

2, 2021 need to wait three weeks for their second shot,³⁴ and vaccine efficacy is not complete for seven to fourteen days thereafter.³⁵ And it will take time for all or even a majority of children to receive the vaccine; even among 12- to 15-year-olds, who have been eligible for the vaccine for months, only 48% are fully vaccinated.³⁶

Enjoining the mask policy now would be especially dangerous because of the imminent holiday season. Last year, Thanksgiving and Christmas ushered in the worst surge of the pandemic.³⁷ The weekly death rate reached a peak 50% higher than any point in the pandemic before or since.³⁸ While vaccination rates will suppress this year's holiday surge, the highly transmissible Delta variant creates a significant risk of another major spike.³⁹ As former FDA Commissioner Scott

³⁴ See *COVID-19 Vaccines for Children and Teens*, CDC (Nov. 4, 2021), <https://bit.ly/3ouCoEY>.

³⁵ See *About the COVID-19 Vaccine: Frequently Asked Questions*, AAP (Nov. 12, 2021), <https://bit.ly/3ouUqHl>.

³⁶ See *Children and COVID-19 Vaccinations Trends*, AAP, at 6 (Nov. 3, 2021), <https://bit.ly/3njT56G>.

³⁷ See, e.g., Christina Maxouris, *December Is the Deadliest Month in the US Since the Coronavirus Pandemic Began—and Projections for January Are “Nightmarish,” Expert Says*, CNN Health (Dec. 27, 2020), <https://cnn.it/3oO1BKX>.

³⁸ *Weekly Updates by Select Demographic and Geographic Characteristics*, CDC (data available as of Nov. 10, 2021), <https://bit.ly/3wLRp9f>.

³⁹ See, e.g., Jackie Salo, *Former FDA Head Warns of Post-Thanksgiving Spike in COVID-19 Cases*, N.Y. Post (Nov. 14, 2021), <https://bit.ly/30AlQ6t> (predicting particularly severe effects in, among other places, western Pennsylvania).

Gottlieb put it, “We’re going to see a post-holiday spike, there’s no question about that. People are exhausted right now, but we need to remain vigilant just for a little bit longer.”⁴⁰

III. Masks Do Not Harm Children.

Plaintiffs suggest—without any scientific support—that masks are somehow harmful to children’s emotional well-being or development. *See, e.g.*, Plfs.’ Br. at 4 (stating that masking requirements have caused children to “become riven with fear and anxiety”), 10 (stating that students in a declarant’s school district have experienced “depression and isolation, monotony and a lack of joy” due to the mask policy), and 25 (describing “interference in socialization skills and development that arose during the mask mandate”). While such fears are understandable, the AAP’s comprehensive review of the medical research has shown that they are unfounded.

There is currently “no evidence that use of face masks prevents or delays speech or language development.”⁴¹ 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.”⁴² Indeed, being

⁴⁰ *Id.*

⁴¹ *Do Masks Delay Speech and Language Development?*, AAP, <https://bit.ly/3x5lqkp>.

⁴² *Id.*

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.⁴³

Crucially, the AAP does not recommend (and the State does not require) 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. Plaintiffs provide neither evidence nor theory for suggesting otherwise.

Some children with preexisting developmental disabilities may have difficulty wearing masks. In many cases, this can be overcome with coaching,⁴⁴ 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 State's policy allows for accommodations, just as the AAP's guidance recommends.

⁴³ *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/3Fxpxc1> (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").

⁴⁴ See, e.g., Maithri Sivaraman, et al., *Telehealth mask wearing training for children with autism during the COVID-19 pandemic*, 54 J. Applied Behavioral Analysis 70 (2021), <https://bit.ly/3Dv5YR0>; Madelynn A. Lillie, et al., *Increasing passive compliance to wearing a facemask in children with autism spectrum disorder*, 54 J. Applied Behavioral Analysis 582 (2021), <https://bit.ly/3oNpQZB>; Mary Halbur, et al., *Tolerance of face coverings for children with autism spectrum disorder*, 54 J. Applied Behavioral Analysis 600 (2021), <https://bit.ly/3HD7dQt>.

In addition, the research demonstrates that mask-wearing is not linked to emotional or psychological harm, particularly when caregivers promote positive associations around mask-wearing.⁴⁵ 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 or disordered behavior 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.

In sum, the fears Plaintiffs express have no basis in scientific research or medical experience. Even if they had provided some shred of credible evidence for their concerns, it would not come close to establishing a likelihood of irreparable harm—much less a harm so significant that it overcomes the risks to other children and the community from the increased spread of COVID-19 if the State’s mask

⁴⁵ *Interim Guidance on Supporting the Emotional and Behavioral Health Needs of Children, Adolescents, and Families During the COVID-19 Pandemic*, supra n. 16; *Face Masks*, supra n. 17 (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 (Aug. 28, 2020), <https://uni.cf/3ny9QLG> (“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.”).

policy is enjoined. The balance of equities and the public interest thus weigh heavily against Plaintiffs' requested injunction.

CONCLUSION

For these reasons and those stated in Defendants' brief, the Court should deny Plaintiffs' request for an injunction.

Dated: November 19, 2021 Respectfully submitted,

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