# CV-21-498

**IN THE ARKANSAS SUPREME COURT**

BENTONVILLE SCHOOL DISTRICT;
DR. DEBBIE JONES, in her official capacity;
ERIC WHITE, in his official capacity;
MATT BURGESS, in his official capacity
KELLY CARLSON, in his official capacity;
BRENT LEAS, in his official capacity;
WILLIE COWGUR, in his official capacity;
JOE QUINN, in his official capacity; and
JENNIFER FADDIS, in her official capacity APPELLANTS

v.

MATT SITTON, MATTHEW BENNETT, and
ELIZABETH BENNETT APPELLEES

**ON APPEAL FROM THE CIRCUIT COURT OF BENTON COUNTY**
**THE HONORABLE XOLLIE DUNCAN, CIRCUIT JUDGE**

**BRIEF OF APPELLANTS**

Marshall S. Ney, Ark. Bar No. 91108
Katherine C. Campbell, Ark. Bar No. 2013241
FRIDAY, ELDREDGE & CLARK, LLP
3350 S. Pinnacle Hills Parkway, Suite 301
Rogers, Arkansas 72758
Telephone: (479) 695-6049
mney@fridayfirm.com
kcampbell@fridayfirm.com

*Attorneys for Appellants*

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## POINTS ON APPEAL

A. The circuit court erred in holding that the Bentonville School District's mask policy violated parents' fundamental right to the care, custody, and management of their children under Sections 21 and 29 of Article 2 of the Arkansas Constitution, when the policy was enacted to promote students' health and safety, to advance their achievement, and to facilitate in-person instruction.

- *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)
- *Davis v. Smith*, 266 Ark. 112, 117, 583 S.W.2d 37, 40 (1979)

B. The circuit court erred in holding that the Bentonville School District lacked authority to issue a policy promoting its students' health and safety, advancing student achievement, and increasing efficiency by facilitating in-person instruction.

- Ark. Code Ann. § 6-13-620
- *Fortman v. Texarkana Sch. Dist. No. 7*, 257 Ark. 130, 132, 514 S.W.2d 720, 722 (1974).

C. The circuit court erred in holding that parents suffered irreparable harm because parents failed to establish their constitutional rights have been violated and parents could have, but did not, (1) seek an exemption from the mask policy, (2) homeschool their children, or (3) transfer their children to another district without a mask policy.

- *Manila Sch. Dist. No. 15 v. Wagner*, 356 Ark. 149, 156, 148 S.W.3d 244, 248 (2004)
- *Wilson v. Pulaski Ass'n of Classroom Tchr*s., 330 Ark. 298, 303, 954 S.W.2d 221, 224 (1997)

D. The circuit court erred in determining that there was a justiciable controversy because parents' claim was not ripe and parents lacked standing to bring the lawsuit.

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## JURISDICTIONAL STATEMENT

**A. This is an appeal from an interlocutory order granting an injunction.** This is an interlocutory appeal from an order of the Benton County Circuit Court filed on October 12, 2021, enjoining enforcement of the Bentonville School District's mask policy. (RP196-204). The appeal is authorized because it is an appeal of an interlocutory order granting an injunction. *See* Ark. R. App. P.–Civ. 2(a)(6).

**B. This appeal is timely.** The circuit court's Order was entered on October 12, 2021. (RP196-204). The Appellants filed a timely notice of appeal on October 13, 2021 (RP205-207) and timely lodged the record on appeal on October 19, 2021.

**C. This appeal is properly before the Supreme Court.** This appeal involves the interpretation of the Arkansas Constitution. Therefore, the Supreme Court has jurisdiction pursuant to Ark. Sup. Ct. R. 1-2(a)(1). Additionally, reassignment to the Arkansas Supreme Court would be warranted because the case involves issues of first impression, issues of substantial public interest, and significant issues needing clarification. *See* Ark. Sup. Ct. R. 1-2(b)(1) & (4)-(5).

## STATEMENT OF THE CASE AND THE FACTS

This case arises from Bentonville School District's implementation of a mask policy at the start of the 2021-22 school year.

### A. The Policy

On August 11, 2021, the Bentonville School District (the "School District") adopted a policy requiring masks indoors and on buses for students three years of age and older (the "Policy"). (RP116, 119). The Policy provides exceptions for those engaged in outdoor activities, eating and drinking, or with documented medical conditions or disabilities. (RP078). A majority of the Bentonville School Board (the "Board") voted for the Policy. (RP116, 119). During the meeting in which that vote was held, the Board heard from 50 members of the community regarding the mask policy. (RP117). The speakers included parents, students, and medical professionals, including several doctors who favored implementing a mask policy. (RP117). Representatives of the Arkansas Department of Education (ADE) and the Arkansas Department of Health (ADH) attended virtually and answered questions from the Board for approximately one hour. (RP117).

### B. Act 1002

In April 2021, the Arkansas General Assembly passed Act 1002, which prohibited state and local governments, including public school districts, from requiring masks. On August 6, 2021, the Pulaski County Circuit Court enjoined Act

1002. *See McClane et al. v. Arkansas et al*., Case No. 60CV-21-4692 (Pulaski Cnty. Cir. Ct. Aug. 6, 2021). This Court has declined to stay that injunction pending appeal. As a result, at all times relevant to this case, Act 1002 did not prohibit the Policy. In fact, the Board's vote came just days after Act 1002 had been enjoined. (RP117).

Governor Hutchison praised the Pulaski County Circuit Court's decision allowing school districts to implement their own mask policies, stating at a press conference, "I do support the decision of Judge Fox. I thought it was well reasoned. It was limited but well-reasoned and certainly constitutionally based." *Hutchinson Briefing, Aug. 6, 2021.* In that same press conference, the Governor made clear that he did not intend to implement a state-wide mask mandate. *Id*. Instead, he supported local school districts implementing their own mask policies. *Id*. ("The schools . . . now have the . . . independent authority to address that gap in the unvaccinated population of under 12 and that was my objective to begin with is that schools now have independent authority to act as needed to protect the children."). In an answer filed in a separate lawsuit, Governor Hutchinson confirmed his belief that "the local school districts should make the call, and they should have more options to make sure that their school is a safe environment during a challenging time for education." (RP131).

By the time the School District was considering the Policy, school districts understood that they were the only line of defense for students at the beginning of the school year.

### C. The Increase in COVID-19 in Children During the Summer of 2021

The Policy was implemented in response to the rise of COVID-19's highly contagious and virulent Delta variant. (RP118-119). During the summer of 2021, the number of COVID-19 cases increased dramatically nationwide, largely due to the Delta variant. Children represented an increasing proportion of new COVID-19 cases and hospitalizations. On August 3, 2021, the Arkansas Health Secretary presented some "sobering numbers." *Hutchinson Briefing, Aug. 3, 2021.* As of August 1, 2021, nearly 19% of all active COVID-19 cases were in kids under the age of 18. *Id*. More than half those children were under the age of 12. *Id*. Between April and July, there was a nearly 570% increase in the number of COVID-19 cases in children under the age of 18 and a nearly 690% increase in the cases in children under 12 years of age. *Id*. There was a nearly 270% increase in hospitalizations in children under 18 years during that same time. *Id*. During that same timeframe, there was a 275% increase in the number of ICU admissions, and 20% of those admissions have been in children under the age of 12. *Id*. Among children less than 18 years of age who were hospitalized in July, 58% of them were less than 12 years of age. *Id*.

In late August 2021, ADH showed that 23% of active cases were in children, and more than 3,000 of those cases were in children under 12 years of age. (RP126-127). On August 25, 2021, Arkansas Children's Hospital reported that it had 23 children hospitalized with COVID-19. *Id.* Half those patients were in intensive care, and seven were on ventilators. *Id.* And in late August 2021, UAMS projected that the "state w[ould] see an additional 10,784 children with COVID-19 by August 30, an increase of 17% over the number reported on Aug. 15." *Williams, COVID-19 Forecast in Arkansas.* During a press conference on August 31, 2021, the Governor reported that 30% of current active cases were in the 0-18 age group, a sharp increase from months before, and there were more hospitalizations in that age group than ever before. *Hutchinson Briefing, Aug. 31, 2021.*

In short, the risk posed to children from COVID-19 at the beginning of the 2021-22 school year was real and more serious than ever. The School District considered the sharp rise in COVID-19 cases among children and the seriousness of the cases in children in implementing the Policy. (RP119).

**D. Mask Wearing Is Scientifically Proven to Reduce Spread of COVID-19**

COVID-19 spreads through respiratory droplets that are released when infected individuals cough, sneeze, or talk. *See Mayo Clinic, Coronavirus Disease 2019.* Individuals usually do not know they are infected for at least several days, and they may never know if they remain asymptomatic. *Id.* The risk of transmission

is heightened in indoor environments. *Id.* Because of the nature of the virus, mask wearing has been scientifically proven to significantly reduce spread of the virus. *Brooks & Butler, Effectiveness of Mask Wearing.* As a result, the Centers for Disease Control and Prevention (CDC), Department of Education (DOE), and Arkansas Department of Education all recommend universal indoor mask wearing by all students, staff, teachers, and visitors to K-12 schools, regardless of vaccination status. (RP048)*; see also CDC Guidance for COVID-19 Prevention in K-12 Schools; Secretary of Education Reopening of Schools Blog.* The School District considered the efficacy of mask wearing in implementing the Policy. (RP118-119).

**E. Mask Wearing Promotes In-Person Instruction**

Because mask wearing prevents the spread of the virus, it also helps promote in-person instruction. The guidance from ADE's Division of Elementary and Secondary Education (DESE) provides that individuals exposed to COVID-19 need not quarantine if they are asymptomatic and both the infected and exposed individual were wearing masks. (RP051). As a result, universal mask wearing greatly increases the odds that children stay in school.

The impact of quarantine on schools was demonstrated by the Marion School District in late July 2021. During the first week of school, seven Marion students and three employees tested positive for COVID-19. *Sherfield, Quarantine After First Week of School in Marion.* Following ADE and ADH guidance, the Marion

School District placed 168 individuals in quarantine during the first week of school. *Id.* After the first two weeks of school, 1,194 students were forced to quarantine. *Marion Mask Mandate.* The Marion School District represented that if all the individuals merely exposed to, but not testing positive for, COVID-19 had been consistently and correctly wearing masks, only a fraction of these individuals would have been required to quarantine. *See* Compl. at 6, *Little Rock School District et al. v. Hon. Asa Hutchinson et al.*, Case No. 60CV-21-4763 (Pulaski Cnty. Cir. Ct. Aug. 5, 2021).

The Board considered the experience of the Marion School District and the impact quarantines would have on school operations in considering the Policy. (RP118). The Board also considered the overarching goal of ensuring a safe return to in-person instruction, the School District's obligation to provide for continuity of operations, and the DESE guidance providing that quarantine is required only for those testing positive or experiencing symptoms if all students are wearing masks. (RP118-119).

Mask wearing has now been proven as an effective tool to keep students in the classroom. In September 2021, the Arkansas Center for Health Improvement reported that more than 100 school districts in Arkansas were requiring masks, and many other districts in the state have partial mask requirements. *ACHI, Back to School Information.* And an Arkansas Bureau of Legislative Research survey shows

that the districts that have implemented such policies have a lower percentage of students and employees who have contracted COVID-19 and who are quarantined than those with no mask policies. *Wickline & Simpson, School Quarantine Survey.*

### F. Schools Without Mask Policies Are Subject to Investigation and Loss of Federal Funding

In order to achieve the national goal of a safe return to in-person instruction, Bentonville School District has received federal funding under the American Rescue Plan (ARP) to help reopen its schools. (RP120). The ARP explicitly authorizes using these funds to implement policies in line with guidance from the CDC for reopening and operating of school facilities. Pub. L. No. 117-2, 135 Stat. 4 § 2001(e)(2)(Q). This specifically includes the CDC's recommendation for universal indoor masking in K-12 schools. 86 Fed. Reg. 21195-01, 21200 (Apr. 22, 2021) (to be codified at 34 C.F.R. ch. II).

Additionally, DOE has announced that investigations are possible, if not likely, for schools that do not require masks, and has endorsed individual districts' ability to implement mask policies. *See DOE OCR Opens Investigations* ("[D]istricts should be able to implement universal indoor masking in schools to protect the health and safety of their students and staff.") (emphasis added); *DOE Letter to Florida* (announcing investigations in five states for prohibiting indoor mask policies at schools). DOE's Office of Civil Rights (OCR) has the authority to investigate any district in which policies or actions infringe on the rights of each

student to access public education equally, including violation of students' rights to adequate education or discrimination as a result of a district's failure to reduce virus transmission risk through masking requirements and other mitigation measures. *Secretary of Education Reopening of Schools Blog.* OCR can issue a range of sanctions for any violations, up to revocation of federal funding. *See* 34 C.F.R. § 100.10.

In sum, the School District considered the danger students and staff faced from the Delta variant, the threat that mass quarantines posed to in-person instruction, and the guidance from the state and federal governments regarding mask wearing in passing the Policy.

**G. Procedural History**

The Plaintiffs in this case (hereinafter, "Parents") sued to challenge the Policy on August 19, 2021. The School District removed that suit to federal court because it raised a claim under the federal constitution. Parents waited weeks while the lawsuit was pending in federal court and never sought a hearing on their request for injunctive relief. Just after the School District moved to dismiss the complaint in federal court on September 9, 2021, Parents voluntarily dismissed it themselves.

Parents re-filed their complaint the next day in state court, strategically removing their Fourteenth Amendment claim. The circuit court heard the request for an injunction on September 30 and reconvened to announce its ruling granting the injunction on October 6. The injunction order was entered on October 12, 2021. (RP196-204).

## ARGUMENT

### I. Overview.

This Court should reverse the circuit court's injunction. First, the Policy does not violate Parents' right to the care, custody, and management of their children under Article 2, Sections 21 and 29 of the Arkansas Constitution. Second, the School District has ample authority to issue policies to promote the health and wellbeing of its students, to promote student achievement, and to increase efficiency, and acted within that authority here. Third, Parents did not suffer irreparable harm. Fourth, there was no justiciable controversy before the circuit court. For these reasons, this Court should reverse.

### II. Standard of Review.

Although appellate courts typically review preliminary injunctions under an abuse-of-discretion standard (*see LaPointe v. New Tech., Inc*., 2014 Ark. App. 346, at 4, 437 S.W.3d 126, 129), this case is different because it involves a challenge based on Parents' rights under the Arkansas Constitution. As a result, a de novo standard of review applies. *See Cent. Oklahoma Pipeline, Inc. v. Hawk Field Servs., LLC*, 2012 Ark. 157, at 9, 400 S.W.3d 701, 707 (holding that de novo review applies to "both the circuit court's interpretation of the constitution as well as issues of statutory interpretation"); *Weiss v. McLemore*, 371 Ark. 538, 268 S.W.3d 897 (2007) (same); *see also Kimbrell v. State*, 2017 Ark. App. 555, at 4, 533 S.W.3d 114, 117

(applying de novo review for constitutional challenge to Arkansas statute based on violations of plaintiff's due process rights). Therefore, this Court should review the circuit court's ruling de novo.

## III. This Appeal Is Not Moot.

As a threshold matter, this appeal is not moot despite the fact that the Policy lapsed in October 2021 due to the decline in infection rates in the School District. A case becomes moot when any judgment rendered would have no practical legal effect on a then-existing legal controversy. *Honeycutt v. Foster*, 371 Ark. 545, 548, 268 S.W.3d 875, 878 (2007). But the two exceptions to the mootness doctrine apply here: (1) this cases raises issues that are capable of repetition while evading review, and (2) the issues in this case raise considerations of substantial public interest that, if addressed, would prevent future litigation. *Swindle v. Rogers Bd. of Educ.*, 2013 Ark. App. 416, at 2, 538 S.W.3d 211, 213.

Here, the Policy provides that it may be revived if there is a fourteen-day infection rate of at least 50 new known infections per 10,000 School District residents. (RP078). If the infection rates again rise above the applicable threshold, then the Policy could again be implemented.

Meanwhile, numbers could decline again before either side (the School District or Parents) could obtain judicial review. As a result, the issues on appeal are capable of repetition yet evading review. *See Swindle*, 2013 Ark. App. at 2, 538 S.W.3d at 213 (holding that "the right to appeal the school board's decision to circuit court is also subject to repetition but evading review.").

Additionally, the issues involved are ones of substantial public interest that, if addressed, would prevent future litigation. It is well established that issues related to public schools are matters of substantial public interest. *See Springdale Bd. of Educ. v. Bowman*, 294 Ark. 66, 68, 740 S.W.2d 909, 909 (1987) (rejecting student's argument that case was moot since she had already graduated because "the questions raised in the case were issues of public interest and practical importance, and were subject to repetition"); *see also Richie v. Bd. of Educ. of Lead Hill Sch. Dist*., 326 Ark. 587, 590, 933 S.W.2d 375, 377 (1996) ("[T]he right of a student to appeal to the school board a suspension from school made by a teacher [is] an issue of public importance and one subject to repetition[.]").

With more than 100 districts having implemented mask policies during the 2021-22 school year, the issue of masking in schools will continue to challenge school districts and parents into the future. Thus, this case presents the Court with an opportunity to decide an issue of substantial public interest whose resolution would prevent to future litigation.

Accordingly, this case falls under both exceptions to the mootness doctrine, and the Court can and should reach the merits of this appeal.

## IV. In Order To Issue an Injunction, the Circuit Court Must Find a Likelihood of Success on the Merits and Irreparable Harm.

A preliminary injunction is an "extraordinary remedy reserved for extraordinary circumstances." *Muntaqim v. Lay*, 2019 Ark. 203, at 2, 575 S.W.3d 542, 545 (affirming denial of preliminary injunction). When determining whether to grant a preliminary injunction, courts consider two factors: "(1) whether irreparable harm will result in the absence of an injunction; and (2) whether the moving party has demonstrated a likelihood of success on the merits." *Id*. "A party seeking a preliminary injunction bears the burden of demonstrating both factors." *Id*. Regarding the first factor, the Arkansas Supreme Court has held: "The prospect of irreparable harm or lack of an otherwise adequate remedy is the foundation of the power to issue injunctive relief." *Three Sisters Petroleum, Inc. v. Langley*, 348 Ark. 167, 175, 72 S.W.3d 95, 100-01 (2002). With respect to the second factor, "the test for determining the likelihood of success is whether there is a reasonable probability of success in the litigation." *Id*.

## V. The Circuit Court Erred in Determining that the Policy Violates Parents' Fundamental Right to the Care of Their Children.

The circuit court simply assumed—without any analysis or support—that the School District's Policy infringed upon Parents' fundamental liberty interest in the

care and custody of their children. (RT075-076). Rather than start with that necessary question, the circuit court focused exclusively on whether the School District had the authority to implement the Policy. (RT077) ("If the Defendants have that authority, the Plaintiffs have failed to show irreparable harm, they have failed to show likelihood of success on the merits. If the Defendants do not have that authority, the Plaintiffs have met their burden on both.").

But the constitutionality of the Policy and the School District's authority to implement the Policy must not be conflated; they are distinct inquiries. The claim that the School District acted beyond the scope of its express statutory authority does not amount to the infringement of a fundamental right. "The law is well settled that school districts are not only authorized to exercise the powers that are expressly granted by statute, but also such powers as may be fairly implied therefrom[.]" *Am. Exch. Tr. Co. v. Truman Special Sch. Dist*., 183 Ark. 1041, 40 S.W.2d 770, 771 (1931); *see also Koch v. Adams*, 2010 Ark. 131, at 6, 361 S.W.3d 817, 821 (dismissing student's claim for unlawful taking of private property without due process of law and rejecting student's argument that the district's "actions in seizing the cell phone were wrongful because no law specifically authorized that conduct").

Rather, when considering a constitutional challenge to state action, courts must consider the nature of the interest at issue and the reason for the state action. The circuit court did neither. Whether analyzed under the *Jacobson* framework unique to a public-health crisis or the more traditional rational basis review, the Policy easily passes muster.

### A. The Policy Is Proper Under the *Jacobson* Framework.

The framework set forth in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) applies in this case. There, the United States Supreme Court upheld the constitutionality of a Massachusetts law authorizing local governments to require immunizations for smallpox. *Id.* at 12-14. In doing so, the Court set forth a "two-part framework" that governs "in the context of a public-health crisis." *In re Rutledge*, 956 F.3d 1018, 1027-28 (8th Cir. 2020). As a result, measures may "infringe on constitutional rights" unless those measures (1) have "no real and substantial relation" to public health, safety or morals or (2) are, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law[.]" *Id*. (quoting *Jacobson*, 197 U.S. at 31); *see also Wright v. DeWitt Sch. Dist. No. 1 of Arkansas Cty.*, 238 Ark. 906, 910, 385 S.W.2d 644, 647 (1965) (relying on *Jacobson* and concluding that state health regulation requiring students to vaccinated against smallpox was "reasonable"). The School District's Policy is appropriate under the *Jacobson* framework.

**1. The Policy is related to public health.**

*First*, the School District's mask policy has a real, substantial relation to public health. It is scientifically proven that masks prevent spread of the COVID-19 virus, and the School District implemented the Policy to prevent spread of the virus, reduce quarantine, and promote student safety and health. (RP118-119). Thus, it is clear that the Policy bears a real, substantial relation to public health under *Jacobson*.

**2. The Policy does not violate a fundamental right.**

*Second*, the Policy is not an invasion of a fundamental right. Here, Parents allege that the Policy infringes upon their liberty interest in the care, custody, and management of their minor children. (RP016). But Parents have not demonstrated that the Policy violates a fundamental liberty interest. Although parents "have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child." *Blau v. Fort Thomas Public School District*, 401 F.3d 381, 395 (6th Cir. 2004); *see also Stevenson v. Blytheville Sch. Dist.* #5, 800 F.3d 955, 966 (8th Cir. 2015) ("[P]arents simply do not have a constitutional right to control each and every aspect of their children's education[.]) (citation omitted).

Parents do have a fundamental liberty interest in the care, custody, and management of their children. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *see*

*also Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (plurality opinion). Arkansas courts recognize that parental rights are protected by the Arkansas Constitution. *See Bush v. Dietz*, 284 Ark. 191, 196, 680 S.W.2d 704, 707 (1984); *Davis v. Smith*, 266 Ark. 112, 117, 583 S.W.2d 37, 40 (1979). But this right is not absolute. *See Davis*, 266 Ark. at 117-18, 583 S.W.2d at 40. The circuit court agreed. (RT075).

The cases analyzing parental rights under the Arkansas Constitution primarily relate to the termination of parental rights. Even in this context, Arkansas courts have made clear that "[p]arental rights are not, however, beyond limitation in the public interest." *Davis*, 266 Ark. at 117-18, 583 S.W.2d at 40 (citing *Prince v. Massachusetts*, 321 U.S. 158 (1944)). The United States Supreme Court in *Prince* held the government "has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." *Prince*, 321 U.S. at 167.

> [T]he family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways.

*Id.* at 166-67. Following *Prince*, the Arkansas Supreme Court held that: "the state's constitutional interest extends to the welfare of the child. Parental rights are not immune from interference by the state in its role of parens patriae." *See Davis*, 266 Ark. at 118, 583 S.W.2d at 40 (citation omitted).

Arkansas courts recognize that a parent's rights are not absolute. Moreover, the United States Supreme Court precedent in *Prince*, followed by Arkansas court for decades, provides that the state has wide latitude in regulating parental rights when the child's welfare is at issue. *See Davis*, 266 Ark. at 118, 583 S.W.2d at 40; *see also Wright*, 238 Ark. at 910, 385 S.W.2d at 647 ("The authority to supervise and control the activities of children is broader than that over similar actions of adults.") (citing *Prince*, 321 U.S. 158). In the specific context of education, Arkansas courts have recognized that "the State's interest in education of its citizens" may outweigh a parent's parental rights. *McFarland v. McFarland*, 318 Ark. 446, 451, 885 S.W.2d 897, 900 (1994).

Further, the United States Supreme Court has "stressed . . . that schools at times stand *in loco parentis*, *i.e*., in the place of parents*." Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2044-45, (2021). In this role, school authorities act "to protect children[.]" *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986). Through the doctrine of *in loco parentis,* courts have "upheld the right of schools to discipline students, to enforce rules, and to maintain order." *Morse v. Frederick*, 551 U.S. 393, 413-22 (2007) (Thomas, J., concurring) (collecting cases and providing historical overview of *in loco parentis* doctrine). As explained in Morse, "the in loco parentis doctrine imposed almost no limits on the types of rules that a school could set while students were in school[.]" *Id.* at 393.

Other courts have held that parents have a constitutionally recognized interest in controlling their children's education, but this interest "is neither absolute nor unqualified[.]" *Blytheville Sch. Dist. #5*, 800 F.3d at 966 (holding parents have no interest in determining which public school in the district their children attend).[1] "Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally 'committed to the control of state and local authorities.'" *Blau*, 401 F.3d at 395–96 (quoting *Goss v. Lopez*, 419 U.S. 565, 578 (1975)).

Applying these principles in a similar case, a federal court recently denied parents' request for injunctive relief and granted summary judgment in favor of a school district. *Borishkevich v. Springfield Pub. Sch. Bd. of Educ*., No. 20-03240-CV-S-BP, 2021 WL 2213237, at *4 (W.D. Mo. May 27, 2021). In that case, the

[1] Arkansas courts addressing the rights of parents have relied on United States Supreme Court precedent related to the Fourteenth Amendment. *See Davis*, 266 Ark. at 117, 583 S.W.2d at 40 (citing *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

applied the *Jacobson* framework and held that the school district's COVID-19 re-entry plan did not violate parents' due process rights. *Id*. The court explained:

> While parents have the constitutional right to remove their children from the public education system by sending them to private school or educating them at home, when parents choose to send their children to public school—as Plaintiffs have done—they do not have a constitutional interest in micromanaging the education their children receive in public schools . . . Put differently, a parent's interest is the right to participate in the entire educational process and not the right to participate in each individual component of that process.

*Id*. (citations and quotation marks omitted).

For these reasons, Parents fail to show that the mask policy violates their rights under the Arkansas Constitution.

### B. Alternatively, the Policy Is Valid Because It Is Rationally Related to a Legitimate Objective.

Even if *Jacobson* review does not apply, the Court should apply the traditional rational basis review to this claim. *See Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 289 (5th Cir. 2001) ("follow[ing] almost eighty years of precedent analyzing parental rights in the context of public education under a rational-basis standard"); *see also McFarland*, 318 Ark. at 449, 885 S.W.2d at 899 (applying rational basis review in context of parent's rights).

Rational basis review sets a low bar. Under this standard, the challenged Policy is presumptively valid, and Parents have the "heavy burden" of showing that no "reasonably conceivable fact situation" could support the Policy. *See Whorton*

*v. Dixon*, 363 Ark. 330, 336, 214 S.W.3d 225, 230 (2005). Here, the Policy is valid because it is rationally related to achieving a legitimate governmental objective. *Id.*

As set forth above, there is a legitimate interest in preventing the spread of COVID-19, keeping students safe from the virus, and ensuring as many students as possible receive in-person instruction. The CDC has stated that masks are one of the most powerful weapons we have to slow the spread of the virus. That is why the CDC, the American Academy of Pediatrics, and the ADE all recommend universal mask wearing for all students ages 3 and older. Moreover, pursuant to DESE's guidance and as confirmed by the Bureau's recent survey, mask wearing greatly limits the number of students who must quarantine after a close contact with the virus. All of these factors were considered by the School District in implement the Policy. (RP0118-119).

## VI. The School District Had Ample Authority To Implement the Policy.

The second inquiry posed to the Court is whether the School District had authority to implement the mask policy. By implementing a policy that promotes student health, safety, well-being, and achievement, the School District acted well within its authority, and indeed its mandate, to ensure the suitable, efficient, and safe operation of its school.

The Arkansas Constitution mandates that "the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education." Ark. Const. Art. XIV, § 1. In furtherance of this constitutional mandate, the General Assembly has delegated numerous powers to school districts through their local school boards. *See, e.g.*, Ark. Code Ann. § 6-13-620 ("The board of directors of each school district in the state is charged with the following powers and required to perform the following duties in order to provide no less than a general, suitable, and efficient system of free public schools . . .").

Arkansas courts have long interpreted Ark. Code Ann. § 6-13-620 as allowing local school boards wide latitude in governing their districts. *See, e.g.*, *Safferstone v. Tucker*, 235 Ark. 70, 72, 357 S.W.2d 3, 4 (1962) (collecting cases). "Necessarily, some latitude in the exercise of this discretion must be given to these boards. They represent the people of the locality affected and naturally are closer to the problems to be solved than any court or other agency could be." *White v. Jenkins*, 213 Ark. 119, 121, 209 S.W.2d 457, 458 (1948). As a result, courts have held that they will not substitute their judgment for that of a school board with regard to policy matters, unless the school board, in enacting the policy in question, abused its discretion. *Id*. The party challenging the school board's policy has the burden of proving the

board's abuse of discretion by clear and convincing evidence. *See Bowman*, 294 Ark. at 69, 740 S.W.2d at 910.

### A. The Board Is Required To Do all Things Necessary To Provide a Suitable and Efficient Public School.

The General Assembly mandates that districts "[d]o all other things necessary and lawful for the conduct of efficient free public schools in the school district." Ark. Code Ann. § 6-13-620(11).

As part of this broad grant of authority, courts have held that school districts' "are authorized, not only to exercise the powers that are expressly granted by statute, but also such powers as may be fairly implied therefrom, and from the duties which are expressly imposed upon them. Such powers will be implied when the exercise thereof is clearly necessry to enable them to carry out and perform the duties legally imposed upon them." *Fortman v. Texarkana Sch. Dist. No. 7*, 257 Ark. 130, 132, 514 S.W.2d 720, 722 (1974).

For example, in *Springdale Board of Education. v. Bowman*, the Arkansas Supreme Court upheld a school policy that prohibited controlled or uncontrolled substances alike without first obtaining the permission of school authorities, even though the statutes only speak in terms of illegal drugs. 294 Ark. at 72-73, 740 S.W.2d at 912-13. And in *Pugsley v. Sellmeyer*, the Court upheld a school policy that prohibited wearing "transparent hosiery, lownecked dresses or any style of clothing tending toward immodesty in dress" and the use of cosmetics, although

there was no statute expressly allowing such a policy. 158 Ark. 247, 250 S.W. 538, 538 (1923). There, the court recognized that "the educational interests and school affairs in each school district in the state are placed by statute under the control and management of the school directors[.]" *Id.* at 539.

Indeed, numerous school district policies are implemented and enforced without express statutory authority. For example, the School District prohibits cell phones in student restrooms to prevent drug deals. The School District has playground rules to promote student safety. The School District prohibits visitors in the classroom, the use of vulgar and obscene language, and public displays of affection. None of these policies are expressly permitted by statute, but they are implemented to promote student safety and well-being, to advance student achievement, and to foster an atmosphere of learning.

The circuit court's ruling requiring an express grant of authority for school district action is not only unsupported by the law, but it also is impracticable. The General Assembly does not have the capacity to involve itself in the day-to-day operations of each school district. That is why, years ago, it granted districts broad power to "do all other things necessary and lawful for the conduct of efficient free public schools in the school district." Ark. Code Ann. § 6-13-620(11). Transferring the administration of day-to-day issues from school districts to the General Assembly would open a Pandora's box of issues.

The School District is allowed, indeed required, to do all things necessary to provide a suitable and efficient public school. Providing a suitable education includes providing a safe education where student achievement is promoted. Providing an efficient education includes promoting in-person instruction. Therefore, the Policy is proper under Ark. Code Ann. § 6-13-620(11).

### B. The School District Is Tasked with Ensuring the Safety of its Students and Promoting Student Achievement.

The General Assembly also has delegated to school district the responsibility of ensuring student safety and promoting student achievement.

> Arkansas schools will have safe and functional facilities. . . . Instructional facilities will be designed and structured to support learning. The school climate will promote student achievement. Every school and school district will enforce school district policies to ensure the safety of every student during school hours at school-sponsored activities.

Ark. Code Ann. § 6-15-1005.

As part of this charge, school districts have the power to regulate students' dress while at school. *See Wallace v. Ford*, 346 F. Supp. 156, 161-62 (E.D. Ark. 1972) (holding that students' right to govern their clothing or apparel is "subject to the right of the school authorities to establish those regulations which are necessary in order to carry out the educational mission of the school"). In *Wallace*, the court held that dress regulations that "promot[e] legitimate objectives, such as safety, health, decency and, indeed, classroom decorum, are permissible." 346 F. Supp. at

162. For example, the School District's student dress and grooming policy does not allow students to wear dress or style of hair that presents a health or safety hazard to the educational process. (RT32).

Within the scope of ensuring student safety, the General Assembly has delegated to school districts the authority to take steps to prevent the spread of communicable diseases. For example, school districts are required to "develop procedures concerning student physical activity in its public schools that include without limitation the recognition and management of . . . [a] communicable disease[.]" Ark. Code Ann. § 6-18-708(a). Superintendents "may delay the start time or release early a school or schools in the school district due to . . . Contagious disease outbreak[.]" Ark. Code Ann. § 6-10-126(a). And schools may hire staff to conduct physical examinations "to detect contagious or infectious diseases . . . that may prevent a pupil from receiving the full benefit of school work." Ark. Code Ann. § 6-18-701(b).

Parents argue that the School District does not have the authority to require healthy students to wear masks. (RP006, 016; RT083). The truth is, however, that individuals usually do not know they are infected with COVID-19 for at least several days, and they may never know if they remain asymptomatic. *See Mayo Clinic, Coronavirus Disease 2019.* But they spread the virus all the same. *Id.* That is the very reason universal mask wearing is recommended. (RP118-119). As a result,

healthy versus unhealthy is a distinction without a difference in this context. Here, the mask policy helps ensure that schools are safe and functional by helping reduce the spread of COVID-19 (a communicable disease) to students and staff. Further, the Policy helps promote student achievement by preventing unnecessary quarantine and advancing the overarching goal of keeping students in the classroom. Therefore, the Policy is proper under Ark. Code Ann. § 6-15-1005.

**C. The Board Is Required to Oversee School District Finances.**

The General Assembly charges school boards with "oversee[ing] school district finances required by law to ensure alignment with the school district's academic and facility needs and goals[.]" Ark. Code Ann. § 6-13-620(6). Courts recognize that "[o]ne of the prime duties of a school board is to conserve the resources of the district." *Safferstone*, 235 Ark. at 75, 357 S.W.2d at 5.

The American Rescue Plan (ARP) allocated billions of dollars in emergency relief funding to school districts, including the School District. The ARP explicitly authorizes using these funds to implement public health protocols including the CDC's recommendation for universal indoor masking in K-12 schools. 86 Fed. Reg. 21195-01, 21200 (Apr. 22, 2021) (to be codified at 34 C.F.R. ch. II). As such, it is within the school board's prerogative to pursue these funds in order to conserve the district's other resources and to ensure that the School District is satisfying the requirements to continue to receive this funding.

Relatedly, as part of the receipt of federal funding in general (and not just ARP funding), the School District is subject to oversight by the DOE. The DOE's Office of Civil Right has made clear that its authority extends to ensuring schools are implementing mask policies, and schools may be subject to investigations and financial penalties if they do not comply. *See supra Statement of Facts, Section F.* As such, it is the School District's prerogative to comply with these federal directives.

The United States Supreme Court unequivocally has held that attaching strings to federal funding is legal. *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987) ("Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.") (quotations omitted); *see also Northport Health Servs. of Arkansas, LLC v. United States Dep't of Health & Hum. Servs.*, 438 F. Supp. 3d 956, 968 (W.D. Ark. 2020) ("The federal government has broad authority to place conditions on the use of funds it distributes").

### D. The School District Is Required to Adhere To State and Federal Laws.

The General Assembly requires districts to "[a]dhere to state and federal laws governing public schools." Ark. Code Ann. § 6-13-620(3). As set forth above, schools may be subject to investigations and face financial penalties for violating a

student's civil rights, including where they do not provide a safe educational environment. *See supra Statement of Facts, Section F*; 34 C.F.R. § 100.10. As such, the School District is obligated to comply with these laws.

### E. As a Political Subdivision, the School District Is Entrusted With the Safety and Health of its Students.

As political subdivisions, school districts' "chief design is the exercise of governmental functions; and that to the electors residing within each is, to some extent, committed the power of local government, to be wielded either mediately or immediately within their territory for the peculiar benefit of the people there residing." *Dermott Special Sch. Dist. v. Johnson*, 343 Ark. 90, 95, 32 S.W.3d 477, 480 (2000). This Court has instructed: "It will be kept in mind that the directors are elected by the patrons of the schools over which they preside . . . These directors are in close and intimate touch with the affairs of their respective districts, and know the conditions with which they have to deal." *Pugsley*, 158 Ark. 247, 250 S.W. at 539.

The fact that school board members are locally elected and politically accountable and the nature of the school board's governmental function is even more important given the nature of this case. The United States Supreme Court recently opined, "Our Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect. When those officials undertake to act in areas fraught with medical and scientific uncertainties,

their latitude must be especially broad." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (citations and alterations omitted).

Precisely because the School District is a political subdivision, if Parents take issue with the School District's policies, they should challenge those policies not through the courts, but through the political process. "If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or homeschool them; or they can simply move." *Morse*, 551 U.S. at 420 (Thomas, J., concurring).

## VII. The Executive Branch's Authority Over Public-Health Matters Does Not Prevent a School District From Issuing Policies Related to the Safety of its Students.

The circuit circuit's ruling was based on its finding that only the executive branch has the authority to issue such policies. (RT084-085) ("The only apparent authority for masking citizens, over their objections, appears to be, perhaps, with the Governor and the Secretary of Health[.]").

As a threshold matter, this is a separation-of-powers argument that was not raised by Parents before the circuit court. *See* Ark. Const. art. IV, § 2 ("No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."); *see also Green v. State*, 362 Ark. 459, 468, 209 S.W.3d 339,

344 (2005) (explaining issues raised for the first time on appeal, even constitutional issues, will not be considered).

In any event, this finding was in error. The fact that the executive branch has the authority to issue directives related to the health and safety of the citizens of the State as a whole does not prevent a school district from issuing local policies related to the health and safety of its students. The two operate in harmony.

Moreover, Parents' argument is undermined by the very document upon which they rely. The Arkansas State Board of Health Rules and Regulations ("Board Rules") were implemented to "protect the public health, welfare and safety of the citizens of Arkansas." (RP024). The Board Rules relate to instances of quarantine and isolation, not to masks or face coverings. (RP024, 031). The School District does not dispute that only ADH may order individuals to isolate or quarantine. In fact, the School District's Safe Schools Plan expressly states that the Sectary of Health, in consultation with the Governor, has authority over all instances of quarantine and isolation. (RP062-063). But this case is abouts masks, not quarantine.

The Board Rules therefore have no bearing on this dispute. The Policy at issue was narrowly drawn to apply only to students of the School District. The Policy requires a face covering to be worn only in school and does not relate in any way to orders of isolation and quarantine or activity outside of school. As a result, the Board Rules complement, rather than preclude, the School District's authority to issue a mask policy.

## VIII. The Circuit Court Erred in Determining There Was Irreparable Harm.

The second factor Arkansas courts consider in evaluating a request for injunctive relief is irreparable harm. Failure to show irreparable harm is an independently sufficient ground upon which to deny a preliminary injunction. *See Manila Sch. Dist. No. 15 v. Wagner*, 356 Ark. 149, 156, 148 S.W.3d 244, 248 (2004) (reversing entry of preliminary injunction for failure to show irreparable harm).

The circuit court determined that because the School District exceeded its power, there was irreparable harm. (RT077). For the reasons explained above, the School District acted within its authority. Therefore, the circuit court erred. Because Parents failed to show irreparable harm, the circuit court's injunction should be reversed.

*First*, Parents did not present any proof of irreparable harm apart from their wholly conclusory and untenable allegations of a constitutional violation. *See Wilson v. Pulaski Ass'n of Classroom Tchr*s., 330 Ark. 298, 303, 954 S.W.2d 221, 224 (1997) (holding that "proof of facts" is required for the moving party to show irreparable harm). Because Parents do not assert the violation of a fundamental right, there is no irreparable harm.

*Second*, all the cases Parents cite to support their argument regarding irreparable harm involve other constitutional violations. For example, the United States Supreme Court case on which they rely involved the First Amendment. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). The other cases they cite also involved other constitutional claims. *See Planned Parenthood of Minnesota, Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 866-67 (8th Cir. 1977) (right to privacy); *Overstreet v. Lexington-Fayette Urb. Cty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (right to privacy and protection against unreasonable searches); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (Eighth Amendment); *Aaron v. Target Corp*., 269 F. Supp. 2d 1162, 1173 (E.D. Mo. 2003), *rev'd*, 357 F.3d 768 (8th Cir. 2004) (protection from state condemnation proceeding). "[I]t is not at all clear that the principle from *Elrod* applies in other constitutional contexts." *Let Them Play MN v. Walz*, 517 F. Supp. 3d 870, 887 (D. Minn. 2021) (holding mask mandates did not violate due process rights and plaintiffs had not shown irreparable harm).

*Third*, as set forth below, Parents have the option of pursuing their right to educate their children through a number of other avenues, but have failed to even attempt to do so. Because the choice is theirs, they cannot show irreparable harm.

Not only have Parents failed to show irreparable harm, but here the opposite is true. The ones who will suffer harm without the ability to implement a mask policy are the School District, its students, and its staff. COVID-19 poses a significant risk to children, and masks are one of the best tools to prevent its spread while keeping children in school for in-person instruction.

The United States Supreme Court addressed the balance of an individual's liberty interests and public safety in *Jacobson* and came out squarely on the side of public safety:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. . . . Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.

197 U.S. 11, 26-27.

## IX. The Circuit Court Erred in Determining That There Was a Justiciable Controversy.

### A. The Issue Is not Ripe for Review.

The issue was not ripe for the Court's consideration because Parents did not apply for an exemption from the Policy. "It is well settled that this court does not render advisory opinions nor answer academic questions." *Wilson*, 330 Ark. at 301, 954 S.W.2d at 223. The Policy provides several exemptions that have been utilized by numerous students. (RP063-064). Parents have the option of seeking an exemption from the Policy but have not done so for any of their children. (RP120). Without having applied for an exemption, Parents seek nothing more than an advisory opinion from the court.

Another Arkansas court tasked with determining the constitutionality of a school district's mask policy recently denied a request for injunctive relief and held that parents lacked standing and had failed to exhaust their administrative remedies because they either did not attend school in the district, had received exemptions from the mask policy, or had not sought such an exemption. (RP122-124).

Because Parents failed to apply for an exemption, the issue is not ripe for the Court's consideration. *See Baptist Health Sys. v. Rutledge*, 2016 Ark. 121, at 4, 488 S.W.3d 507, 510.

### B. Parents Lack Standing.

The circuit court also erred in determining that Parents had standing. (RT076). Here, any alleged injury was entirely avoidable. The Policy applied only "(a) while attending school or an indoor school function in any school building, School District facility, or (b) when riding in school-provided transportation." (RP078). Parents had numerous alternatives, including (i) homeschooling their children; (ii) requesting virtual instruction; or (iii) transferring their children to another school district that does not require masks. *See* Ark Code Ann. § 6-18-201. There are several districts within less than 25 miles of the School District, and the School District agreed to approve such transfer requests if the other district accepts the student. (RP120). Thus far, all such transfer requests have been approved. *Id.* Parents did not pursue any of these options before filing their lawsuit.

As a result, any alleged future injury is not imminent. It can end at any time at Parents' option. Therefore, Parents lack standing.

## CONCLUSION

The School District's mask policy does not violate Parents' fundamental liberty interest in raising their children, and the Policy was issued within the scope of the authority delegated to the School District by the General Assembly. As a result, the Policy was proper.

Further, the circuit court erred in determining that Parents suffered irreparable harm or had presented a justiciable controversy for review. For these reasons, the Policy should not have been enjoined.

## REQUEST FOR RELIEF

The School District asks this Court to reverse the circuit court's injunction order.

Respectfully submitted,

Marshall S. Ney, Ark. Bar No. 91108
Katherine C. Campbell, Ark. Bar No. 2013241
FRIDAY, ELDREDGE & CLARK, LLP
3350 S. Pinnacle Hills Parkway, Suite 301
Rogers, Arkansas 72758
Telephone: (479) 695-6049
Facsimile: (501) 244-5389
Email: mney@fridayfirm.com
Email: kcampbell@fridayfirm.com

By: */s/ Marshall S. Ney*
Marshall S. Ney

*Attorneys for Appellants*

## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with (1) Administrative Order No. 19's requirement concerning confidential information, and (2) Administrative Order No. 21, Sec. 9. It also conforms to the word-count limitation identified in Rule 4-2(d), in that, excluding the excludable sections under Rule 4-2(d), it contains 8,407 words.

/s/ *Marshall S. Ney*
Marshall S. Ney

## CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2021, I electronically filed the foregoing with the Clerk of the Court for the Arkansas Supreme Court by using the eFlex electronic filing system. I further certify that all participants in the case are registered eFlex users and that service will be accomplished by the eFlex electronic filing notification system. In addition, a copy of the foregoing will be provided to the following via U.S. Mail, postage prepaid:

Benton County Circuit Court Clerk
102 NE A Street
Bentonville, AR 72712

By: */s/ Marshall S. Ney*
Marshall S. Ney