IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

DR. VALERIE RITTER, ***for herself as an individual and for and on behalf of her Minor Children RR and ER;*** **KIMBERLY BUTLER,** ***for herself as an individual and for and on behalf of her Minor Child HB;*** **MARY ANN MARTIN,** ***for herself as an individual and for and on behalf of her Minor Children KM, EM, and MM;*** **DR. BRITNEY ELSE,** ***for herself as an individual and for and on behalf of her Minor Child BJ;*** **and THE OKLAHOMA STATE MEDICAL ASSOCIATION,** ***an Oklahoma Not for Profit Corporation,***	
Plaintiffs/Appellees/ Counter-Appellants,	
v.	**Case No. 119840**
THE STATE OF OKLAHOMA; AND THE HONORABLE KEVIN STITT ***in his official capacity as*** **GOVERNOR OF OKLAHOMA,**	**Oklahoma County District Court Case No. CV-2021-1918**
Defendants/Appellants/ Counter-Appellees.	

APPELLEES'/COUNTER-APPELLANTS' COMBINED ANSWER BRIEF AND BRIEF-IN-CHIEF ON COUNTER-APPEAL

APPEAL FROM DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA
The Honorable Natalie Mai - Nature of Action: Injunction

Submitted by:
Riggs, Abney, Neal, Turpen,
Orbison & Lewis, P.C.
Donald M. Bingham, OBA# 794
Sharon K. Weaver, OBA# 19010
502 West Sixth Street
Tulsa, Oklahoma 74119-1010
(918) 587-3161 Telephone
(918) 587-9708 Facsimile

Robert A. Nance, OBA #6581
Chad C. Taylor, OBA #18308
528 NW 12th Street
Oklahoma City, Oklahoma 73103
(405) 843-9909 Telephone
(405) 842-2913 Facsimile

ATTORNEYS FOR APPELLEES/COUNTER-APPELLANTS

November 18, 2021

INDEX AND TABLE OF AUTHORITIES

INTRODUCTION

Appellees / Counter-Appellants, Plaintiffs below, (hereinafter "Appellees") brought suit challenging the constitutionality of Senate Bill No. 658 ("SB658"). After reviewing the arguments and authorities herein, it will be evident to the Court that SB658 favors one subset of the applicable population (parents and students) over others in that classification, and that the injunction of the District Court applies only to a subset of the universe of schools where parents and students can be exposed to the virus that has sickened hundreds of thousands of Oklahomans and led to the death of over 10,000 of them. Neither the law nor the decision can stand as written.

I. SUMMARY OF THE RECORD

Senate Bill No. 658 ("SB658") was passed by the Oklahoma Senate on May 25, 2021 and passed by the Oklahoma House of Representatives on May 26, 2021. It was signed into law by Governor Kevin Stitt on May 28, 2021. [Record on Appeal ("RA") at 1-22, Ex. B. to First Amended Petition]. Senate Bill No. 658 is codified at Oklahoma Statute Title 70, Sections 1210.189-1210.191. Two new sections of law were created in SB658 and a third existing section was amended.

Newly created Section 1210.189 prohibits a "board of education of a public school district or a technology center school district, the board of regents of an institution within The Oklahoma State System of Higher Education, the governing board of a private postsecondary educational institution, the Oklahoma State Regents for Higher Education, the State Board of Education or the State Board of Career and Technology Education" from requiring a vaccination against Coronavirus disease 2019 (COVID-19) or requiring a "vaccine passport"

as a condition of admittance to or attendance at the school or institution and from implementing a mask mandate for students who have not been vaccinated against COVID-19.

Newly created Section 1210.190 prohibits a board of education of a public school district or a technology center school district from implementing a mandate to wear a mask or any other medical device unless first consulting with the local county health department or city-county health department within the jurisdiction of where the board is located and only when that jurisdiction is under a current state of emergency declared by the Governor.

Existing Section 1210.191 was amended to change references contained therein from the State Board of Health to the Commissioner and to add Subsection E requiring the State Board of Education to ensure that each school district in Oklahoma provides notice to parents of immunization record information required for school enrollment, or exemption therefrom. [RA at 1-22, First Amended Petition, Ex. B]

Appellees brought suit seeking injunctive and declaratory relief. [RA at 1-22, First Amended Petition]. Challenging the constitutionality of the laws, Appellees moved for a temporary injunction enjoining enforcement of Sections 1210.189 and 1210.190 under theories that the laws violate the equal protection and due process provisions of the Oklahoma Constitution; that the laws are prohibited special laws; that SB658, as a whole, violates the single subject rule; and, that the laws violate the right of Oklahoma children to a free public education in a safe environment. [RA at 1-22, First Amended Petition].

Following briefing, the District Court heard argument on September 1, 2021. The Honorable Judge Natalie Mai granted Appellees' Motion for Temporary Injunction, in part, enjoining the enforcement of Oklahoma Statute title 70, § 1210.189(A)(3) and §1210.190 against any board of education of a public school district that implements a mask mandate that

includes the same exemptions present in Oklahoma Statute title 70, §§ 1210.192-1210.193, and set bond at $1,000. The Order was entered and the bond was paid into court on September 8, 2021. [RA at 545-547].

A. Error of the District Court's Order

Injunction in this case is appropriate. Sections 1210.189 and 1210.190 of Title 70 violate the Oklahoma Constitution and should not be enforced. While, the District Court properly enjoined enforcement of the laws, it overreached when it wrote into SB658 a parental "veto" of any mask mandate implemented by a public school.

Appellees sought injunctive relief on the following theories: 1) that Sections 1210.189 and 1210.190 violate the equal protection and due process provisions of the Oklahoma Constitution; 2) that Sections 1210.189 and 1210.190 are prohibited special laws; 3) that SB658, as a whole, violates the single subject rule; and, 4) that Sections 1210.189 and 1210.190 violate the right of Oklahoma children to a free public education in a safe environment. The District Court limited its ruling to equal protection and, contrary to Appellants' contention, did not address the other claims raised.[1]

While injunctive relief is appropriate in this case, the District Court erred in conditioning enforcement of its temporary injunction upon public schools' compliance with two unrelated statutes whose applicability was never raised by the parties in their respective briefs and arguments. The District Court ruled that public schools are free to decide whether masking mandates should be imposed and that the State should be enjoined from enforcing SB658 against public schools, but only if public schools adopting such mandates also afforded

[1] Appellants' claim that the District Court entered a ruling on Appellees' single subject challenge is inaccurate. The District Court entered its ruling on the basis of equal protection. At page 24 of the hearing transcript, cited by Appellants, the District Court is discussing Sections 1210.191, 1210.192, and 1210.193; it is not entering a ruling on Appellees' single subject claim.

the parents of public-school students the same virtual "veto" over mandatory masking as is applied to mandatory vaccinations under Okla. Stat. tit. 70, §§ 1210.192 and 1210.193. In the District Court, the parties neither briefed nor orally argued any application of the vaccination-statutes, because it was readily apparent that exemptions to mandatory vaccination would not apply to mandatory masking policies that might be adopted by public school districts.

The District Court nevertheless imposed the vaccination-exemptions so that those parents could unilaterally "opt out" of any requirement that their children wear masks in school, just as parents are able to unilaterally "opt out" of having their children vaccinated before admission to school. In so ruling, the District Court decided a question that had not been presented by the parties, namely, whether the "veto" provided to parents under the vaccination-statutes applies to Section 1210.189(A)(3) and Section 1210.190, both of which address only mandatory masking.

The District Court's grafting Sections 1210.192 and 1210.193 into Sections 1210.189(A)(3) and 1210.190 is clearly against the public interest, in that this unnecessary application of the former to the latter results in a profound inequality: if the District Court's merger of these statutes is allowed to stand, a public school district that decides to require masking must also afford every parent an individual "veto" over their child's masking, or face prosecution by the State for violation of Section 1210.189(A)(3) or Section 1210.190, whereas the governing bodies of private schools are free to adopt mandatory masking policies without affording their parents a similar "veto" over student-masking. Parents of public school students and their children would be forced to endure classroom education where some – and perhaps many – students remain unmasked (due to certain parents' exercise of the "veto"), but

parents whose children attend a private school need not subject their children to a classroom where masking is optional.

Appellees ask this Court to affirm the injunction against enforcement of Sections 1210.189 and 1210.190 of Title 70 and enter an order vacating the "parental opt-out" applicable to public school mask mandates that was written into SB658 by the District Court, and find that the Sections in question likely violate the Oklahoma Constitution and that enforcement thereof should be preliminarily enjoined.

II. ARGUMENTS AND AUTHORITIES

A. Standard of Review

"Matters involving the grant or denial of injunctive relief are of equitable concern." *Dowell v. Pletcher*, 2013 OK 50, ¶ 5, 304 P.3d 457, 460. The standard for appellate review of an Order granting injunctive relief is asks whether the lower court abused its discretion or rendered a decision clearly against the weight of the evidence. *Dowell*, 2013 OK 50 at ¶¶ 5-6, 304 P.3d at 460; *Meritor, Inc. v. State ex rel. Board of Regents of University of Oklahoma*, 2019 OK CIV APP 64, ¶ 8, 451 P.3d 914, 917. The reviewing court considers all the evidence on appeal to determine whether the trial court abused its discretion. *Dowell*, 2013 OK 50 at ¶ 5, 304 P.3d at 460. In equitable actions, the general rule is that the appellate court may modify the judgment to render the judgment that the trial court should have. *Meritor, Inc.*, 2019 OK CIV APP 64 at ¶ 8, 451 P.3d at 917.

When an appellate challenge concerns questions of law such as the constitutional validity, construction, or application of a statute the standard of review is *de novo*. *Benedetti v. Cimarex Energy Company*, 2018 OK 21, ¶ 5, 415 P.3d 43, 45. *De novo* review allows the

appellate court plenary, independent, and non-deferential authority to examine the issues presented. *Id.*

In the instant case, the District Court's grant of a temporary injunction, a matter of equitable concern, is reviewed under the more deferential discretionary standard. The District Court's determination that the statutes at issue violate equal protection is reviewed under the less deferential *de novo* standard.

B. Appellees' Propositions of Error

Appellees bring the following allegations of error:

Proposition I: Injunction is proper in this case, however, the District Court erred in creating an absolute parental "veto" over public school masking policies and in limiting injunctive relief to only public schools that honor such a "veto."

Proposition II: The District Court also erred in finding that the exemptions contained in Oklahoma Statute title 70, §§ 1210.192 and 1210.193 must be included in any mask mandate implemented by a public school.

Proposition III: The District Court's Order results in a continuing violation of equal protection and due process.

Proposition IV: The District Court erred in not recognizing that SB658 is absolutely and unequivocally unconstitutional under Oklahoma Constitution Article 5 §§ 46 and 59. Under § 59 where a general law can be made applicable, no special law shall be enacted. SB658 is a special law and a general law could cover the classes of parents and students regarding enforced immunization and mandatory mask mandates. In adopting § 46, the constitutional founders provided public schools protection from legislative tampering in local matters.

Appellees' first three Propositions rely on similar principles and the analyses will overlap. In order to avoid repetition, the arguments in Section III of this Brief address not only Appellees' first three allegations of error simultaneously, but are also submitted in response to Appellants' arguments on appeal. Appellees' final Proposition is addressed separately.

III. APPELLEES' PROPOSITIONS I, II, AND III COLLECTIVELY AND RESPONSE TO APPELLANTS' BRIEF-IN-CHIEF[2]

A. Background - Evolution of SB658

A brief review of the evolution of SB658 from its introduction to its enactment is important in analyzing the law. As the court will see, up until the day before the vote was taken in the Senate the legislation left the decision to implement a mask mandate up to the local school district and provided a process whereby the citizens of the jurisdiction could challenge the mandate. Just as interesting is the fact that, when SB658 was first introduced, in January 2021, it **only** contained an amendment to Section 1210.191 changing the statutory term and adding Subsection E. [RA at 422-537; SB658 Introduced 01/21/2021; 02/09/2021; 03/04/2021, collectively Ex. 1 to Supp. Reply].

As SB658 progressed through the legislative process it was amended, in April 2021, to add a section creating Title 70, Section 1210.190. [RA at 422-537; SB658 Committee Substitute 04/08/2021, Ex. 2 to Supp. Reply]. Initially, Section 1210.190 required only that before implementing a mask mandate a board of education of a public school district or a technology center school district first consult with a local health department within the

[2] Appellants' sovereign immunity argument [Aplts' Brief-In-Chief at 12] ignores the fact that it is the duty of the courts to act when a statute is clearly, palpably, and plainly inconsistent with the constitution. *Beason v. I.E. Miller Servs.*, 2019 OK 28, ¶ 15, 441 P.3d 1107, 1121. The Oklahoma Supreme Court has recognized that whether or not the Legislature has acted outside its powers in enacting an unconstitutional law presents a justiciable question. *Fair School Finance Council of Oklahoma, Inc. v. State*, 1987 OK 114, ¶ 62, 746 P.2d 1135, 1150. Likewise, Appellants' equity argument [Aplts' Brief-In-Chief at 13] focuses on purported actions of non-parties and belies Appellants' prior contention that the State does not have the power to regulate private schools. Neither of these arguments from Appellants should bear on the outcome of this appeal.

jurisdiction and expressly state the purpose(s) for the mandate or the mandate would be invalid. [RA at 422-537; Ex. 2 to Supp. Reply]. Less than two weeks later, proposed Section 1210.190 was further amended to add a specific process whereby citizens within the jurisdiction of the school district implementing the mask mandate could challenge the mandate provided they presented evidence, specifically defined in the law, to support claims of adverse effects of masks or medical devices, ineffectiveness of masks or medical devices, or risk of substantial harm from wearing a mask or medical device. In other words, the proposed law allowed a school district to implement a mask mandate and made it incumbent upon challengers thereto to come forth with valid evidence supporting the nature of the challenge. [RA at 422-537; SB658 Engrossed House Amendment to Engrossed Senate Bill No. 658, 04/19/2021, Ex. 3 to Supp. Reply].

On or about May 19, 2021, SB658 was further amended to add proposed Section 1210.189 which prohibited an expanded list of educational institutions from requiring a COVID-19 vaccination or implementing a mask mandate applicable to the COVID-19 unvaccinated.[3] [RA at 422-537; SB658 Conference Committee Report A, 05/19/2021, Ex. 4 to Supp. Reply].

On or about May 20, 2021, SB658 was amended to add Subsection C to the proposed Section 1210.189 exempting any public or private healthcare setting. [RA at 422-537; SB658 Conference Committee Report 05/20/2021 (8:48:18 AM); 05/20/2021 (11:02:20 AM), collectively Ex. 5 to Supp. Reply].

On or about May 24, 2021, SB658 was again amended to remove from proposed Section 1210.190 the citizen challenge provision and the definition section. This amendment

[3] Proposed Section 1210.190 remained applicable to only public and technology center school boards and still contained the citizen challenge provision.

also added, for the first time, the prohibition against public and technology center school boards implementing a mask mandate unless the jurisdiction in which the board is located is under a current state of emergency declared by the Governor. [RA at 422-537; SB658 Conference Committee Report 05/24/2021 (9:27:08 AM); 05/24/2021 (3:10:08 PM); Conference Committee Substitute 05/24/2021 (4:29:09 PM), collectively Ex. 6 to Supp. Reply]; [RA at 422-537; Summary of versions of SB658, Ex. 7 to Supp. Reply].

The next day, on May 25, 2021, the Oklahoma Senate passed SB658 and two days later on May 26, 2021, the Oklahoma House of Representatives passed SB658. Without any rational or compelling explanation, the Legislature implemented two prohibitory sections of law, applicable to different educational bodies, which treat the unvaccinated population and the vaccinated population differently and give the Governor plenary control over decisions which should be, and in prior versions of SB658 were, made by the local school boards.

In Okla. Stat. tit. 70, §§ 1210.189 and 1210.190 (the prohibitory sections), the Legislature inexplicably changes the focus from all students attending school in Oklahoma to educational governing boards and moves from direction ("you must verify immunization") to prohibition ("you must not implement mask mandates or require vaccines"). Section 1210.189 is applicable to "[a] board of education of a public school district or a technology center school district, the board of regents of an institution within The Oklahoma State System of Higher Education, the governing board of a private postsecondary educational institution, the Oklahoma State Regents for Higher Education, the State Board of Education or the State Board of Career and Technology Education." Section 1210.190 applies only to "[a] board of education of a public school district or a technology center school district . . . ."

B. Okla. Stat. tit. 70, §§ 1210.191-1210.194 - Background on Section 1210.191

The laws at issue in this case are codified in Title 70 entitled "Schools" and included within Chapter 15 entitled "Health and Safety" under the Subsection "Immunizations." Okla. Stat. tit. 70, §§ 1210.189-1210.194. Prior to the recent addition of the disputed Sections 1210.189 and 1210.190, the Immunization statutes included only Sections 1210.191-1210.194.

A brief background on Section 1210.191 is also important. Oklahoma Statute title 70, § 1210.191 was enacted in 1970 and has, since that time, **required** children enrolling in **any** "public, private, or parochial" school in the State of Oklahoma to show certification of the receipt of, or of being in the process of receiving, the immunizations identified therein. When enacted in 1970, the law limited its application to minor children being admitted "for the first time to any public, private, or parochial elementary school" operating within the State. Okla. Stat. tit. 70, § 1210.191 (Emerg. Eff. April 15, 1970). At that time a tuberculosis test was required as well as immunizations for diphtheria, pertussis, tetanus, measles (rubeola), (rubella), poliomyelitis, and smallpox, unless the child was likely to be immune as a result of having had the disease. Okla. Stat. tit. 70, § 1210.191 (emerg. eff. April 15, 1970).

In 1976, Section 1210.191 was amended to provide that "[n]o minor child shall be admitted to any public, private, or parochial school operating in this state unless . . ." and removed the requirement of a tuberculosis test. In other words, the class of persons affected was expanded and the required immunizations changed. In 1970 the law applied to minor children enrolling "for the first time" in a public, private, or parochial "elementary" school. In 1976 the limitations of "for the first time" and "elementary" were removed and the law required any minor child being admitted to **any** public, private, or parochial school within the State of Oklahoma to show certification of having received, or of being in the process of receiving, the

identified immunizations. (1976 c. 262, § 1, emerg. eff. June 17, 1976).

The law was then amended in 1998 in what appear to be four successive session laws, each effective November 1, 1998, altering, each time, the identified required immunizations. (1998 c. 95, § 2 (removing smallpox and adding haemophilus influenzae type B (HIB) and varicella); 1998 c. 175, § 1 (removing smallpox and adding only haemophilus influenzae type B (HIB); 1998 c. 177, § 2 (removing smallpox and adding only hepatitis A); 1998 c. 412, § 3 (removing smallpox and adding haemophilus influenzae type B (HIB), varicella, and hepatitis A)).

The current amendment to Section 1210.191 merely replaces reference to the State Board of Health with "Commissioner" and adds Subsection E which requires the State Department of Education to provide and ensure that each school district in the state provides, on the school district's website, and in any notice or publication to the parents regarding immunization that "for school enrollment" a parent or guardian must provide either current up-to-date immunization records or a completed and signed exemption form. Okla. Stat. tit. 70, § 1210.191(E). [RA at 422-537; Okla. Stat. tit. 70, § 1210.191 versions collectively at Ex. 8 to Supp. Reply].

For more than fifty years, the State of Oklahoma has balanced the liberty interest of individuals against the safety of the community has a whole. Section 1210.191 has always **required** parents to immunize their children, or provide a valid exemption therefrom, as a condition of enrollment in **any** school within the State of Oklahoma, whether public, private, or parochial. Section 1210.191 is clearly related to a valid health concern, the recognized prevention of the transmission of communicable diseases. It applies across the board to all children (and their parents) attending school in the State of Oklahoma. Absent a valid

exemption, immunization is not left to the choice of the parent, nor has it been since at least 1970. It commands compliance or valid exemption from compliance.

The exemption sections 1210.192 and 1210.193 of Title 70 apply only to exemptions from mandated immunizations. No statute requires a parental veto of a mask mandate. A parent, guardian, or legal custodian of any minor child in Oklahoma seeking exemption from the immunization requirements must submit a certificate of a licensed physician stating that due to the physical condition of the child, immunization would endanger the life or health of the child [§ 1210.192], a written objection to the immunization of the child [§ 1210.192], or a claim for exemption from immunization based on medical, religious, or personal grounds [§ 1210.193]. There is no mention therein of allowing an exemption from any other requirement implemented by a school district for attendance at school which furthers the health and safety of the students, teachers, staff, and community as a whole.

In fact, Title 70, Section 1210.194 allows a school to prohibit a child afflicted with a contagious disease or head lice from attending a public, private, or parochial school until such time as he is free from the contagious disease or head lice. A health professional must certify that a child is no longer afflicted with head lice before the child may reenter school. There is no parental exemption in Section 1210.194 to allow a child afflicted with a disease or with head lice to continue to attend school and potentially infect other children. The health and safety of the other children, teachers, and staff is paramount to the individual choice of the parent to send a child to school with a contagious disease or head lice.

C. Appellants' Argument that the State has Plenary Control of Education is Erroneous

"The promotion and improvement of the health of the citizens is a fundamental obligation of the local, state, and federal governments." *Tulsa Area Hospital Council, Inc. v.*

Oral Roberts University, 1981 OK 29, ¶ 16, 626 P.2d 316, 320. Appellants argue that the State has plenary control over education and methods of operating the public school system. [RA, Tr. at 10:2-5]. SB658 is not related to an education issue or an education policy choice. It does not address subjects to be taught, how taught, by whom students are taught, or how funds are appropriated. The fallacy in Appellants' contention that the State possesses plenary or absolute control over public school education is clear when one considers that the Oklahoma Constitution expressly forbids the passage of local and special laws that regulate the affairs, or prescribe the powers and duties of the officers, of school districts, or regulate the management of public schools. OKLA. CONST. ART. 5, § 46.

The importance of local control is further evidenced by the declared intent of the Legislature on the subject of State Aid: "The maximum public autonomy and responsibility for public education should remain with the local school districts and the patrons of such districts." Okla. Stat. tit. 70, § 18-101(2). As the Oklahoma Supreme Court recognized in *Fair School Finance Council of Oklahoma, Inc. v. State*, 1987 OK 114, ¶ 47, 746 P.2d 1135, 1146: "Because the objective of local control over education is one which is both constitutionally legitimate and explicitly intended by the Legislature, there is not a factual issue to be determined in this regard." *See also*, *Dowell v. Board of Education of Oklahoma City*, 1939 OK 268, 91 P.2d 771 (holding that fixing of the boundaries of a school district is a purely local affair and stating "the regulation of such local affairs as are commonly left to local boards and officers is not understood to belong properly to the state." *Id.* at ¶ 15, 91 P.2d at 775).

The District Court, instead of simply finding that the Appellees' are likely to prevail on the constitutional challenge brought against Sections 1210.189 and 1210.190 proceeded to create an exemption process, found nowhere in SB658, from any public school implemented

mask mandate. The District Court's order crafts a law that usurps the local authority of the school districts of the State and perpetuates equal protection and due process violations in treating public schools differently from other schools in the State and in treating parents of students attending public schools differently from parents of students attending other schools in the State. Oklahoma law is clear that, contrary to the State's argument, the Legislature does not have absolute authority over health and safety in public schools in the State of Oklahoma.

D. SB658 is Prohibitory and Violates Equal Protection / Due Process

Against the foregoing backdrop, the District Court erred in enjoining enforcement of Sections 1210.189 and 1210.190 only against public schools that include in their policies a "parental veto" against a mask mandate. The District Court's reasoning on this limitation is unclear and seems to miss the point of the Appellants' argument on exactly what they contend the object and purpose of the challenged legislation is: liberty of parents and students in matters of education and health. When the equal protection analysis is undertaken step by step, the District Court's error comes to light.

The first step in an equal protection analysis is identification of the object and purpose of the legislation at issue. Even though SB658 does not directly mention or discuss personal autonomy, Appellants argue in their briefings to the District Court, no less than fourteen times, that the object and purpose of SB658 is protection of the fundamental liberties of parents and students.[4] At the hearing before Judge Mai, Appellants argued parental liberty, but then

[4] As shown in "Classification of Individuals – Population" below, Appellants' solicitude for (supposed) fundamental liberties of parents and students is plainly an under-inclusive classification because it only advances the (supposed) liberties of a subset of the population. It advances the interests of parents and students *who oppose mandatory immunizations and, as is the issue in this case, mask use,* without advancing the fundamental rights of other parents and students who would welcome mandatory mask usage because they want to stop the spread of this sometimes deadly virus from schools to homes, and vice versa. The deficient classification of this special law creates preferences and establishes inequality between, on the one hand, private school students and their parents and, on the other hand, public school students and their parents.

switched gears and also argued that SB658 was about health and safety in schools. [RA, Tr. at 10:10-13; 10:18-20; 15:22-24; 16:1-8]. In their Brief-In-Chief, Appellants continue their equivocation and avoidance against plainly stating what they contend the object and purpose of SB658 to be. In the first paragraph of the first page of their Brief they say "the entire purpose of the challenged law is to expand parent and student choice." [Aplts' Brief-In-Chief at 1 (emphasis added)]. Later in the Brief, however, they claim that the analysis undertaken by the District Court was erroneous in applying a "heightened scrutiny on the public school / private school distinction." [Aplts' Brief-In-Chief at 9-10]. And, even later in the brief, Appellants appear to classify the challenged law as a health and safety regulation. [Aplts' Brief-In-Chief at 12].

If the legislation's object and purpose impacts fundamental rights and liberties, strict scrutiny is the proper standard by which the law is measured. A strict scrutiny analysis places the burden on the government. *Clegg v. Oklahoma State Election Board*, 1981 OK 140, ¶ 7, 637 P.2d 103, 106. If the legislation impacts other than fundamental rights, the standard requires that the distinctions drawn in the challenged legislation bear some rational relationship to a legitimate state purpose. *Hendricks v. Jones*, 2013 OK 71, ¶ 8, 349 P.3d 531, 534; *Nitz v. State*, 2017 OK CIV APP 20, 394 P.3d 305. The burden to demonstrate the lack of rational basis is on the challenger. *Torres v. Seaboard Foods, LLC*, 2016 OK 20, ¶ 17, 373 P.3d 1057, 1066. Under either standard, SB658 fails.

Appellants seek to protect parental liberties with prohibitory legislation attempting to control local public school health policy in the midst of a pandemic. If, in fact, taking Appellants at their word, the entire purpose of the challenged law is to expand parent and student choice, strict scrutiny is the proper standard. The presumption of validity of legislative

enactments disappears when the statutory classification impacts upon a fundamental right or if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. *Fair School Finance*, 1987 OK 114 at ¶ 34, 746 P.2d at 1144. Appellants argued before Judge Mai that balancing two competing fundamental interests, namely "the liberty interest" against the right to a safe education is not a matter for the court. [RA, Tr. at 11:11-12:4]. Appellants then actually argued that a court "can't really decide in any particular manageable standard when to prioritize liberty over safety." [RA, Tr. at 12:8-9]. Oh, but the court can do so and has done so for over one hundred years. The absolute parental liberty claimed by Appellants is not absolute and the idea of such "absolute" rights embodies a profound misunderstanding of America's fundamental law.

Almost one hundred years ago, the United States Supreme Court found that an act not inherently immoral or inimical to the public welfare is not a legitimate subject for prohibitory legislation. *Meyer v. Nebraska*, 262 U.S. 390, (Syllabus), 43 S. Ct. 625, 61 L. Ed. 1042 (1923) (recognizing that a measure designed to prohibit a practice that of itself is not injurious to the public is unconstitutional). "[T]he family itself is not beyond regulation in the public interest . . . ." *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645 (1944). Parental freedom and authority may lawfully be limited in things affecting the child's welfare. *Id.* As the United States Supreme Court stated long ago in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905):

> [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. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each

> individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This 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 made, so far as natural persons are concerned.'

Id., 197 U.S. at 26, 25 S. Ct. at 361.

The instant case concerns prohibitory legislation allegedly designed to protect the parental liberty of some but not all, through an unconstitutional overreach, premised on speculation and fear, directed at some schools but not all. COVID-19 mitigation efforts, including masking and vaccinations, are neither immoral nor injurious to the public welfare. "There is no fundamental constitutional right to not wear a mask." *Klaassen v. The Trustees of Indiana University*, 2021 U.S. Dist. LEXIS 133300, *106, 2021 WL 3073926 (N.D. Ind. 2021) (stating that masking and testing for presence of a virus before entering a place of public accommodation "aren't issues of fundamental constitution import, but often transient and trivial inconveniences"); *Klaassen v. Trustees of Indiana University*, 2021 U.S. App. LEXIS 22785, 2021 WL 3281209 (7th Cir. 2021) (stating that wearing of masks and being tested are not constitutionally problematic). As the United States Supreme Court stated in *Meyer*, because the practice of wearing a mask or immunizing against contagious disease are not acts which in themselves are injurious to the public, the prohibitory legislation is unconstitutional.

i. Classification of Individuals - Population

Continuing in the equal protection analysis, once the object and purpose of the legislation is identified, the court must determine the classification of individuals to which the law applies, *i.e.* the population. In this case, again taking Appellants at their word that the stated object and purpose of the legislation is the choice or liberty interest of parents and

students, the District Court erred in identifying the population as K-12 students who have to be in school. [RA, Tr. at 24:7-13]. The population would actually be parents of all school aged children in the State of Oklahoma and students of the age of majority attending school in the State of Oklahoma. The differing classifications in each Section of SB658 are in no way rationally related to the Appellants' alleged protection of parents' and students' liberty interests. Nor can there be a compelling State interest in differentiating between the parents of public school children and the parents of children attending other schools or between public school students and students attending other schools.

Appellants boldly argue that "the Legislature needs to be more protective of parents' liberty interests in public schools than private." [Aplts' Brief-In-Chief at 11]. Appellants apparently take the position that the Legislature may, under the rubric of "parental liberty," deny public school parents and their children options to preserve health that are available in private schools. This is the definition of an equal protection violation. If a liberty interest is fundamental, it is not any less of a liberty interest because a parent has the means to send a child to private school. Under the challenged legislation, public school parents and their children are denied any opportunity to persuade their local school district to impose mandatory masking, regardless of the prevalence of illness in their district. Parents of private school students are free to make that argument to their schools' governing bodies. Notably, due to mandatory attendance laws, parents of public school children can be prosecuted for failure to send their children to school, which leaves those parents with a "Hobson's Choice": do they violate the mandatory attendance law or send their child to an unsafe (*i.e.* partially masked) environment. Only the parents of public school students face this dilemma.

Examination of the limited classifications found in Sections 2 and 3 of SB658 (Okla. Stat. tit. 70, §§ 1210.189 and 1210.190 respectively) clearly shows that the challenged legislation violates equal protection in light of the Appellants' stated object and purpose of the law. It is important to note that neither Section expressly addresses the liberty interests of parents or students.

The applicability of the second Section of SB658 (Okla. Stat. tit. 70, § 1210.189), is limited, without explanation, to "[a] board of education of a public school district or a technology center school district, the board of regents of an institution within The Oklahoma State System of Higher Education, the governing board of a private postsecondary educational institution, the Oklahoma State Regents for Higher Education, the State Board of Education or the State Board of Career and Technology Education." It forbids those institutions, *inter alia*, from requiring a vaccination against COVID-19 (when Section 1210.191 has required numerous immunizations since 1970) and from implementing a mask mandate for students who have not been vaccinated against COVID-19. Okla. Stat. tit. 70, § 1210.189(A)(3). Also, because there is no "emergency declaration" clause applicable to Section 1210.189, if the Governor were to declare a state of emergency, Subsection 1210.189(A)(3) would still prevent the identified institutions from enacting a mask mandate for any unvaccinated student.

Section 3 of SB658, (Okla. Stat. tit. 70, § 1210.190) further limits, without any explanation, its applicability to "[a] board of education of a public school district or a technology center school district . . ." If, and only if, the Governor has declared a state of emergency encompassing the jurisdiction in which the board of education is located and the board of education has consulted with the local health department within its jurisdiction, may

the board of education then implement a mask mandate (or mandate of any other medical device, which is undefined).

In a weak effort to explain this dichotomy, Appellants contend that the State may treat public and private schools differently and regularly does so. [Aplts' Brief-In-Chief at 6-12]. However, the examples cited, *i.e.* bullying, Jim Thorpe Day, interpreters, etc., do not concern communicable diseases that have resulted in the death of thousands of Oklahoma citizens.[5] The vaccination and exemption statutes admittedly apply to all students in public, private, or parochial schools in the State. *See* Okla. Stat. tit. 70, §§ 1210.191-1210.193; 1210.195; and 3243-3244. The State requires all students to obtain certain vaccinations prior to enrollment in school but also affords all parents and students exemptions. In addition, "any child" afflicted with a contagious disease may be prohibited from attending a public, private, or parochial school until such time as he is free from the contagious disease. Okla. Stat. tit. 70, § 1210.194. Moreover, SB658 itself expressly attempts to restrict the governing board of a private postsecondary education institution. Okla. Stat. tit. 70, § 1210.189. It is disingenuous for Appellants to argue that the State does not have the same ability to regulate private schools in this case with respect to mask mandates and COVID-19 vaccinations when it specifically does

[5] Numerous statutes in Oklahoma apply equally to public and private schools: Okla. Stat. tit. 10, § 1633 (requiring local law enforcement agencies to assist private schools in developing a fingerprinting program if desired); Okla. Stat. tit. 21, § 1190 (prohibiting hazing in public or private schools or institutions of higher education); Okla. Stat. tit. 21, § 1277 (making it unlawful to carry a concealed or unconcealed firearm into any public or private school absent exceptions); Okla. Stat. tit. 25, § 153 (requiring schools to display the flag of the United States of America); Okla. Stat. tit. 63, §§ 2-401 and 2-402 (making it unlawful to distribute, possess, or purchase a controlled dangerous substance near a public or private school); Okla. Stat. tit. 70, § 2605 (requiring all 5th – 11th grade students and their parents receive information on the Oklahoma Higher Learning Access Program); Okla. Stat. tit. 70, § 1210.213 (prohibiting use of tobacco on school property); Okla. Stat. tit. 74, § 51.2a (Oklahoma Office of Homeland Security will make grant monies available to public and private schools, technology center schools and institutions of higher learning to encourage emergency preparedness); and the Oklahoma Administrative Code requires teachers in private schools to have a college degree and meet Oklahoma certification standards, O.A.C. 210:35-3-86. Additionally, though private schools are not required to be accredited by the State Board of Education, as a practical matter, private schools must obtain accreditation from the State so that their students will be able to transfer to public schools in Oklahoma or in other States and receive full credit for the courses which they successfully completed in private school.

so, as stated above, with respect to the other required vaccinations and the exemption statutes and seeks to do so, at least in part, in the challenged legislation by making it applicable to private postsecondary education institutions.

The Legislature has chosen to protect children in both public and private schools from head lice, from contagious disease, and from hazing, but when it comes to the most deadly contagious disease in our nation's past one hundred years, for the Legislature to unreasonably restrict the public boards of education in Oklahoma from implementing a useful prevention tool to protect their students when required is not only irrational, it is immoral. Appellants again declare in their appellate Brief, as they did in briefing below, that SB658 "guarantees" that children "will not be forced against their will to wear a mask." [Aplts' Brief-In-Chief at 11]. Governor Stitt has said, in the past, that he has no intention of declaring an emergency which, under SB658, would allow the school districts the flexibility to issue a mask mandate if necessary. Without every preventative option, school districts may be forced to move to distance learning again in the future, an option which is unfavored by all but which is not prohibited by SB658. In-person learning is preferred, surely no one will disagree. To irrationally and unreasonably restrict a necessary means to reach that end cannot stand. There is simply no rational basis to prohibit a board of education from implementing a mask mandate, when necessary, for the safety of the students and employees in the school district (and ultimately others), while permitting a school district to shut down and move to distance learning to combat this contagious disease when in-person learning is not only preferable but is paramount.[6]

[6] Appellants' position that Appellees are advocating mandatory masking regardless of the rate of infection is inaccurate. Currently, school districts seeing a downward trend in COVID-19 cases in their schools are rolling back their implemented mask mandates. It is Appellees' position that the decision should be left to the local boards of education which monitor the data on COVID-19 infections in their respective districts.

Appellants would have this Court ignore the very real fact that Oklahoma, and in fact the United States, is still within the grasp of an epic pandemic which directly affects the public interest and welfare. Appellants cite *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), but miss the critical point of this opinion which reinforces that prohibitory legislation is improper when the subject of the prohibition is not inherently harmful. *Id.* at 534, 45 S. Ct. 573; *See also Meyer*, 262 U.S. 390, (Syllabus), 43 S. Ct. 625, 61 L. Ed. 1042 (1923). The State of Oregon, in *Pierce*, sought to prohibit the education of children of a certain age in any manner other than within the state's public school system. *Id.* The United States Supreme Court, holding the prohibitory legislation unconstitutional, found it unlawful to deny parents the choice to send their children to a private school. *Id.* Though *Pierce* strikes down unlawful prohibitory legislation, the facts of that case did not concern the illness and deaths of thousands of people due to a highly contagious virus. The *Jacobson* opinion did.[7] Conspicuously absent from Appellants' Brief is any citation to or acknowledgement of the *Jacobson* or *Prince* cases. *Jacobson*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905); *Prince*, 321 U.S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645 (1944). Both of these cases, as shown herein, stand for the proposition that family rights and parental liberty are not beyond regulation in matters of public interest and welfare.

As stated above, if the purpose of the challenged legislation in this case is to protect the rights of parents and/or students to choose among various preventative options, then the population identified in that purpose consists of parents of school-aged children and students

---

[7] Appellants' reference to the IDEA does not support their argument that the federal government distinguishes between public and private schools. The IDEA obligates school districts to help students with disabilities while SB658 prevents the school districts from exercising all options available to help students with disabilities. Additionally, the Ohio, Maine, Nebraska, and Kentucky cases cited by Appellants do not concern the health of students during a pandemic or health and prevention concerns arising from contagious disease. Therefore, none of these authorities are persuasive in this case. [Aplts' Brief-In-Chief at 7-8].

throughout the State. There is no rational reason to limit these alleged protections to the parents and/or students of the restricted subset of entities identified in Sections 1210.189 and 1210.190. There is no rational reason, much less a compelling state interest, that fewer than all parents of school aged children and fewer than all students should receive the same protection of freedom of choice. An underinclusive statute may demonstrate the absence of a compelling state interest required for a state's justification when restricting a fundamental right. *Torres*, 2016 OK 20 at ¶ 32, fn.61, 373 P.3d at 1075.

E. Conflict Between 1210.189 and 1210.190

As discussed in Appellees' Reply filed in the District Court, the conflict between Okla. Stat. tit. 70, § 1210.189(A)(3) and § 1210.190, effectively renders a school district unable to implement, under any circumstances, a mask mandate encompassing students who have not been vaccinated against COVID-19 even if the Governor declares an emergency. [RA at 392-401, Plaintiffs' Reply]. Section 1210.189 does not contain an emergency clause. Therefore, by the force of Section 1210.189, any emergency declared by the Governor would not apply to unvaccinated students. Clearly, the legislation is not balanced but instead, as written in light of the Appellants' claimed object and purpose of the law, favors the "liberty interest" of the unvaccinated population over the "liberty interest" of those who have chosen to receive the vaccine. Even in the name of "liberty" there is no compelling state interest to justify the disparate classification.

F. The State May not Perpetuate an Unsafe Learning Environment

Appellants' "balancing" argument does not provide either a compelling state interest or a rational basis for the disparate treatment in the law between the parents of public school students and the parents of students in other schools throughout Oklahoma or of favoring

protection of the alleged rights of unvaccinated students over vaccinated students. Contrary to Appellants' position, the courts can, and have for quite some time as Appellees have shown, prioritized between liberty and safety. In the case of a pandemic where lives are being lost daily the liberty interest of the individual fades in the interest of the safety of the community as a whole. *Jacobson*, 197 U.S. at 26, 25 S. Ct. at 361.

On page two of its Response to the Motion for Temporary Injunction, [RA at 117-383] the Appellants acknowledged that the Oklahoma Constitution guarantees to Oklahoma children an "adequate" public education, but claimed that this guarantee does not encompass a right to be educated in a reasonably safe environment. Indeed, Appellants contend in their Brief-In-Chief that there can be no due process challenge to a public school policy absent evidence that a child is not receiving "at least a basic adequate education." *Fair School Finance*, 1987 OK 114 at ¶ 63, 746 P.2d at 1150. [Aplts' Brief-In-Chief at 5]. This is an improper reading of the *Fair School Finance* case. *Fair School Finance*, concerned a challenge to the State's system of financing public schools and the amount of money spent per student. The court stated that where a charge fairly could not be made that a child was not receiving at least a basic adequate education, an argument of equality in public support of schools, though meritorious was of no avail. *Id.*, 1987 OK 114 at ¶ 63, 746 P.2d at 1150.

In this case, the issue is not equality in school financing. Instead, this case challenges prohibitory legislation. The issues center on the health and safety of children, balanced against (as Appellants claim) the liberty interest of parents and students, in the midst of a pandemic and whether the Legislature has acted outside its bounds with SB658 in tipping the balance against parents who seek effective public measures to limit the spread of this dangerous, and

sometimes deadly, virus. Appellees are not required, in this case, to show a lack of quality in education to bring their due process challenge.

Under the Due Process Clause of the Oklahoma Constitution, a student's right to be reasonably safe while at school does not hinge on equality in school financing or the quality of education provided but is best understood as prohibiting the State of Oklahoma from affirmatively increasing or enhancing a known danger posed to students in the classroom. Legislation that does so is irrational and cannot be justified as an exercise of the State's police power to protect citizens. The Due Process Clause of the Oklahoma Constitution provides no less protection to life than does the Due Process Clause of the United States Constitution. *Torres, supra,* at ¶ 23, 373 P.3d at 1069. Accordingly, if the federal Due Process Clause prohibits a State from endangering the lives of its students, the Oklahoma Due Process Clause includes the same prohibition.

Even if a State does not create the particular threat or danger that faces its students, the State violates its students' rights under the federal Due Process Clause if its affirmative action "increases" or "enhances" the danger. *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253, 1262-1263 (10th Cir. 1998) (action for damages under 42 U.S.C. §1983). It follows that the Oklahoma Due Process Clause invalidates a statute removing from school administrators a tool to mitigate the deadly threat of COVID-19, because enacting such a law means "the state has taken affirmative action which increases the individual's danger of, or vulnerability to, [the threat not created by the state] beyond the level it would have been at absent state action." *Id.* at 1263 (citations omitted).[8] SB658's blanket prohibition of mandatory masking in public

[8] The State of Oklahoma Health Department identifies key prevention strategies and shows that "consistent and correct use of masking" is the number one priority in preventing COVID-19 in primary and secondary schools. https://oklahoma.gov/content/dam/ok/en/covid19/documents/resources-and-

schools "renders citizens more vulnerable to a danger than they otherwise would have been." *Id.*

The District Court in this case recognized that the challenged laws are codified in the "Health and Safety" Chapter of Title 70. However, it erred when it did not address Appellees' fourth theory for injunctive relief, that Sections 1210.189 and 1210.190 violate the right of Oklahoma children to a free education in a safe environment. As shown in Appellees' briefing and herein, the liberty interest of the individual must cede to the health and safety of the community as a whole in certain circumstances. A global pandemic is the epitome of such circumstances. The rights of parenthood are not beyond limitation. *Prince*, 321 U.S. at 166, 64 S. Ct. at 442, 88 L. Ed. at 652. The Legislature has the power to regulate the health and safety of public and private school students and has done so through various statutes. (*See* footnote 4 *supra*). A community, including a school district, has the right to protect itself against an epidemic of disease which threatens the safety of its members and their children. *Jacobson*, 197 U.S. at 27, 25 S. Ct. at 362. In SB658, the Legislature decided to leave intact the rights of private school parents to send their children to fully-masked learning environments but denied the same opportunity to parents of public school students. The prohibitory sections 1210.189 and 1210.190, unconstitutionally place liberty over health and safety, have no rational relation to a compelling state interest, and are clearly unconstitutional. This Court is well within its right to enter the order the District Court should have entered and find that Sections 1210.189 and 1210.190 should be enjoined from enforcement.

---

recommendations/Preventing_COVID_in_Schools_July2021_Final.pdf. *See* **Plaintiffs' Opening Brief in** Support of Their Amended Motion for Temporary Injunction and attachments thereto. [RA at 58-116].

IV. APPELLEES' PROPOSITION IV: The Challenged Legislation is an Unconstitutional Special Law

What the State has actually done in enacting Okla. Stat. tit. 70 §§ 1210.189 and 1210.190 is to enact prohibited special laws which unconstitutionally attempt to regulate and manage the affairs of public schools, school districts, and even cities in violation of Article 5 Sections 46 and 59 of the Oklahoma Constitution. Article 5, Section 46 provides in pertinent part:

> The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing:
>
> * * *
>
> Regulating the affairs of counties, cities, towns, wards, or school districts;
>
> * * *
>
> Creating offices, or prescribing the powers and duties of officers, in counties, cities, towns, election or school districts;
>
> * * *
>
> Regulating the management of public schools, . . .

Section 59 provides:

> Laws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted.

The Oklahoma Supreme Court, in its 1928 opinion in the case of *School District No. 85, Kay County v. School District No. 71, Kay County*, 1928 OK 689, 276 P. 186 stated:

> Local or special laws are all those that rest on a false or deficient classification. Their vice is that they do not embrace all the class that they naturally embrace. They create preference and establish inequality. They apply to persons, things, and places possessed of certain qualities or situations and exclude from their effect other persons, things, or places which are not dissimilar in this respect.

Id. at Syllabus ¶ 4; *Wilkinson v. Hale*, 1939 OK 11, 86 P.2d 305.

In *Wilkinson*, the challenged law was one that contained a population limitation

(counties having a city therein of over 100,000 population) which meant it operated only in those school districts located in Oklahoma and Tulsa counties, to the exclusion of districts situated in all other portions of the state. *Wilkinson*, 1939 OK 11 at ¶ 9, 86 P.2d at 307. A teacher in the Sand Springs school district, (located in Tulsa County but a town, at that time, of about 8,000 residents), who had not been retained for the ensuing school year brought a mandamus action to compel the Sand Springs Board of Education to classify and reinstate her as a teacher. She relied on the Teachers Tenure Law which had been enacted only months before. It required certain school districts to follow a procedure for discharging teachers. *Id.* at ¶¶ 1-8, 86 P.2d at 306-307. The Oklahoma Supreme Court struck down the Teachers Tenure Law as an unconstitutional special law in violation of the prohibition against regulating the management of public schools under Oklahoma Constitution Article 5, § 46. The court found:

> We are here confronted with an act applicable to school districts situated in only two counties of this state and those two counties are selected to the exclusion of others upon the basis of the existence therein of cities containing more than 100,000 population. The capricious nature of the classification adopted and its effect in making the law 'apply to persons, things, and places possessed of certain qualities and exclude other persons, things or places not dissimilar,' is singularly illustrated in the case at bar. Application of the law is here sought in connection with the management of the school system in the city of Sand Springs, a city of approximately 8,000 population. What peculiarity of that school district distinguishes it from the many other school districts of the state outside Tulsa and Oklahoma counties containing cities of similar size?
>
> What substantial difference distinguishes the school system of Sand Springs from the school systems of the many other towns of Oklahoma of comparable area and population? No real distinction is pointed out by the plaintiff, nor can any be perceived by us. There is no connection between the population of the principal city in a county and the employment of teachers in the school districts of the county, especially in those districts lying outside the corporate limits of the principal city. The absence of distinctive feature renders the law objectionable on constitutional considerations.

Wilkinson, 1939 OK 11 at ¶¶ 11-12, 86 P.2d at 307.

Special laws are those which single out less than an entire class of similarly affected persons or things for different treatment. *Reynolds v. Porter*, 1988 OK 88, ¶ 14, 760 P.2d 816, 822. When a special law is enacted concerning one of the subjects listed in Article 5, Section 46 of the Oklahoma Constitution, it is absolutely and unequivocally unconstitutional. *Reynolds*, 1988 OK 88 at ¶ 17, 760 P.2d at 822. The vice of special laws is that they create preferences and establish inequality. *Reynolds*, 1988 OK 88 at ¶ 19, 760 P.2d at 823. The Legislature may not deal with any phase of public school administration other than by a statute which has general statewide application. *Maule v. Independent School Dist. No. 9 of Tulsa County*, 1985 OK 110, ¶ 12, 714 P.2d 198, 204.

Oklahoma Constitution Article 5, § 59 generally allows the legislature to pass special laws when a general law is not applicable. To determine whether a statute is unconstitutional under § 59, a three-pronged analysis is necessary. *Reynolds*, 1988 OK 88 at ¶ 13, 760 P.2d at 822. Under the first prong the court must identify the class. A statute relating to particular persons within a class is a special law. *Id.* Under the second prong, the court must determine if the subject of the legislation is reasonably susceptible of general treatment or if there is a special situation possessing characteristics impossible of treatment by general law. *Id.* at ¶ 15. Here, the court will consider both the nature and objective of the legislation as well as the conditions and circumstances under which the statute was enacted. *Reynolds*, 1988 OK 88 at ¶ 15, 760 P.2d at 822. Under the third prong, the court must determine if the special legislation is reasonably and substantially related to a valid legislative objective. *Id.* at ¶ 16.

Under § 46 constitutional review of a statute the first question may also be the last: Is the statute a special or general law? "If the statute is special, § 46 absolutely and unequivocally prohibits its passage by the legislature." *Reynolds*, 1988 OK 88 at ¶ 17, 760 P.2d at 822-23.

Appellees charge that the actual object and purpose of Sections 1210.189 and 1210.190 is regulating the affairs of school districts or cities, regulating the management of public schools, and/or prescribing powers of officers of school districts or cities in direct violation of Art. 5, § 46. The effect on schools is evident; however, the potential effect on cities should not be overlooked. The laws impermissibly regulate the affairs of cities in creating the very real question of whether a citywide mask mandate would be enforceable at its resident public school. In the event of a citywide mask mandate, an enumerated school would face the impossible choice of whether to comply with the city mandate or Oklahoma law. Sections 1210.189 and 1210.190 unconstitutionally seek to regulate the affairs of school districts, public schools, and/or cities.

If the object and purpose of Sections 1210.189 and 1210.190 is, as Appellants claim, protection of personal autonomy and parental liberty, why does the legislation protect only the liberty interests of parents whose children attend public schools or technology centers and of students of those schools? And, why does the legislation protect the liberty interests of unvaccinated persons over the vaccinated? The immunization requirements in Section 1210.191 apply statewide and have since at least 1970.

In this case, taking the object and purpose of the laws as personal autonomy and protection of liberties, under the three prong analysis required by Oklahoma Constitution Article 5, Section 59, the first prong finds Sections 1210.189 and 1210.190 to be special laws because the class of persons to which the laws relate is but a subset of all of the parents of school aged children in the State of Oklahoma. Under the second prong, protection of liberty is reasonably susceptible of general treatment, no special law is required. In the second prong, the Court should consider the stated nature and objective of the legislation and the

circumstances under which it was enacted. The polarized political positions which exist in our society and plague almost any conversation concerning COVID-19 all but drown out the aspects of health and safety which should be paramount. And, finally, under the third prong, the special legislation is not reasonably and substantially related to a valid legislative objective. The prohibitory Sections 1210.189 and 1210.190, are not general laws but instead create special laws without any explanation of how the distinct classifications to which they apply are necessary to further either the public interest or a valid legislative objective. When a general law will suffice, no special law may be enacted. On this basis alone, Section 1210.189 and 1210.190 are unconstitutional and should be enjoined from enforcement.

CONCLUSION

Whether to implement a mask mandate for a particular school district in light of the ongoing COVID-19 pandemic should be a decision made locally by the boards of education of each district. The majority of the Appellees in this case are parents of school children who face health challenges. Their liberty interests are just as important as every other parents' and students' liberty interest. Yet, the challenged legislation prevents Appellees from being able to send their children to in-person learning in public school in a fully-masked environment or to petition their public school board for a mask mandate, absent a declared emergency, while parents of private school students are not so restricted. For all the reasons stated herein, and contained in the record on appeal, the laws, as written and as applied, violate equal protection and due process, are unconstitutional special laws, and cannot stand. The District Court correctly granted injunctive relief but erred in writing into the law a "parental opt-out" for public schools implementing mask mandates. Injunctive relief should be affirmed, but the erroneous court-legislated opt-out should be reversed.

Respectfully submitted,

RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, P.C.

By: 

Donald M. Bingham, OBA #794
Sharon K. Weaver, OBA #19010
502 West 6th Street
Tulsa, OK 74119-1010
(918) 587-3161
(918) 587-9708 (Facsimile)
don_bingham@riggsabney.com
sweaver@riggsabney.com

- AND -

Robert A. Nance, OBA #6581
Chad C. Taylor, OBA #18308
528 NW 12th Street
Oklahoma City, OK 73103
(405) 843-9909
(405) 842-2913 (Facsimile)
rnance@riggsabney.com
ctaylor@riggsabney.com

Attorneys for Appellees / Counter-Appellants

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing was transmitted by electronic mail to the office of the Honorable John M. O'Connor, Attorney General of the State of Oklahoma, on the 18th day of November, 2021.

Bryan Cleveland
bryan.cleveland@oag.ok.gov
Assistant Solicitor General
Mithun Mansinghani
mithun.mansinghani@oag.ok.gov
OKLAHOMA ATTORNEY GENERAL'S OFFICE
313 NE 21st St.
Oklahoma City, OK 73105
(405) 522-1961 Telephone

A copy was also filed with the office of the Oklahoma County Court Clerk on the 18th day of November, 2021.

Sharon K. Weaver