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.

THE STATE OF OKLAHOMA; AND THE HONORABLE KEVIN STITT ***in his official capacity as*** **GOVERNOR OF OKLAHOMA,**

Defendants/Appellants/ Counter-Appellees.

Case No. 119840

Oklahoma County District Court Case No. CV-2021-1918

APPELLEES'/COUNTER-APPELLANTS' REPLY IN SUPPORT OF COUNTER-APPEAL

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

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Appellees / Counter-Appellants, Plaintiffs below, (hereinafter "Appellees") for their Reply in Support of their allegations of error on counter-appeal submit the following. After reading Appellants' Response to Counter-Appeal and Reply in Support of Appeal (hereinafter "Appellants' Response" or "Aplts' Response"), one must wonder whether Appellants are answering Appellees' Brief-In-Chief, or responding to a brief they wish Appellees had filed. Appellants' Response attempts to recast the case or to distract this Court from what is actually at issue. Appellants' Response does not credibly refute the allegations of error brought in Appellees' Counter-Appeal. Their contention that the Legislature has plenary authority and can, basically, act at its will with little to no review improperly ignores some very fundamental principles of law.

APPELLANTS HAVE AN ABSOLUTE DUTY TO PROTECT AND PROMOTE THE HEALTH OF THE PEOPLE OF THE STATE OF OKLAHOMA

It is critically important at the outset to recognize that Appellants are charged with the inalienable duty to act for the protection, security and benefit of the people and to promote their mutual and general welfare. OKLA. CONST. ART. 2, § 1; OKLA. CONST. PREAMBLE. 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, 321. [RA at 392-401, Plaintiffs' Reply at 1-2]. "Promotion and improvement of the people's health is a corresponding handmaiden to the inalienable right to the pursuit of happiness." *Id.*; OKLA. CONST. ART. 2, § 2.

Over one hundred years ago, the United States Supreme Court wrote in its opinion in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905) that the Massachusetts constitution, similarly, provided that all the people shall be governed by certain laws for the common good and that government is instituted "for the common good, for the

protection, safety, prosperity and happiness of the people, . . ." *Id.* at 27, 25 S. Ct. at 361. The legislature cannot "abdicate its function to guard the public health and safety." *Id.* at 30, 25 S. Ct. at 363. "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." *Id.* at 26, 25 S. Ct. at 361. [RA at 422-537, Plaintiffs' Supp Reply].

One major difference between *Jacobson* and the case at hand is the fact that in this case, the questioned legislation is prohibitory. Typically, in such cases as in *Jacobson*, the legislature passes a law commanding compliance with a rule or regulation in furtherance of the public health. That law is then challenged by one or more citizens who contend their rights or liberties are aggrieved by the legislative command. For example, in *Jacobson*, the statute in question was enacted under the state's police power and required the adult citizenry of a city or town to comply with a vaccination requirement or face a fine when the local board of health found it necessary to vaccinate or revaccinate its citizenry against smallpox. *Jacobson*, 197 U.S. at Syllabus, 25 S. Ct. at Syllabus. In that case, the legislature passed a law to require action when deemed necessary.

In the case now before this Court, the opposite is true. The challenged legislation does not require action, it prohibits action. Regardless of the rate of this, sometimes deadly, infectious disease in any given school district across the State, the individual boards of education are prohibited from implementing a mask mandate unless the Governor has declared an emergency and then the mandate would not apply to any unvaccinated persons. Okla. Stat. tit. 70, §§ 1210.189(A)(3), 1210.190 (the dichotomy between these statutes is still not appreciated by Appellants, see Response at 20-21). Tellingly, Appellants have maintained throughout this case that SB658 "guarantees" a "child will not be forced against their will to

wear a mask." (Aplnts' Brief-in-Chief at 11); [RA at 402-421, Defendants' Supp Surreply at 3]. In other words, regardless of the infectious rate of the pandemic, no emergency will ever be declared; how could there otherwise be a "guarantee."

Prohibitory legislation, such as we have here, requires the court to look at what is being prohibited in light of the purpose of the legislation. *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625 (1923). [RA at 422-537, Plaintiffs' Supp Reply]. When the prohibited act is not injurious to the health or morals of the people, the prohibition is unconstitutional. *Meyer*, 262 U.S. at 402, 43 S. Ct. at 628.

> Where the constitutionality of an act of the Legislature is in question, all reasonable doubt will be resolved in favor of the questioned authority and the act will be declared constitutional unless it can be clearly demonstrated that the Legislature did not have the power or authority exercised or that its authority was exercised arbitrarily and capriciously, for instance, as to classification or delegation of authority, to the prejudice of the rights of some of the citizens. Particularly is this true where the act in question is, as here, of great public concern involving the performance of an absolute duty imposed on the Legislature by the basic law of the state.

School District No. 25 v. Hodge, 1947 OK 220, ¶ 3, 183 P.2d 575, 579. There can be absolutely no dispute that the State is obligated to protect and promote the health of the citizenry. The current dispute involves matters of great public concern. Protection of the health of the people is an absolute duty imposed on the Legislature by the Constitution of the State of Oklahoma. To enact prohibitory legislation that disallows a local school board from exercising all means available to protect and promote the health of school children is irrational and contrary to the very duty the government owes the people. The action prohibited in this case by SB658 is not injurious to the health or morals of the people. Additionally, as Appellees have shown throughout their briefings in this case, the classifications in SB658 favor the rights of some citizens to the prejudice of others.

Contrary to Appellants' arguments, Appellees do not shy away or hide from *Hodge*. If the legislation at issue concerned a choice between two or more options available for protection of the public against a deadly infectious disease, the choice by the Legislature of one option over the other may be upheld under *Hodge*. That, however, is not the case. *Hodge* does not stand for the principle that a state can ignore its absolute duty to protect and promote the general health and welfare of its citizens and that its actions in so doing will not be subject to review. *Hodge*, as quoted above, expressly states that the constitutionality of an act of the Legislature is properly reviewed when it has exercised its authority arbitrarily or capriciously or to the prejudice of the rights of some of the citizens.[1] SB658 is not a policy, it is not discretion exercised by the State.[2] What we have here is legislation creating an absolute prohibition to act in a manner which may, in fact, provide protection and promote the health of the people. Given the duty of the State to protect and promote the health of its citizens, SB658's preclusion of a reasonable means of doing so is unconstitutional, is properly challenged, and cannot stand.[3]

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[1] Appellants' argument on alleged "equitable factors" is illogical. Their contention that Appellees have in any way conceded to this misguided argument is clearly incorrect. Appellees briefing throughout this case shows the fallacy in Appellants' position. Appellees have already explained how the *Hodge* decision does not support Appellants' argument and have also offered a variety of examples of the State's statutory regulation of private schools in Oklahoma. It is Appellants who focus on the effectiveness of masks in their briefs in an attempt to distract from the constitutional issues under which SB658 clearly fails.

[2] Even if it were a policy, in Oklahoma school boards are vested with the power, the authority, and the responsibility for establishing rules and policies best suited to the needs of the school district. Okla. Stat. tit. 70, § 5-117.

[3] Appellants' claim of sovereign immunity fails for this very reason. If Appellants actually thought the Legislature was immune from suit for enacting an unconstitutional law, it would surely have filed a motion to dismiss rather than submit to the jurisdiction of the court. Appellants' argument on this point should be disregarded.

APPELLANTS FAIL TO CREDIBLY REFUTE THAT SB658 IS UNCONSTITUTIONAL AND THAT THE DISTRICT COURT ERRED IN CRAFTING AN OPT OUT INTO THE INJUNCTIVE ORDER

As Appellees note in their Combined Answer Brief and Brief-In-Chief ("Combined Brief"), the first page of Appellants' Brief-In-Chief states that "[T]he entire purpose of the challenged law is to expand parent and student choice." (Emphasis added). Appellees, who are parents and students, want to exercise their "choice" to petition their respective school districts for implementation of mandatory masking. This is a choice that is afforded to parents and students in private schools, but the challenged law effectively eliminates the exercise of any "choice" by public-school parents and students to convince a school district to impose masking, regardless of the rate of contagious disease within their respective jurisdiction absent a declaration of emergency, which Appellants effectively "guarantee" will never happen. In a very real sense, therefore, the challenged law does not "expand" parental and student choice, but instead eliminates that choice for a portion of the population subject to the law without any rational or compelling interest for so doing.

All parents and students in Oklahoma have a fundamental right to speak on matters of parental and family concern to the individuals who govern their children's schools. Parents of private-school students retain and enjoy that fundamental right, but the challenged law precludes public school-board members from even considering the speech of parents and students on the subject of mandatory masking. Clearly, strict scrutiny was the proper standard for the District Court to use in assessing whether SB658 impermissibly disfavors parents and students in public schools and favors parents and students of private schools.

The strict-scrutiny standard is also appropriate because, as Appellees show, the right of parents and students to have education occur in a reasonably safe learning environment is a

fundamental right of both parents and students throughout Oklahoma. [Appellees' Combined Brief at 23-26]. Under the challenged law, individual private schools are free to protect parents and students by imposing a masking mandate if and when necessary, whereas public schools may not even consider doing so regardless of the circumstances. The Legislature may not constitutionally shirk its duty to protect and promote the health and welfare of the people and enact a law that imposes a ban adversely affecting public-school parents and children but leaving intact the rights and options available to private-school parents and children. Essentially, Appellants are arguing that the Oklahoma Constitution permits parents and students in private schools to enjoy the benefits of their local school's health policies, while denying even the possibility of such enjoyment by parents and students in public schools.

Again, Appellees did not ask the District Court to mandate masks for children or parents in any part of the State of Oklahoma.[4] The District Court was asked by Appellees to enjoin enforcement of particular legislation which precludes individual public school districts from considering a mask mandate for their own students based upon their own circumstances. The preliminary injunction entered by the District Court reinstates a parent's opportunity to persuade the governing body of a public school that it should consider and implement a mask mandate, the same opportunity enjoyed by parents in private schools. However, the District Court erred when it required a public school district implementing a mask mandate to include

[4] Appellants' reliance on *Hagen v. Independent School District No. I-004*, 2007 OK 19, 157 P.3d 738, is misplaced. Appellees are not asking this court to make a factual finding of whether masks are the most effective means of prevention of infectious disease. The constitutionality of SB658, prohibiting a local school board from even considering whether or not to implement a mask mandate, is at issue. Interestingly, the *Hagen* case supports Appellees' position in favor of local control. "A teacher has the same rights as a parent or guardian to control and discipline a child attending a public school, according to local policies." *Id.* at ¶ 19, 157 P.3d at 742. Whether or not a mask mandate should be issued in a particular district should be a matter of local control based on the rate of this, sometimes deadly, infectious disease in the district. School personnel have the same rights of control as does a parent when children are attending public school. What could be more important than the health and safety of children and the opportunity for all children to receive an education, in person, in a safe, secure, and healthy environment?

the same exemptions provided in Oklahoma Statutes Title 70 Sections 1210.192 and 1210.193 pertaining to required vaccinations. [Appellees' Combined Brief at 3-5].

It is well known that "[t]he guiding principle under the equal protection clause is that all people shall be treated alike under like circumstances and like conditions, enjoying the same benefits and privileges as well as the same liabilities." *Rivas v. Parkland Manor*, 2000 OK 68, ¶ 7, 12 P.3d 452, 455. Under equal protection, a governing body is prohibited from applying a law dissimilarly to people who are similarly situated. *Id.* "To determine if the law is in accord with the constitution the Court must first identify the population and whether a distinction or classification has been drawn within that population." *Id.* at ¶ 9, 12 P.3d at 456. If a distinction has been drawn within a population (*e.g.* parents of school-aged children in Oklahoma), the Court will determine whether the classification is constitutionally proper. In so doing, the Court "must first identify the objects and purposes of the [statute]. The object and purposes of a law present the touchstone for determining whether the classification passes equal protection muster...[T]he reasonableness of a classification depends upon the objective." *Id.* at ¶ 11, 12 P.3d at 456 (citation omitted). [RA at 58-116, Plaintiffs' Opening Brief]; [RA at 422-537, Plaintiffs' Supp Reply].

Throughout briefing in this case, Appellants have stated the purpose of this law is to protect or expand the liberty interests of parents to make health decisions for their children. In fact, in their Response, they specifically state that parental liberty interests are the only fundamental rights at issue in SB658. [Aplts' Response at 17]. However, they fail to clearly define the population to which they assert the challenged law applies. As close as they come to doing so is in the first sentence of their Response when they state that SB658 "is a law that seeks to maximize parental liberty interests that are unique to public schools." [Aplts'

Response at 1]. This statement ignores the fact that portions of SB658 also apply to the governing boards of private post-secondary institutions. Okla. Stat. tit. 12, §§ 1210.189, 1210.191. From there, Appellants' argument follows a path of tortured reasoning. Throughout their briefing, they waffle between whether the population to which the law applies is parents, or schools, or public schools, or parents of public school children. If, taken at their word as stated in Appellants' Brief-In-Chief, "the entire purpose" of SB 658 is to "expand student and parent choice" then, as Appellees have argued, the population would consist of all students and all parents.

Appellants' weak argument in response is that the liberty interest to be protected is not the same for both private school parents and public school parents because private school parents have more money and more choices than public school parents. [Appellants' Response at 18-20]. This argument serves to further illustrate the irrationality of the challenged legislation. The statement "public school parents need greater protection of their liberty interests" begs for analysis. [Appellants' Response at 19]. For purposes of example only, under Appellants' theory, the alleged "protection" provided by SB658 is the right to be free from compulsion to wear a mask against one's will. If this is actually the intent of SB658, it would seem that application of the law to private school parents would be just as necessary as application to public school parents. Again, under Appellants' theory, a private school is beyond regulation and can enact a mandate if it chooses. The "protection" from compulsion therefore does not exist for private school parents, under Appellants' theory, unless they want to move their children to another school or to a public school wherein it is "guaranteed" under the law that no mask mandate will be implemented. The freedom allegedly protected under SB658 is not the freedom to decide where to send children to school, but the freedom to be

without a compulsion to wear a mask in an effort to curtail the spread of a, sometimes deadly, infectious disease. If, under Appellants' theory, to come within the protection of the alleged purpose of the law a private school parent would have to move his/her child to public school, how would the law not be discriminatory against the private school parent? *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). There is no rational or compelling reason to claim that the liberty of public school parents deserves greater protection than the liberty of any other parent of school-aged children.

Additionally, Appellants' fail to explain how such a distinction furthers a compelling state interest which justifies the differing classification contained in the statute or is necessary to effectuate its purpose. *Clegg v. Oklahoma State Election Board*, 1981 OK 140, ¶ 7, 637 P.2d 103, 106. [RA at 392-401, Plaintiffs' Reply]; *See Fair School Finance Council of Oklahoma, Inc. v. State*, 1987 OK 114, ¶ 54, n. 48, 746 P.2d 1135, 1148 (noting the due process clause of the Oklahoma Constitution has a definitional range coextensive with its federal counterpart and contains a built-in anti-discrimination component which affords protection against unreasonable or unreasoned classifications serving no "important governmental objectives." (citations omitted)). It bears noting that, contrary to Appellants' argument, Appellees are not taking, and have never taken, the position that the State should regulate private schools as public schools, even though it does in many instances. Appellees contend that the decision of whether to implement a mask mandate should be made by the local school board in the particular school district and that SB658's prohibition against such local action is unconstitutional. As Appellees have argued, the Oklahoma Constitution prohibits the passage of any local or special law regulating the affairs of school districts or the management of public schools. OKLA. CONST. ART. 5, § 46.

The State's distinction between classifications in SB658 cannot be explained, because there is no compelling governmental interest that requires or supports such a distinction; the legislation is unconstitutional. Because of the many flaws in the legislation the Appellants are unable to cogently articulate their way through the equal protection analysis, especially when it is the State's obligation to promote and protect the health and mutual and general welfare of the people, which Appellants seem to forget. This is why Appellants' briefing is difficult to follow.

At the hearing in the underlying case, the District Court found that the Appellees were likely to succeed on their claim that the contested provisions of SB658 violate the Equal Protection Clause of the Oklahoma Constitution, and that Appellees had met the other factors necessary for obtaining a preliminary injunction against enforcement of Sections 1210.189(A)(3) and 1210.190. [RA at 545-547, Order]. The District Court erred, however, by refusing to enjoin this probable violation of the Equal Protection Clause unless the parents who oppose mandatory masking are afforded an "opt out" from any mandatory masking policy. The District Court did so in the erroneous belief that SB658 somehow incorporated the mandatory parental "opt out" found in the *vaccination* exemption statutes. These vaccination exemption statutes, Sections 1210.192 and 1210.193, and the parental "opt out" in those statutes have no application to SB658, and neither party had asked the District Court to apply them to the mandatory-masking controversy. Appellants state in their Response that "injunctions are restrictions on enforcement, not creation of new laws" which is effectively what the District Court did in crafting the "opt out" into its injunctive order. [Aplts' Response at 9].

The District Court's imposition of a parental "opt out" into its injunction against equal-protection violations ironically results in a new and different violation of equal protection. Under the District Court's qualification of its preliminary injunction, the governing board of a private school may implement a mandatory masking policy that does not permit any parental "opt out," and so insure that its students can learn in a fully-masked environment whereas a public school district must either forgo mandating masks for its students or adopt a masking policy that will result in many students remaining free to be in class without wearing masks (if their parents have exercised their "opt out"). Thus, under the District Court's ruling, public school children must face a learning environment where many of their classmates do not wear masks despite a mandate, whereas private school students subject to a mandate have an opportunity to learn in a fully-masked classroom.

"Reliance upon a generality [*e.g.* 'the police powers of the State' or 'the plenary power of the State to regulate education'] to decide a legal issue has been long-recognized as insufficient legal analysis when application of a legal principle requires a greater degree of specificity." *Torres v. Seaboard Foods, LLC.*, 2016 OK 20, ¶ 22 n. 29, 373 P.3d 1057, 1069. All parents of school aged children have a fundamental right to petition a school's governing body to implement a masking mandate, which is a matter of exercising free speech and of exercising a fundamental parental right to act on behalf of their children. "An **under** inclusive 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, n. 61, 373 P.3d at 1074 (text of footnote and citations omitted, emphasis added). The Supreme Court of Oklahoma has noted favorably "the concept that when a statute *prohibits* certain conduct [prohibiting public schools from mandating masks], the articulated state interest given in

justification of the prohibition is not a compelling state interest when the statute is underinclusive due to its *failure to prohibit other conduct* [no prohibition against private schools requiring all students to wear masks] producing substantial harm or alleged harm of the same sort." *Id.* (internal quotation marks and citations omitted, emphasis added). In addition to the Equal Protection violation embodied in SB658, the contested provisions of the new law are, simply put, irrational. Appellants cannot perpetuate an unsafe learning environment for students in public schools by precluding the public schools from being able to implement a mask mandate if and when necessary. Doing so disregards their inalienable duty to protect and promote the health of all the citizens of Oklahoma. [Appellees' Combined Brief at 23-26]. Under a proper application of the Oklahoma Constitution's Due Process principles, such an irrational statutory classification cannot stand. *Torres,* 2016 OK 20 at ¶ 47, 373 P.3d at 1079.

APPELLANTS FAIL TO CREDIBLY CHALLENGE APPELLEES' CONTENTION THAT SB658 IS AN UNCONSITITUIONAL SPECIAL LAW

Contrary to Appellants' argument, Appellees did raise both OKLA. CONST. ART. 5, § 46 and ART. 5, § 59 in its special law arguments to the District Court. [RA at 392-401, Plaintiffs' Reply]; [RA at 422-537, Plaintiffs' Supp Reply]. The only argument offered against Appellees' proposition is that SB658 applies to all public school districts and, allegedly, therefore cannot be a special law. Because Appellants have failed to refute Appellees' arguments, to avoid repetition, Appellees will stand on their briefing to date on this issue.

CONCLUSION

Appellants seek to cloud the issues by claiming reliance on a plenary power that ignores its inalienable duty to promote and protect the health and mutual and general welfare of the people of the State of Oklahoma. This very important responsibility cannot be ignored or

dimmed in the face of a political controversy shrouded in fear and misinformation. SB658 was amended at the last minute prior to being voted on in the Legislature to change the law from a command to a prohibition. [RA at 422-537, Plaintiffs' Supp Reply]. Appellants' attempts to find justification for the prohibition fail. The law violates equal protection, is an unconstitutional special law, and should be enjoined from enforcement. The District Court properly enjoined enforcement, but erred in crafting into the injunction the parental opt out applicable to Oklahoma's mandatory vaccination statutes. The District Court's grant of injunctive relief should be affirmed but the inclusion of the parental opt out should be reversed.

Respectfully submitted,

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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 3rd day of December, 2021.

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A copy was also filed with the office of the Oklahoma County Court Clerk on the 3rd day of December, 2021.

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