CV-21-498

IN THE ARKANSAS SUPREME COURT

BENTONVILLE SCHOOLS, DR. DEBBIE JONES, Superintendent, in her official capacity, ERIC WHITE, School Board President, in his official capacity, KELLY CARLSON, board member, in his official capacity, BRENT LEAS, board member, in his official capacity, MATT BURGESS, board member, in his official capacity, WILLIE COWGUR, board member, in his official capacity, JOE QUINN, board member, in his official capacity, and JENNIFER FADDIS, board member, in her official capacity. APPELLANTS

V.

MATT SITTON, MATTHEW BENNETT and ELIZABETH BENNETT APPELLEES

APPELLEES' BRIEF

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Scott et al. v. Magazine SP. School Dist. No. 15, 173 Ark. 1077, 294 S.W. 365, 366 (1927)

Wheelis v. Franks, 189 Ark. 373, 72 S.W.2d 231, 232 (1934)

B. The trial court properly found that the mask mandate policy of the Bentonville School District violated the fundamental liberty interests of parents and that, therefore, irreparable harm would result to Appellees without injunctive relief.

J.T. v. Arkansas Department of Human Services, 329 Ark. 243, 947 S.W.2d 761, 763 (1997)

Linder v. Linder, 348 Ark. 322, 72 S.W.2d, 841, 851-52 (2002), *citing Troxel v. Granville*, 530 U.S. 57 (2000)

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I. Overview

This is an interlocutory appeal pursuant to Rule 2(a)(6) of the Arkansas Rules of Appellate Procedure by which an appeal may be taken from a circuit court to the Arkansas Supreme Court from "an interlocutory order by which an injunction if granted, continued, modified, refused or dissolved, or by which an application to dissolve or modify an injunction is refused." The substance of this appeal is whether the Circuit Court abused its discretion in granting a temporary restraining order issued pursuant to Rule 65 of the Arkansas Rules of Civil Procedure having found in the affirmative the two elements required for interlocutory injunctive relief, that of (1) a determination of the likelihood of success of appellee, and (2) appellee's prospect of irreparable harm. *Three Sisters Petroleum, Inc. v. Langley*, 348 Ark. 167, 72 S.W.3d 95, 100 (2002). Since the issuance of a temporary restraining order is a matter addressed to the sound discretion of the trial court, its decision will not be reversed on appeal unless it is clearly erroneous. *Id*. Given that the trial court decided after hearing the legal arguments and being fully advised in the premises that Appellees had both a likelihood of success and were irreparably harmed, and in its discretion granted temporary injunctive relief, the court's decision should be upheld.

II. Standard of Review

Under the precedent set by *Three Sisters*, the standard of review for issuance of a temporary restraining order is abuse of discretion, and a decision of the trial court will not be overturned unless it is clearly erroneous. *Three Sisters*, *supra*. The court's evaluation of the constitutional issues in rendering its opinion that temporary injunctive relief was appropriate in this instance was necessary to determine that both the elements of likelihood of success and irreparable harm were met. And it is temporary relief, after all. The parties have ample opportunity to address the fundamental constitutional issues in the near future either during arguments on motions or in a hearing in the underlying Petition for Declaratory Judgment, filed contemporaneously with the Motion for Temporary Restraining Order, for which the trial court entered its Order of October 12, 2021. However, for our purposes here, the trial court's appropriate use of discretion in granting temporary injunctive relief is the sole issue.

III. Mootness

Appellees agree that this case is not moot despite the fact the challenged District Policy "lapsed" just days after being temporarily restrained by court order on the 12th day of October, 2021. Under one of the two exceptions to the mootness doctrine, this case raises issues that are capable of repetition. As admitted in Appellants' principle brief, the School District's use of their sole discretion to mandate masks for school children waxes and wanes based on an

arbitrary number of active infections in the surrounding community per 10,000 residents of a full range of demographics and degrees of susceptibility to COVID, not, as would seem reasonable, the number of exposed or infected children in the schools. Appellant's Brief at 24. The District arbitrarily, capriciously and without any legislative authority reserves unto itself the sole discretion whether to mandate face masks on the children and, consequently, violate the constitutional rights of parents.

IV. Likelihood of Success and Irreparable Harm

The case cited by Appellants as to the appropriateness of temporary injunctive relief here is on point in that "a preliminary injunction is an 'extraordinary remedy . . . reserved for extraordinary circumstances." *Muntaquim v. Lay*, 2019 Ark. 203, 575 S.W.3d 542, 545 (2019). Under the facts of this case, in considerating the actions of Respondents in mandating face masks applicable to all the children in the district with no legal authority or consent of the parents, and in violation of their fundamental rights, to describe these circumstances as "extraordinary" is wholly appropriate. Moreover, after considering the facts and arguments, "[t]he decision to issue a preliminary injunction rests within the sound discretion of the circuit court, and not in the discretion of this court." *Id*. Further, "any factual findings that lead to the circuit court's conclusion of irreparable harm and likelihood of success on the merits will not be set aside unless clearly

erroneous. Accordingly, we will not delve into the merits of the case further than necessary to determine whether the circuit court exceeded its discretion" *Id*. Ordinarily, the inquiry should end here, but Appellants insists on a deep dive into the merits and counsel would be remiss not to address the issues without conceding, of course, that such delving is required.

V. The Trial Court Properly Found That the School District's Mask Policy Violated the Fundamental Liberty Interests of Parents

The circuit court rightly held that the Bentonville School District had no statutory authority to mask healthy students. (RP202). That was a reasonable conclusion given the law regarding the operation of public school in the State of Arkansas. As an initial proposition, "[i]t has been too often held, as now to be a matter of debate, that the Legislature is clothed by the Constitution with plenary power over the management and operation of the public schools." *Wheelis v. Franks*, 189 Ark. 373, 72 S.W.2d 231, 232 (1934). That being the case, it is equally well settled "that the directors of a school district possess only such power as is conferred upon them by statute, either in express terms or by necessary implication." *Scott et al. v. Magazine SP. School Dist. No. 15*, 173 Ark. 1077, 294 S.W. 365, 366 (1927). The Arkansas legislature provides whatever authority exists for the operation of schools, and the search for statutory authority that would allow the School District to mandate masks for all school-aged children regardless of health status is an exercise in frustration, and the court was exceedingly generous

with Appellants in allowing them to argue the point in hearing oral arguments (RT059) as well as entertaining Appellants' Post-hearing brief over Appellees' objection (RT074). But at the end of the day the court appropriately found that the district policy was "enacted without proper authority . . . ." (RT085).

A. *Jacobson*

There is a fundamental flaw in Appellants' reasoning throughout its arguments that extends into this appeal, and that is that a school board acts as a separate sovereign with independent police powers such that it can unilaterally make law in the absence of statutory authority. To the court's credit, it devoted almost five pages of its eight-page Temporary Restraining Order to analysis of relevant Arkansas law, and the court "had asked the Defendants for a list of authorities they relied upon to impose the burden of masking on the entirety of the student body in the district and the Defendants have provided that list in court with the supplemental brief, as well as in their pleadings. I've studied the list of cases, I've studied the statutory authority." (RT077). It cannot reasonably be claimed, then, that the trial court's decision was made "thoughtlessly and without due consideration." *Muntaquim*, *supra*.

The first sentence of the *Jacobson* opinion, so heavily relied on by Appellants, belies the point they attempt to make. As written by Justice Harlan, "[t]his case involves the validity, under the Constitution of the United States, of

certain provisions in the statutes of Massachusetts relating to vaccination." *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905). It would be futile to argue against, nor do Appellees attempt to here, the concept of "liberty regulated by law." *Id*. at 27. The issue is who is doing the regulating. In that regard, the Supreme Court in *Jacobson* has stated that it:

> has distinctly recognized the authority of a state to enact quarantine laws and 'health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and public safety.
> *Id*. at 25.

1. The School District Has No Authority Over Public Health

The school, however, is not the State, school policy is not law, and the schools have no inherent police powers, so Appellants' assertion that their mask mandate has a "real, substantial relation to public health," (Appellants' Brief at 29) carries no weight since they cannot substitute their judgment for that of the Arkansas General Assembly. Because "[t]his court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, so far as natural persons are concerned.'" *Jacobson*, *supra*, at 27. If individual rights are to be regulated by

law in the interest of the social contract, that power to do so resides solely in the state legislature under its inherent "police power,-- a power which the state did not surrender when becoming a member of the Union under the Constitution." *Id*. at 25. If individual school districts or the Arkansas Department of Education requires measures for the protection of public health, it can take those issues up with the Arkansas legislature. In the meantime, the Arkansas State Board of Health ("ADH") is charged by the State with "[t]he protection of the public health and safety," under Arkansas law. A.C.A. § 20-7-109(a)(1)(A). And in the exercise of that authority conferred by the legislature, ADH is authorized in the "direction and control of all matters of quarantine rules and enforcement." A.C.A. § 20-7-110(a)(2). Try as they might, the demands of due process prohibit Appellants from initiating health measures that infringe upon the constitutional rights of parents.

Only a legislative act of the State itself, therefore, can infringe upon those otherwise inviolable rights. Case in point, in the 1930's school boards required smallpox vaccines for entry into schools based on orders of the state board of health, and this Court found "[i]t is well settled that it is a valid exercise of the police power of the state, the use of which was not restricted by the grant of power to the federal government, to designate local boards of health authorized to require under penalty the vaccination of all citizens when it may be deemed necessary to the public health and safety . . . ." *Allen v. Ingalls*, 182 Ark. 991, 33 S.W.2d 1099,

1101 (1931). Moreover, "[w]e have long recognized the health regulation requiring vaccination of all school children as being a valid exercise of the police power of the state." *Wright v. Dewitt School Dist. No. 1 of Arkansas County*, 238 Ark. 906, 385 S.W.2d 644, 646 (1965). The common theme running throughout Arkansas caselaw, therefore, establishes that police power resides in the State, not school districts, which are considered merely "creatures of the state." *Ozarks Unlimited Resources Cooperative, Inc. v. Daniels*, 333 Ark. 214, 969 S.W.2d 169, 173 (1998). In fact, this Court has recognized that it is the intent of the Arkansas legislature that "school districts not be part and parcel of state government." *Crenshaw v. Eudora School District*, 362 Ark. 288, 208 S.W.3d 206, 212 (2005). Therefore, school districts enjoy no measure of that inherent police power enjoyed by the State.

Likewise, in 2019, the ADH promulgated pursuant the Arkansas Administrative Procedures Act on April 26, 2018, a rule entitled "Rules and Regulations Pertaining to Reportable Disease," citing as its authority "Ark. Code Ann. § 20-7-101 et seq." (RP021). The responsibility of schools in the state disease reporting hierarchy are addressed in two separate sections. Section XIV, entitled "Exclusion and Readmission to School or Child Care Facilities," provides that "[i]t shall be the duty of the principal or other person in charge of any public or private schools, or child care facility, at the direction of the Department, to

exclude therefrom any child, teacher or employee affected with a communicable disease until the individual is certified free of the disease, by written note from a physician, school nurse, public health nurse or the Department." (RP032). No prophylactic measure such as a mask mandate is authorized here. Also, Section III, subsection C, provides that "[i]t shall be the duty of every superintendent of a public school district or such person(s) he designates, to report immediately to the Department on the Toll Free Disease Reporting System any outbreak of three (3) or more cases of any of the conditions declared notifiable." (RP025). Those two provisions are the alpha and omega of the authority of public school districts as it regards communicable diseases.

2. The Mask Mandate Violated the Fundamental rights of Parents

On the other hand, the fundamental liberty interests of parents in the upbringing of their children is extensive and has been recognized by this Court as "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Linder v. Linder*, 348 Ark. 322, 72 S.W.2d, 841, 851-52 (2002), *citing Troxel v. Granville*, 530 U.S. 57 (2000):

> More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We

> explained in Pierce that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id. at 535, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070. We returned to the subject in Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."
>
> In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children . . . . In light of the extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody and control of their children.

Id. To Appellant's point that parents cannot micromanage a child's education (Appellants' Brief at 29), Arkansas recognizes that parents are possessed of the fundamental liberty interest to nurture and direct, to establish a home and bring up, nurture and make decisions concerning the care, custody and control of their children. But, in addition, while it is fundamental that those enumerated functions of care and custody of their own children that reside primarily with the parents, "a parent has the liberty interest . . . in shaping a child's education." *Id*. at 852, *citing Wisconsin v. Yoder*, 406 U.S. 205 (1972).

In challenging the fundamental liberty interests of parents in making health decisions for their children, Appellants cite, yet misinterpret, the concept of *in loco parentis*. They purposefully abbreviate the definition of the term to "in place of

parents." Appellants' Brief, p. 31. While perhaps a technically correct translation, as a legal concept, "the doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them." *Mahanoy Area School District v. Levy*, 141 S.Ct. 2038, 2046 (2021). Regulating students' First Amendment freedoms within the confines of schools as in *Mahonoy* is significantly different than substituting the judgment of school boards for that of parents when said parents are available and have expressed the willingness and have the ability to make those decisions on behalf of their children. In the context of health care decisions for their children in the form of mask mandates, school administrators and school boards simply do not stand *in loco parentis*.

True, said parental rights to the care and custody of their children are not absolute, but subject only to the police power of the state, an exception not applicable here. There is no existing law in the State of Arkansas empowering school districts to mandate face masks for children and Appellants have not cited any. Instead, Appellants seek to adopt of the mantle of the "state" in suggesting its own sovereign police powers (Appellants' Brief at 31). However, this Court has already determined that school districts and the State are separate and distinct. *Crenshaw*, *supra*, at 212. Moreover, that "school districts are mere political subdivisions of this state." *Id*. at 214.

B. Rational Basis Test for Due Process

Appellants further argue that this Court is obligated to apply "the traditional rational basis review to this claim." Appellants' Brief at 33. That argument presumes, however, a couple of things: (1) that an arbitrary rule of a school district is equivalent to an exercise of police power by the legislature that enjoys a presumption of constitutionality, and (2) that the school district was authorized under Arkansas law to issue such a rule. Neither presumption is true. Acts of a duly elected and representative legislature are presumed to be constitutional and rationally related to achieving a legitimate governmental objective. *City of Siloam Springs v. Benton County*, 350 Ark. 152, 85 S.W.3d 504, 507 (2002). As noted above, an act of the Arkansas legislature created the Department of Health which is solely empowered by statute with authority over public health and safety. The existing rules of the Arkansas Department of Health regarding communicable diseases, properly promulgated and subjected to legislative review, to provide general control measures to such threats to public safety, do not delegate further any authority other than reporting to local school districts. Therefore, this case does not involve a constitutional challenge to a statute that enjoys the presumption of validity. Rather, we are dealing with an illegal act of a school district that infringes upon the constitutional rights of parents. The rational basis test is inapplicable here.

VI. The School District Has No Authority to Issue a Mask Mandate

Use of discretion by a school board presumes it has been granted legal authority under which that discretion can be used. Otherwise, the school has authority neither express nor implied. Appellants here cite A.C.A. § 6-13-620(11) for the proposition that school districts can "do all things necessary" to provide a suitable and efficient school (Appellants' Brief at 36) while glossing over the prerequisite of doing all things "lawful," the point at which their argument fails. Since the School District has no express statutory authority to issue a mask mandate, it acted illegally in its infringement of the fundamental liberty interests of parents. Neither does the school district enjoy any authority issued to it by implication as noted in the *Scott* case cited above that a school board may possess power granted to it in "express terms or by necessary implication." *Scott*, supra.

A school board's sole constitutional obligation as a creature of the state appears in Article 14, Section 1 of the Arkansas Constitution that "[i]ntelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt al suitable means to secure to the people the advantages and opportunities of education." Other than that, as set forth in *Wheelis v. Franks*, the legislature has plenary power over operation of the public schools. *Wheelis*, *supra*.

Appellants also propose that a school districts authority to mandate masks for children might arise from a statutory section enumerating the powers and duties of school boards. Appellants' Brief at 34. Appearing in A.C.A. § 6-13-620 is a fairly generic list of obligations for a district to provide "no less than a general, suitable, and efficient system of free public schools." Nothing from the list of powers, including attending meetings, determining the mission of the district, adhering to state and federal laws, and enforcing policies could possibly be interpreted as implied authority to engage in general health measures for the children in their care. They cite *Safferstone v. Tucker*, however, for the proposition that the schools have latitude in the exercise of discretion in the use of that authority:

> The law involved appears to be well settled. In this State a broad discretion is vested in the board of directors of each school district in the matter of directing the operation of the schools and a chancery court has no power to interfere with such boards in the exercise of that discretion unless there is a clear abuse of it and the burden is upon those charging such an abuse to prove it by clear and convincing evidence.

Safferstone v. Tucker, 235 Ark. 70, 357 S.W.2d 3, 4 (1962). But, as fleshed out a little further in another case from 1962, "Courts will not interfere in matters of detail and government of schools, unless the officers refuse to perform a clear, plain duty, or unless they unreasonably and arbitrarily exercise the discretionary authority conferred upon them" *Evans v. McKinley*, 234 Ark. 472, 352 S.W.2d

829, 831 (1962). In that same vein, in the case cited by Appellants for the proposition that school boards have generalized wide discretion in performing their duties, the decision to close white schools, while keeping black schools open and paying out transportation cases and tuition for the white students all within its statutory budget restrictions, the court there held "we do not find that appellees went beyond their statutory powers or violated any statutory duty in doing this." *White v. Jenkins*, 213 Ark. 119, 209 S.W.2d 457, 458 (1948). Discretionary authority and statutory powers? So, there's the rub. The school districts have not been granted the discretionary authority to make health decisions for children by the Arkansas legislature explicitly or implicitly in light of the statutory regime that specifically addresses student health, or within the restrictions mandated by this Court in recognizing the fundamental liberty interests of parents. No such authority of the school district is to be found in the specific statutory section regarding the health of children as opposed to the more general list of general powers and responsibilities of school districts, and "this court has long held that a general statute must yield to a specific statute involving a particular subject matter." *Lambert v. LQ Management*, LLC, 2013 Ark. 114, 426 S.W.3d 437, 440 (2013).

There exists an entire subchapter in the Arkansas Code referencing student health. A.C.A. § 6-18-702 *et seq*. Therein is contained provisions for the

employment of school nurses and/or physicians, immunization requirements for admission, school-based health clinics, school breakfast programs, etc. There is one statutory provision providing for school-based health clinics, A.C.A. § 6-18-703, that includes an acknowledgment of parental rights in the health care of their children in that "no child shall receive school-based health clinic services without parental consent." A.C.A. § 6-18-703(a)(1)(A)(i). There is only one statutory reference, however, to a communicable disease appearing in A.C.A. § 6-18-708 regarding health procedures the district is obligated to take concerning recognition and management of an event or condition "that may be encountered by a student during athletic training or physical activity." A.C.A. § 6-18-708(a). Included among those acute events are concussions, an environmental issue, sudden cardiac arrest, or "a communicable disease." A.C.A. § 6-18-708(a)(4). That section involves the development of procedures and provides a requirement for the training of athletic coaches in the recognition and management of those acute illnesses with no implied power to the schools to take any preventative measures of those enumerated illnesses. It strains credulity, therefore, to suggest that the power to mask students arises from a general list of powers granted to a school district when not addressed in a statutory section on student health if the legislature intended the schools to have that power.

A. Suitable and Efficient Public Schools

Likewise, language from the Arkansas Public Education Act of 1997 is unavailing. Appellants' Brief at 36. A.C.A. § 6-15-1005, entitled "Safe, equitable, and accountable public schools," is a legislative enactment the trial court accurately described as "code of behavior to respect the rights of others and maintain a safe and orderly environment," (RT202) but makes no reference to health measures. Again, another general policy statement regarding law in furtherance of the State's constitutional obligation to provide a free and adequate education to the children of this State, A.C.A. § 6-15-1005(a)(2)(A) states the "[e]very school and school district will enforce school district policies to ensure the safety of every student during school hours and school-sponsored activities," and (B) that "[t]hese policies will include, at a minimum, policies on weapons, violence, alcohol, other drugs, gangs, and sexual harassment." Clearly, these measures were calculated to protect school-aged children from physical violence in schools. But nothing from the language of that section either expressly or impliedly suggests the ability of a school district to implement health measures such as a mask mandate that can be imposed on students without the consent of their parents. In fact, A.C.A. § 6-15-1005(a)(3) provides, in the language cited by the circuit court, that "[e]very school and school district will enforce a code of behavior for students that respects the rights of others and maintains a safe and orderly environment." Giving the school district every benefit of the doubt in the

use of broad discretion in implementing those particular legislative priorities, it cannot reasonably be construed to sanction the mandatory masking of children against the will of the parents in violation of their constitutional rights.

Appellants cite further Arkansas caselaw that has no bearing on the issues at hand. Appellants' Brief at 36. *Springdale Board of Education v. Bowman*, 294 Ark. 66, 740 S.W.2d 909 (1987) involves the expulsion of a student for violation of a school drug policy and is a challenge to the schools' authority to expel a student for the exchange of a drug that is not illegal, not the drug policy itself. In *Pugsley v. Sellmeyer*, 158 Ark. 247, 250 S.W. 538 (1923), a student was denied entry to a school for the use of talcum powder appearing on her face in violation of a rule issued by the school board of directors against the use of "face paint or cosmetics." Appellants observe the issuance of said rule by the school in the absence of specific statutory authority under the guise of the wide range of discretion of school boards as an analogy to the present case. Appellant's Brief at 37. However, unlike the use of cosmetics, there is a statutory scheme for public health in Arkansas as represented by A.C.A. §§ 20-7-109 and 110 and the 2019 ADH Rules for Reportable Diseases promulgated under the Administrative Procedures Acts providing guidance for schools that did not exist in 1923. Therefore, a rule preventing the wearing of cosmetics is not comparable to the school-imposed health measure of a mask mandate issued in the light of said

statutory scheme that sets out responsibilities for public health and safety and the regulations regarding the reporting requirements for schools and isolation of students affected with a communicable disease. It should also be noted that pursuant to said 2019 Rules of the ADH, the agency itself is conferred no ability to enact prophylactic health measures by rule, but is limited to procedures for isolation or quarantine in reaction to the infection or exposure of individuals without the further promulgation of rules reviewable by the House and Senate Committees on Public Health, Welfare and Labor pursuant to A.C.A. § 20-7-109(a)(2). More specifically, "[w]henever the health of citizens of this state is threatened by the prevalence of any epidemic or contagious disease . . . then the Governor shall call the attention of the [ADH] to the facts and order it to take such action as the public safety of the citizens demands to prevent the spread of the epidemic or contagious disease." A.C.A. § 20-7-110(b). And the Governor has done so in issuing EO 20-43 on July 16, 2020 by which he ordered the Secretary of Health to issue a public health directive "requiring every person in Arkansas to wear a face covering over the mouth and nose . . . ." (RP039). Said executive has since expired. (RT057).

Essentially, as Appellants argue, that while the Governor must take an extraordinary, official act to mobilize the Arkansas Department of Health when public safety is threated by a communicable disease, which department can issue

necessary and reasonable rules of a general nature, but which must first be approved by House and Senate committees, a school board can issue health rules applicable to all children in the district in their sole discretion by simple majority vote. If that were the case, the Governor could indirectly issue mask mandates for students via directives of his Department of Education applicable to school districts around the state, thereby bypassing legislative oversight of administrative rulemaking over state health measures. It should be self-evident that the schools have no such authority and the circuit court was correct in its conclusions.

B. The Safety of Students

The enforcement of school dress codes that was the subject at issue in *Wallace v. Ford*, F.Supp.156, 161-62 (E.D. Ark. 1972) does involve the constitutional right of students to govern their personal appearance, but it is a dress code not a health regulation. In Arkansas, ADH had been conferred the authority to promulgate health regulations by statute. *Wright, supra*. The issue in *Wright* being a state health regulation requiring a smallpox vaccine as a precondition to attending school, the court held that "[w]e have long recognized the health regulation requiring vaccination of all school children as being a valid exercise of the police power of the state." *Id*. at 646. Again, the State maintains the police power as conferred upon the ADH which can regulate under the provisions of A.C.A. § 20-7-109 with legislative oversight. A school district has no such police

power and its activities as they relate to communicable diseases are limited to those set forth for it in the 2019 Rules of the Department of Health.

Appellants suggest, however, the language contained in A.C.A. § 6-15-005 that every school will enforce policies to ensure the safety of every student contemplates health measures. Appellants' Brief at 38. The trial court appropriately found A.C.A. § 6-15-005 inapplicable to health measures. (RT199) and in the context of the statutory scheme was absolutely correct. As noted in A.C.A. § 6-15-005(b)(2)(B), said "policies will include, at a minimum, policies on weapons, violence, tobacco, alcohol, other drugs, gangs, and sexual harassment," student health, of course, covered elsewhere. It is also significant that the State of Arkansas, by statute, has created an "Advisory Board of the Arkansas Center for School Safety of the Criminal Justice Institute," in A.C.A. § 6-15-1305. Said board consists of sixteen (16) individuals of various professions, including one "citizen at-large," and with the exception of one (1) "school-focused mental health professional," none that could be described as a medical professional. Clearly, health measures are not contemplated in the term "safe schools."

C. School District Finances

The circuit court held that it "does not accept the premise that because the district accepted federal money in exchange for their agreement to mask their students, they now have the authority to infringe upon the Plaintiffs' constitutional

rights . . . ." (RT199). Appellants argue, however, that "it is within the school board's prerogative to pursue [American Rescue Plan] 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." Appellant's Brief at 40. Further, Appellants share that "as part of the receipt of federal funding in general . . . the School District is subject to oversight by the DOE." Appellants' Brief at 41. Not oversight by the Arkansas State legislature, mind you, but by the federal Department of Education. At least we have now cut through the pretext. The Bentonville School District is willing to ignore the constitutional rights of parents if the price is right. And all that despite federal law prohibiting federal control of education, stating that "[n]o provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system." 20 U.S.C. § 1232(a). Moreover, though the facts underlying school desegregation cases are a stain on the history of this State, one principle from that era is enduring, and that is that "the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of federal authority with the management of such schools cannot be justified." *Garrett v. Faubus*, 230 Ark. 445, 323 S.W.2d 877,

881 (1959). The idea that public education is the exclusive province of the State is not a new one, and the principle that education is not among the powers enumerated in the U.S. Constitution as an affirmative grant to the federal government and therefore reserved to the States is entirely consistent with the authority from Article 14, § 1 of the Arkansas Constitution which requires that "the State shall ever maintain a general, suitable and efficient system of free public schools . . . ." And it bears repeating, that "[i]t has been too often held, as now to be a matter of debate, that the Legislature is clothed by the Constitution with plenary power over the management and operation of the public schools." *Wheelis v. Franks*, *supra*. It is incomprehensible that the school's financial situation is in the forefront of considerations over the constitutional rights of parents in the minds of the school board and administration of Bentonville Schools.

D. School District and Federal Laws

Nevertheless, Appellants claim an obligation of compliance to federal law regarding education. Appellants' Brief at 41. Notwithstanding the blatant unconstitutionality of that concept, as presented by Appellants, "[t]he ARP explicitly authorizes using these funds to implement public school health protocols . . . ." Appellants' Brief at 40; that "the CDC's recommendation for universal indoor masking in K-12 schools." *Id*.; and that "schools may be subject to investigations and financial penalties if they do not comply." Appellants' Brief at

41. There is no federal law mandating face masks for children and the CDC statements are as described, mere guidelines. The trial court properly and succinctly held that "I don't believe, however, that the school district can rely on a deal made with another governmental entity as authority to step on anyone's constitutional rights." (RT200). Exactly so. But the school district desires the federal funding so intently, they cite *South Dakota v. Dole* for the proposition that the school district is obligated to comply with all strings attached to federal funding. 483 U.S. 203 (1987). Appellants' Brief at 41. Yet, *Dole* includes "the unexceptional proposition that the [spending] power may not be used to induce the States to engage in activities that would themselves be unconstitutional." *Id*. at 210. Again, the spending power shall not reach down through the administrative hierarchy to a mere creature of the state, *i.e.* the school districts, but to the "States" themselves. And it is not to infringe upon "[t]he interest of parents in the care, custody, and control of their children [which] is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Linder*, *supra*. The strings attached to federal highway funding in *Dole* passed constitutional muster because "[w]ere South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action in doing so would not violate the constitutional rights of anyone." *Dole*, *supra* at 211. That is simply not the case

here and the constitutional rights violated are among the earliest recognized, most revered and wide ranging.

E. Safety and Health of Students

Once again, statutory responsibilities for public health are conferred directly under Arkansas law to the Arkansas Department of Health, or to the Governor under his emergency authorization. Despite the ambiguous case citations presented by Appellants, it is abundantly clear that the public school districts in the State of Arkansas do not possess and cannot exercise independent judgment or discretion unless authorized by statute and are subject to strict oversight by the state legislature that alone enjoys plenary power over the management of its schools. *Wheelis v. Franks*, *supra*. Appellants fail to provide any contrary authority to overcome applicable Arkansas law which provides that unless the legislature has acted and conferred upon the schools that independent authority by express statutory provision or such can be inferred, they do not have any such power. *Scott, supra.* Moreover, a review of the statutory section specifically referencing the health of students and a school district's obligations in that regard provides shatters the illusions held by Appellant that they have the autonomous authority to issues mask mandates given that no express or implied statutory authority exists for the mandatory masking of children as a prophylactic measure against communicable diseases.

Neither is there any such authority to be found in the 2019 ADH Rules regarding reportable diseases. In support of a proposition that a school district is "entrusted with the safety and health of its students," Appellants are clearly misguided. And unless a court with jurisdiction were to determine that a parents' failure to place a mask on their child falls within the definition of the detriment or destruction of a child's health and well being and lack of reasonable care, which no court in this State has to date, "the rights of natural parents are not to be passed over lightly." *J.T. v. Arkansas Department of Human Services*, 329 Ark. 243, 947 S.W.2d 761, 763 (1997). That is, parental rights can be infringed only by the state legislature in a legitimate exercise of their police power; by courts, after a reasoned determination of the best interest of the child; but by schools, not at all.

VII. Unilateral Act of the School District

Appellants cite language from the circuit court's TRO that "[t]he only apparent authority for masking citizens, over their objections, appears to be, perhaps, with the governor and the Secretary of Health . . . ." (RT084-085), and suggest an error by the court in inserting an unargued point. Appellants' Brief at 43. The point, here, of course, is statutory authority which, perhaps, either the Governor has under his emergency authority, or the Secretary of Health has pursuant to the 2019 Rules regarding Reportable diseases, arguments fully fleshed out below but which leave the school district out in the cold, *i.e.* without necessary

statutory support. But the school district is omnipotent, so Appellants' argument goes, and "[t]he 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." Appellants' Brief at 44.

As an initial observation, Appellees attached to their Petition for Declaratory Judgment, incorporated by reference into their Motion for Temporary Restraining Order, both Governor Hutchinson's Executive Order EO 20-43 (RT039) and the 2019 Rules of the Arkansas Department of Health (RT021) in support of their argument of certain exceptions to the generally applicable police power of the state that have been delegated to the executive branch. Therefore, Appellants' opening argument appearing in this section is off base. Moreover, Appellants' suggestion that those exceptions to the general rule that legislative approval of certain responsibilities granted to executive branch agencies by statute and the illegal assumption of public health related activities by a school board are harmonious is simply incredible.

Appellants further acknowledge that legislative approval for emergency health measures granted to ADH for isolation and quarantine is inapplicable here, because no reference is made to masks. Therefore, they argue, "the Board Rules complement, rather than preclude, the School District's authority to issue a mask

policy." Appellant's Brief at 45. *Au contraire*. The 2019 Rules of the ADH, pursuant to A.C.A. § 20-7-109, were reviewed the legislative bodies of the House and Senate Committees on Public Health, Welfare and Labor as required by law while the illegal mask mandate of the school was issued in its sole discretion and it has no such authority.

VIII. The Circuit Court Appropriately Found a Reasonable Likelihood of Irreparable Harm to Appellees

The trial court found that "[t]he Plaintiffs claim a liberty interest in the care and custody of their children under the Arkansas Constitution. They absolutely have that constitutional interest, but it is not absolute." (RT198). Further, the court deliberated over the question that "whether or not the school district Defendants have the authority to impose this limitation on Plaintiffs' constitutional rights. This limitation being, of course, the masking requirement. 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." *Id*. And finally, "[i]n conclusion, I don't find any statutory authority for the Defendants to mask healthy students." (RT201). So, with a finding of lack of statutory authority, the court did what it said it would do and found irreparable harm to Appellees.

Such a result is dictated by the Arkansas Civil Rights Act, ("ACRA") A.C.A. § 16-123-105, which provides that "[e]very person who, under color of any

statute, ordinance, regulation, custom, or usage of this state of any of its political subdivisions subjects, or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities by the Arkansas Constitution shall be liable to the injured party in an action in circuit court for legal and equitable relief or other proper redress." Moreover, pursuant to A.C.A. 16-123-105(c) of ACRA, an Arkansas court may look for guidance to state and federal decisions interpreting the Civil Rights Act of 1871, which decisions shall have persuasive authority. As noted in Petitioners' Petition for Declaratory Injunction incorporated into their Motion for TRO, there is an abundance of authority for the proposition that a violation of constitutional rights supports a finding of irreparable harm. (RT082). And, so the trial court found here in its discretion. But such was not difficult given, for example, the admonition of the U.S. Supreme Court that "[v]iolations of constitutional rights are deemed irreparable injury for purposes of injunctive relief." *See*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976). As a result, the trial court in its discretion found that Appellants' were without legal authority to issues its global mask mandate, and said decision violated the fundamental liberty interests of parents. It is, therefore, well within the court's discretion to find that said constitutional violation resulted in irreparable harm arising from the fact that Bentonville Schools had injected itself into the relationship between parents and children in making health care decisions, a relationship which has been placed in

the overall context of rights recognized by both the U.S. and Arkansas constitutions as "the interest of parents in the care, custody and control of their children [which] is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Linder*, *supra* at 851. It cannot be said to be error for the trial court in this case, given the fundamental liberty interests at stake, to find that their violation is irreparable.

Appellees are at a loss as to how Appellants can claim that "Parents do not assert the violation of a fundamental right . . . ." Appellants' Brief at 46. In Paragraph 2 of their Motion for TRO (RT080), Appellees allege that "the fundamental liberty interests of parents to the care, custody and maintenance of their minor children under Article 2, Section 21 and Article 2, Section 29 of the Arkansas Constitution as recognized by the Arkansas Supreme Court, are infringed upon each school day said children are forced to wear masks or face coverings without Petitioners' consent." Further, in Paragraph 4 of their Motion for TRO (RT080), Appellees claim that "[e]ach day that Respondents mandate that school children wear face masks or be expelled from school under School Board Policy EP 1.3.21 is a day said constitutional rights are violated and the fundamental liberty interests in the care, custody and management of their minor children are infringed upon . . . ." Likewise, in Appellants attempt to distinguish the constitutional harm here from cited cases regarding other constitutional harms, that

is, the first amendment harm occurring in *Elrod*, they suggest that *Elrod* analysis would not apply in a parental right case despite the Supreme Court finding that parental rights are the oldest of the recognized fundamental liberty interests. Appellants' Brief at 46. And the one case Appellants' cite regarding mask mandates, *Let Them Play MN v. Walz*, involves an executive order by the Minnesota governor with arguable emergency powers, not the arbitrary action of a school board with no authority whatsoever. 517 F.Supp.3d 870 (D.Minn.2021). Again, in this section Appellants cite *Jacobson* for the proposition the parental rights are not absolute. Appellants' Brief at 47. And again, Appellants fail to recognize or acknowledge the distinction between actions by the State by statute in the exercise of its inherent police powers and the capricious actions of school boards with no police powers.

IX. Justiciable Controversy

A. Ripenesss

Appellants here argue that Appellees were obligated to seeks exemptions from their illegal mask mandate that violates their fundamental liberty interests in the care, custody and maintenance of their children. Appellants' Brief at 48. Under A.C.A. § 16-111-101, "Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relationships whether or not relief is or could be claimed." The trial court found both that the Appellants

had no statutory authority to mandate masks for the children in their schools and that said mask mandate violated the fundamental liberty interests of parents. Parents, therefore, are neither required to seeks exemptions from the illegal act of the school district nor take additional steps to access their constitutional right to make health decisions for their children due to the unconstitutional mandate. Nor are parents obligated to overcome illegal proscriptions on their constitutional rights in order to seek a declaratory judgment. The school board's mask mandate is not a legislative act nor an act of a delegated authority but is an illegal act and not subject to the provisions of the Arkansas Administrative Procedures Act. And Appellees seek a declaration of rights as is appropriate under Arkansas law, not an advisory opinion, and if the act of the school board is unconstitutional, as it is on its face, parents seeking whatever exemptions Appellants demand here as necessary administrative remedies would have to comply with, or recognize the validity of, that unconstitutional act. But the mask mandate of the school district was not promulgated by an administrative agency with power to do so, and the parents are not obligated to comply with that unconstitutional act.

B. Standing

As set forth in their Petition for Declaratory Judgment, in Paragraphs 3, (RT007) a party who whose rights are affected by a statute, or an official act other than a statute, i.e. in this case, an act of a school board, has standing to challenge

that act on constitutional grounds. *Magruder v. Arkansas Game and Fish Commission*, 287 Ark. 343, 698 S.W.2d 299, 300 (1985). Moreover, schools have a constitutional obligation under Article 14, § 1 to provide a free and adequate education to the children within its district, without imposing pre-conditions that that infringe upon the constitutional rights of parents without legal authority. As the trial court held, "[d]efendants claim the Plaintiffs must either choose to accept an additional burden in other to have their children educated or they have to forego a constitutional right to raise their children. So, the education offered to these Plaintiffs is not as free to them as it may be to others." (RT197). Parents should not be obligated to seek alternatives to the services that Appellants are constitutionally obligated to provide due to a school policy that Appellants were neither expressly or impliedly authorized to implement by statute. And given that the fundamental liberty interests of parents in the care, custody and maintenance of their children were being infringed upon by the school district each day the district enforced its mask mandate, *i.e.* , a present controversy, this case was ripe for decision. Were this case to involve an exercise of the police power of the state in the evaluation of a statutory state-wide mask mandate, for example, "[i]t is not doubted that there are limitations upon the legislative exercise of the police power or that it is a judicial question for the courts to determine whether or not a given regulation is reasonable and falls fairly within the power of the Legislature."

Williams v. State, 85 Ark. 464, 108 S.W. 838, 840 (1908). But this case does not involve the exercise of the police power by the State. Nor does it involve powers conferred upon a school district by statute or by necessary implication. *Scott*, *supra* at 366. Therefore, since whether a legislative enactment unlawfully infringes upon a constitutional right is justiciable, so too legitimacy of an act of a body that has no police power either express or implied can likewise be determined by the courts.

CONCLUSION

The trial court did not abuse its discretion in finding that Appellants had no statutory authority by which to issue the health care measure, either express or implied, under Arkansas law, in the form of a face mask mandate applicable generally to all students within the Bentonville School District and that, therefore, Appellees were likely to succeed on the merits. Moreover, the trial court did not commit error in holding that Appellees, as parents of children within the school district which is constitutionally obligated to provide a free and adequate education to all children within the district, are possessed of a fundamental liberty interest in the care, custody and maintenance of their children that is infringed upon by said school mask mandate and, therefore, Appellees were irreparably injured without injunctive relief. Said mask mandate should have been enjoined by the court.

REQUEST FOR RELIEF

The October 12, 2021 Temporary Restraining Order of the Circuit Court of Benton County, Arkansas, enjoining the mask mandate of the Bentonville School District should be upheld.

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 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 case participants 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 email or U.S. Mail, postage prepaid:

The Honorable Xollie Duncan
Benton County Circuit Court Clerk
102 NE A Street
Bentonville, AR 72712

By__*/s/ Gregory F. Payne*_____
Gregory F. Payne

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with (1) Administrative Order No. 19's requirements concerning confidential information, and (2) Administrative Order No. 21, Section 9. It also conforms to the word-count limitations of Rule 4-2(d) in that, excluding those sections excludable under the rule, this Brief contains 8,538 words.

By_*/s/ Gregory F. Payne*_____
Gregory F. Payne