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 THE STATE OF OKLAHOMA,
Defendants/Appellants/Counter-Appellees,

No: 119,840

District Court No: CV-2021-1918
Judge: Mai

APPELLANTS' RESPONSE TO COUNTER-APPEAL AND REPLY IN SUPPORT OF APPEAL

TABLE OF CONTENTS

Constitutional Provisions

Cases

Cases

Statutes

This Court has bound lower courts to defer to the Legislature's policy choices regarding public schools for over seventy years. SB 658 is one of those policy choices: it is a law that seeks to maximize parental liberty interests that are unique to public schools. Plaintiffs do not ask this Court to reconsider or overrule its precedent on deference, which is fatal to their counter-appeal. The district court correctly read the precedent on deference to the Legislature in rejecting all of Plaintiffs' claims besides the public school / private school distinction, and the district court's rulings challenged in the counter-appeal must be affirmed on that basis.

Plaintiffs' response to the appeal fails to explain why the Oklahoma Constitution should be construed to require that every law that regulates public schools must also be applied to private schools. Such a legal rule would be a radical departure from the approach taken by this State since its founding. Plaintiffs have no genuine interest in such a rule because they do not want Defendants extending SB 658 to cover private schools as well as public schools, as their extensive commentary on masks indicates. The only real defense they offer of the district court's rule regarding private schools is that they like its resulting interference with Legislative management of public schools in this particular case. That interference may appeal to Plaintiffs, but it is not a *legal* reason for this Court to fundamentally rework education law in this state. This Court should reject any legal rule that requires the Legislature to exercise equal power over both private schools and public schools, reversing the injunction.

RESPONSE TO THE COUNTER-APPEAL

The counter-appeal has four propositions that arise under two theories: that the district court erred in its equitable crafting of an injunction (Propositions I, II, and III), and that the district court erred in denying that SB 658 is a special law (Proposition IV). Neither has merit.

I. The district court correctly followed precedent and correctly declined to rule on the efficacy of masks when it crafted an injunction.

While Plaintiffs nominally challenge the injunction directly, there are two premises to their challenge that are doing most of the intellectual work. *First*, Plaintiffs believe that the district court incorrectly applied this Court's precedent. *Second*, Plaintiffs assume that this Court would engage in fact-finding regarding masks in the first instance and find in their favor. Neither premise is correct. As a result, Plaintiffs are also incorrect that there is any error in the district court's equitable crafting of an injunction. Defendants address both premises and the equitable crafting in turn below.

A. The district court correctly followed precedent regarding deference to the Legislature.

In reaching its conclusions regarding deference to the Legislature, the district court cited a 1947 opinion of this Court. Two particular portions from this Court's opinion were quoted in the ruling. *First*, "[t]hough the purposes of the Act are known to be commendable and in furtherance of the foregoing constitutional mandate, it is not for the courts to say that the legislation is good, bad, advisable or inadvisable in whole or in part." Tr. at 22 (quoting *Sch. Dist. No. 25 of Woods Cnty. v. Hodge*, 1947 OK 220, ¶ 2). *Second*, "[t]he determination of the policy to be pursued in matters of enactment of legislation to discharge its constitutional responsibility to the people in matters of education is a question that rests solely with the legislature." *Id.* at 23 (quoting same). *See also Okla. Educ. Ass'n v. State ex rel. Oklahoma Legislature*, 2007 OK 30, ¶ 21 (applying the *Hodge* rule as good law).

On the basis of those instructions from this Court, the district court concluded that "[i]t is not for the Court, this Court or any other Court, to substitute its judgment on what is wise or not wise in terms of policymaking decisions that the Legislature chooses to make." Tr. at 23. Then

it declined to make any factual findings regarding whether "masks are effective versus not effective," concluding "[t]hat is for the Legislature to decide in their policymaking process." *Id.*

Plaintiffs never once ask this Court to revisit or overrule its precedent on deference. Instead, their only contention appears to be that the district court erred by concluding that SB 658 is a policy within the *Hodge* rule quoted at length by the district court. Because they concede validity of the *Hodge* rule and do not seek its overruling, they must necessarily lose their counter-appeal, as the district court's application of the *Hodge* rule was correct.

Plaintiffs' argument about how to read the *Hodge* rule is curiously devoid of any reference to *Hodge*. *See* Counter-Appeal Br. at 12-14. Instead, they offer the citation-free assertion that the policies within the Legislature's control are limited to categories like teachers or subjects. *See id.*

But this Court has held that it is the Legislature's *method* in establishing and maintaining the school system, not the adequacy of the content, which is exempt from judicial review. *See Okla. Educ. Ass'n*, 2007 OK 30, ¶ 22; *Fair Sch. Fin. Council v. State*, 1987 OK 114, ¶ 56; *Hodge*, 1947 OK 220, ¶ 2. Thus, the district court was exactly right when it concluded that the question of masks in the school system was committed to the Legislature under the Legislature's authority over public schools.

Plaintiffs now concede, for the first time on appeal, that the Legislature's power includes not only teachers and subjects but also funding. *Compare* Pls' TI Reply at 1, *with* Counter-Appellants' Br. at 13. That concession only underscores that the Legislature's power concerns any aspect of operating public schools, not merely the direct instruction of students. Plaintiffs' attempts to narrow the Legislature's power cannot ignore that this Court has, for many decades, acknowledged the plenary power of the Legislature regarding public schools. The district court correctly applied precedent in deferring to the Legislature.

The Legislature's discretion over public schools is rightly respected because any of those policy choices involve competing value considerations. Whether to mandate masks for COVID, or the flu, or RSV—the latter of which can be especially deadly for children—is no less a choice of school methods than whether to mandate riding the bus to school, even though the lack of a school bus mandate may result in far more deaths. *See* Defs' TI Opp. Br. at 4 & Ex. 1 (children are 70 times safer on the school bus than riding in their family car to school). Oklahoma has long sought a careful balance of parental and student liberty interests with school safety in all methods involved. That is why this Court has long insulated such political questions from judicial review, as the district court correctly recognized.

Plaintiffs next argue that, because the Legislature prefers local control of public schools, it lacks plenary authority over public schools. *See* Counter-Appellants' Br. at 13. That argument has the analysis backward. The Legislature's desire to grant local control in many areas is effective precisely because it has plenary power to decide how to structure public education, not because it is compelled to prefer that structure. Plaintiffs' two citations say nothing to the contrary. *See id.* *Fair School Finance Council* references local control being "legitimate," not required, by the Constitution, and notes it is "explicitly intended by the Legislature"—relying on statutes to determine the proper structure of public schools. 1987 OK 114, ¶ 47. Likewise, *Dowell* holds that there is no non-delegation problem in the Legislature's right "to create inferior municipal organizations and confer upon them the powers of local government," such as the power to create school districts with authority over their own boundaries. *Dowell v. Bd. of Ed. of Oklahoma City*, 1939 OK 268, ¶ 15. Neither says anything to deny the Legislature's plenary authority, as both opinions rely on that plenary authority to resolve the case before them. That is why Plaintiffs' argument that any application of SB 658 "usurps the local authority of the school districts" is, again, devoid

of any discussion of the relevant cases. *See* Counter-Appellants' Br. at 14. It misconstrues the plenary power of the Legislature that this Court has repeatedly affirmed.

Plaintiffs otherwise just rely on their special law argument. *See* Counter-Appellants' Br. at 13-14. But the special law clause has nothing to do with whether the Legislature can enact general laws that reach every school district in the state. *See infra* Part II. Accordingly, nothing about special law prohibitions helps Plaintiffs overcome the *Hodge* rule.

In short, Plaintiffs' counter-appeal fails to address the key case relied on by the district court in deferring to the Legislature and otherwise offers no reason to believe the district court misread *Hodge* and its progeny. This Court should confirm that the district court correctly applied precedent by deferring to the Legislature regarding its choice of methods to regulate public schools.

B. Even if precedent were different, Plaintiffs fail to explain why this Court should make factual findings regarding masks in the first instance.

Because Plaintiffs fail to ask this Court to reconsider the *Hodge* rule, and because the district court correctly applied that rule, no factual findings regarding masks were necessary or appropriate. Nevertheless, Plaintiffs appear to believe that, if the district court incorrectly applied the *Hodge* rule, then they are entitled to factual findings regarding masks in this Court in the first instance. *See, e.g.*, Counter-Appellants' Br. at 18 (opining on the effectiveness of masks). This argument misunderstands the difference between trial courts and appellate courts: If Plaintiffs did successfully challenge precedent, then the correct remedy would be a remand, not a trial of the fact record here.

Under Oklahoma law, questions of fact are to be determined by the trier of fact. *See, e.g.*, *Hagen v. Indep. Sch. Dist. No. I-004*, 2007 OK 19, ¶¶ 7-8. The trier of fact may be either a trial court or a jury, and findings by either are entitled to the same force and effect on appeal. *See id.* The appellate courts do not make the findings of fact but instead accept the trier's findings so long as

they are supported by competent evidence. *See id.* This division of labor exists because trial courts are best situated to perform fact-finding.

As the trial court acknowledged, much of the argument below relied on competing evidence regarding the effectiveness of masks. *See* Tr. at 23. Defendants compiled an extensive record of randomized controlled trials—the gold standard for determining the effectiveness of a new intervention—showing that there has been no statistically significant decrease in infections from the use of masks. *See* Defs' TI Opp. Br., Exs. 4-11. This evidence is important because randomized controlled trials can isolate the effect of one health intervention, preventing the results from being improperly influenced by test subjects that are also distancing, washing hands, or learning or working in well-ventilated rooms. According to this record of studies below, cloth masks in particular have a 97% pass through rate (as opposed to N95s), and masks have been shown to undermine the benefits of other health interventions. *See id.* Exs. 9-11. Indeed, as European nations have observed in avoiding school mask mandates, young children in particular may have an increased risk of infection with masks because they touch their face more when they are wearing masks. *See id.* Exs. 12-15. There are also multiple studies indicating long term harm to children from mask mandates, including evidence that students with disabilities such as autism are particularly harmed by such mandates. *See id.* Exs. 13, 16-19.

Defendants note this record to highlight that, contrary to Plaintiffs' assumptions in favor of masks in their brief, the underlying record is hotly contested as to whether masks are helpful or harmful. If the Court decided the district court misapplied the *Hodge* rule, the proper remedy with this record would be a remand for factual findings, not a trial of that complex record in this Court. Plaintiffs offer no authority to conclude otherwise.

This Court need not reach this fact issue because the district court correctly applied *Hodge*. *See supra* Part I.A. But if this Court decides to adopt Plaintiffs' novel construction of the *Hodge*

rule, then a remand for fact-finding is the proper remedy to the district court's decision not to find facts regarding masks in light of *Hodge*.

C. The district court correctly balanced competing factors in its injunction.

After correctly rejecting Plaintiffs' invitation to violate *Hodge* and make fact-finding on matters committed to the Legislature, the district court then explained the competing considerations it faced. It opined that the only problem it saw with SB 658 was the exclusion of private schools. Tr. at 25-26. Contrary to Plaintiffs' representations, Counter-Appellants' Br. at 3,[1] the district court not only reached their other claims but also concluded that their other claims were so obviously foreclosed by this Court's precedent that the "hearing would have taken two minutes" but for the question of the public school / private school distinction. Tr. at 25-26; *see also id.* at 27 ("If the Legislature chooses to give the governor that right and that power to declare an emergency to -- in order for certain entities to issue a mask mandate, that is perfectly within their power to do so.") Thus, the district court faced the question of how to address the omission of private schools without crossing this Court's admonitions in *Hodge* and its progeny not to second-guess the Legislature's policies regarding public schools.

Consideration of all of these factors was proper because injunctive relief is equitably crafted, not something that must be granted or denied in its entirety. "Matters involving the grant or denial of injunctive relief are of equitable concern." *Dowell v. Pletcher*, 2013 OK 50, ¶ 5. "Equity courts exercise discretionary power," and the granting or withholding of injunctive remedies "rests in the sound discretion of the court to be exercised in accordance with equitable principles and in light of all circumstances." *Id.* ¶ 6. A finding of some likelihood of success does not compel a

[1] *See also* Counter-Appellants' Br. at 26 (repeating the accusation that the district court did not reach most claims).

court to automatically grant a plaintiff everything they seek. Rather, a district court can and must account for all of the equitable factors in granting relief.

The district court resolved the competing factors in this case by looking to the policies that the Legislature has imposed on both public and private schools. In the district court's view, the clearly expressed policy of the Legislature was that "parental choice is extremely important" in school health and safety laws, and it would be against the public interest to violate that policy, especially while *Hodge* is still good law. Thus, the district court looked to the Legislature's other expressions of that policy, noting that private schools are included in the vaccine statute (70 O.S. § 1210.191) and its companion parental choice provisions (§§ 1210.192 and 1210.193). The district court then concluded that it was in the public interest to limit any injunction to public schools that respected parental choice in all health and safety provisions in the same manner as the vaccine statutes indicated was the Legislature's policy, granting some relief while abiding by *Hodge*'s command not to second-guess Legislative policy regarding public schools.

This injunction still granted substantial relief to Plaintiffs because it likely increased the use of masks at several school districts. When no mask mandate is in place, students may not be wearing masks for a variety of reasons, including forgetting a mask at home or matching friends' preferences. When a mask mandate is in place, far fewer families exercise the option to opt-out. For example, in Tulsa Public Schools, less than 1% of families have proactively opted out of a mask mandate. Thus, Plaintiffs (many of whom are Tulsa parents or students) achieved the widespread masking they desired, and Defendants still protected the Legislature's clear policy preference for parental choice. That is an equitable outcome based on the district court's rulings—

even if the injunction still contravenes the Legislature's policy preference for no mask mandates at all.[2]

Plaintiffs' only real argument against this approach is that private schools are not compelled to offer the same opt-out under the injunction. *See* Counter-Appellants' Br. at 4-5. They seem to believe that equal protection required a different outcome. *See id.* at 14. Their argument fails for two reasons. *First*, the district court could not mandate additional restrictions on private schools. While some might incorrectly describe injunctions as though they were legislation, courts understand that injunctions are restrictions on enforcement, not creation of new laws. Because the mask provisions of SB 658 only reach public schools, the district court could only condition when they are enforced against public schools, regardless of what the court thought was proper for private schools. *Second*, the district court had to include the opt-out to be consistent with *Hodge*. As explained above, *Hodge* requires deference to Legislative policy choices, and Plaintiffs did not ask this Court to reconsider *Hodge*, meaning that they have no legal basis to complain about Legislative deference in the injunction. Plaintiffs' allegations that the resulting opt-out is "unsafe," Counter-Appellants' Br. at 18, *see id.* at 21, 23-26, are merely an exercise in assuming the contested facts are resolved in their favor. Because there is no such factual finding in favor of masks on the record, so their factual assumptions are no basis to reject the district court's balancing of multiple equitable factors in its injunction.

Accordingly, none of the first three propositions on the Counter-Appeal have merit. The district court properly crafted the injunction (Proposition I). The district court did not believe that §§ 1210.192 and 1210.193 themselves applied to masks but rather properly determined the

[2] Indeed, Defendants only contest the legal accuracy of the district court's rule forbidding distinctions between public schools and private schools, not that the district court equitably crafted relief if its ruling regarding private schools is correct.

Legislative policy to which it must defer by reviewing school health and safety statutes, including the vaccine statutes (Proposition II). Finally, Defendants cannot be enjoined based on allegations that the court, and not Defendants, is violating equal protection (Proposition III), but to the extent that proposition is just restating Proposition I, then the district court's equitable crafting was, again, proper. This Court should affirm the district court's rulings challenged in Propositions I-III of the counter-appeal.

II. The district court correctly followed precedent in rejecting Plaintiffs' special law challenge.

SB 658 is not a special law in violation of Article 5, § 46 of the Oklahoma Constitution because it regulates every public school district in the state without distinction. This Court has held that there is no special law claim where there is "no allegation" that the challenged law "do[es] not apply to all districts in the state." *Fair Sch. Fin. Council*, 1987 OK 114, ¶ 56. The mask provisions of SB 658, by their very terms, apply to all public school districts in the state. *See also* Am. Pet. ¶¶ 17-18.

Plaintiffs appear to not understand that the constitutional provision they rely upon limits laws that treat public schools districts *differently from one another. See Fair Sch. Fin. Council*, 1987 OK 114, ¶ 56. Indeed, their brief quotes at length from a case where a law applied only to school districts in two counties, treating other public school districts differently. *See* Counter-Appellants' Br. at 28. While Article 5, § 46 imposes limits on laws that treat districts differently, it does not limit laws that treat all public schools the same, nor does it say anything about private schools. *See Fair Sch. Fin. Council*, 1987 OK 114, ¶ 56; OKLA. CONST. art. 5, § 46. Accordingly, because SB 658 applies to all public school districts in the state, SB 658 is a general law and does not violate Article

5, § 46. This Court should affirm the district court's rulings challenged in Propositions IV of the counter-appeal.[3]

REPLY IN SUPPORT OF THE APPEAL

Plaintiffs' response to the appeal almost completely omits any defense of the district court's equal protection rule. The district court refused to make any factual findings on masks, *see supra* Part I.A, instead finding an equal protection violation based on how it understood state Legislative authority over public and private schools. Thus, in the district court's view, the law was constitutional if it banned mask mandates in all public and all private schools. *See* Tr. at 28. But Plaintiffs defend the injunction on the basis that it is needed to address "unsafe" schools, Counter-Appellants' Br. at 18, or address the "pandemic," *id.* at 22. The district court's ruling reached well beyond the narrow topic presented (mask mandates) and said nothing about safety from masks. Plaintiffs' failure to defend the district court's ruling on its own terms is a strong sign that Defendants' appeal is correct and that reversal of the injunction is warranted.

III. Plaintiffs fail to adequately defend the district court's radical rule regarding the regulation of private schools.

The opening brief in this appeal raised three contentions to which Plaintiffs responded: (1) that the Legislature has broad authority over public schools but does not have that same authority over private schools, (2) that the Legislature has a long history of separately addressing public and private schools, and (3) that the Legislature may rationally distinguish between public and private schools. Plaintiffs' responses will be categorized under those contentions and addressed in turn below.

---

[3] Plaintiffs raise an additional argument about Article 5, § 59 for the first time on appeal. *See* Counter-Appellants' Br. at 27-31. Claims not presented to the district court are waived on appeal. *See Osage Nation v. Bd. of Comm'rs of Osage Cty.*, 2017 OK 34, ¶ 17. Nevertheless, even if they had made that claim in their Petition, it would be foreclosed under precedent on the same grounds as their § 46 claim. *See Fair Sch. Fin. Council*, 1987 OK 114, ¶ 56 (addressing both provisions).

A. Plaintiffs fail to demonstrate the Oklahoma Constitution grants the Legislature equal authority over both public and private schools.

At the outset, Plaintiffs fail to adequately contest Defendants' interpretation of the Oklahoma Constitution's education provisions at issue in this case. *See* OKLA. CONST. art. 1, § 5; *id.* art. 13, §§ 1, 5. This Court has repeatedly held that the duty of the Oklahoma Legislature to establish and maintain a system of free public schools, as laid out in those constitutional provisions, "carries with it" expansive power over public schools in Oklahoma. *Hodge*, 1947 OK 220, ¶ 12; *see also Okla. Educ. Ass'n v. State ex rel. Okla. Legislature*, 2007 OK 30, ¶ 19 (separation of powers concerns in judiciary affecting public schools); OKLA. CONST. art. 4, § 1. As a result, absent a suspect classification, due process clause challenges to public school policy require evidence "that a child is not receiving *at least a basic adequate education.*" *Fair Sch. Fin. Council,* 1987 OK 114, ¶ 63.

Plaintiffs provide no contrary interpretation, nor do they ever explain how private schools would come within the scope of any of those constitutional provisions. Instead, they merely observe that one of *Hodge*'s progeny, *Fair Sch. Fin. Council*, was applying those constitutional provisions in the context of school finance. Counter-Appellants' Br. at 24. The context of that one case is true, but nothing in that case declares the *Hodge* rule is now limited to the facts of that case. To the contrary, the case merely acknowledges that *Hodge* is still good law and then applies it to the facts presented. *See Fair Sch. Fin. Council,* 1987 OK 114, ¶ 60. It states based on precedent that the right granted by the Oklahoma Constitution is a right to a basic, adequate education. *See id.* (interpreting OKLA. CONST. art. 13, § 1). It notes the longstanding rule from *Hodge* that "our constitution places few restrictions on the Legislature's power to provide a school system for the state and the methods employed by the Legislature in doing so are largely within its discretion." *Fair Sch. Fin. Council,* 1987 OK 114, ¶ 62 (citing *Hodge*). Then, it concludes that the presentation

before it regarding school finance does not overcome those general rules from precedent. *See id.* Nothing in that decision limits the *Hodge* rule.

Thus, since this Court has not limited the *Hodge* reading of those education provisions in the Oklahoma Constitution, the remaining question is how private schools would come within those constitutional provisions. Nothing in the constitution's text places private schools within those provisions. *See* OKLA. CONST. art. 1, § 5; *id.* art. 13, §§ 1, 5. Plaintiffs offer no argument on this point. For good reason: if Defendants are correct that the Oklahoma Constitution grants plenary power in these clauses, they are also correct that those provisions only confer that power over public schools and not private schools by their plain text.

Plaintiffs' only other argument is that the due process clause of the Oklahoma Constitution does not allow Legislative power over public schools to include "prohibitory legislation" that is "inherently immoral or inimical to the public welfare." Counter-Appellants' Br. at 16-17, 22, 24-25. This argument is flawed in two respects. *First*, it completely fails to respond to Defendants' argument in the opening brief that the general due process clause does not place limits on the Legislature's specific constitutional power over public schools. *See* Appellants' Br. at 5. References to federal law, *see* Counter-Appellants' Br. at 25, are no answer because the federal constitution has no similar clause regarding Legislative authority over schools. Likewise, Plaintiffs' extensive commentary on general equal protection rules, *id.* at 14-23, are no answer because, again, there is a specific constitutional provision on public schools at issue. *Second*, even if Plaintiffs had not waived a response to the first argument, they would still not prevail on this point because there is no finding that SB 658 is immoral or harms public welfare. Quite the opposite: the district court found that a statewide mask mandate that reaches private schools would be constitutional. Accordingly, nothing in the Oklahoma Due Process Clause constrains Defendants' reading of the Oklahoma Constitution's education provisions.

Plaintiffs otherwise seem to confuse the question of whether parental rights are absolute with the question of whether Legislative regulation regarding those rights is subject to judicial second-guessing. To be sure, the fundamental liberty interests of parents are not absolute. Defendants have never argued otherwise. Instead, Defendants have argued that through careful balancing, the Legislature defines the contours of what parental powers and responsibilities are assumed *in loco parentis* by its public schools and what parental powers are retained by the parents. *See* Defs' TI Opp. Br. at 3. This balancing is a non-justiciable political question under *Hodge*, such that the Legislature's decision to prohibit mask mandates or to impose mask mandates would be equally insulated from judicial review. The Indiana cases cited by Plaintiffs, *see* Counter-Appellants' Br. at 17, only confirm that constitutional provisions do not provide for second-guessing of Legislative balancing on these issues.

It appears that Plaintiffs' mistake is this: they believe that, because plaintiffs *asserting* parental liberty interest have lost in court, plaintiffs *opposing* parental liberty interest should necessarily win in court. *See, e.g.*, Counter-Appellants' Br. at 21-22. This syllogism is flawed. As Plaintiffs well know, Defendants have already explained that *Jacobson* and its progeny insulate all of these state Legislative health decisions from judicial review, whether favoring or opposing parental liberty. *See* Defs' TI Opp. Br. at 9. In areas of scientific uncertainty, the Legislature has the widest discretion. *Jacobson v. Massachusetts*, 197 U.S. 11, 30–31 (1905); *cf. Gonzales v. Carhart*, 550 U.S. 124, 163 (2007); *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997); *Jones v. United States*, 463 U.S. 354, 370 (1983); *State v. McCuistion*, 174 Wash. 2d 369, 391 (2012); *State v. Post*, 197 Wis. 2d 279, 304 (1995). The costs and the benefits of mask mandates are uncertain, and weighing the decision of whether to require them involves a *policy choice* based on competing evidence and competing harms. The Legislature is certainly not compelled to prioritize parental liberty interest in that balancing, but it is also not irrational if it chooses to prioritize that interest.

In sum, the Oklahoma Constitution gives the Legislature expansive power over public schools, and public schools alone. Plaintiffs fail to offer a competing interpretation of the constitutional provisions at issue, instead focusing on the Due Process Clause without refuting that the Oklahoma Constitution's specific education provisions control over the more general due process provision. This Court should hold that the Legislature's plenary power over public schools is limited, by the plain text of the Oklahoma Constitution, to public schools alone.

B. Plaintiffs fail to meaningfully contest Oklahoma's long history of treating public and private schools differently.

Plaintiffs offer little to contest Defendants' long history of regulating public and private schools differently. They essentially concede that many statutes apply solely to public schools, choosing instead to argue that health and safety statutes are different because the vaccine statutes apply to private schools. Counter-Appellants' Br. at 20. But as Defendants stated in their opening brief, the Legislature has limited power to regulate private schools. Appellants' Br. at 5-6. Nothing in the Oklahoma Constitution requires the Legislature to maximize its use of that limited power, whether in health and safety or in any other category. Nor should the Constitution impose such a rule: the result would be that private schools would be placed in a straightjacket by state power imposing every regulation it can, eliminating the distinctive character of public schools and defeating the very purpose of creating schools outside of public appropriation.

Plaintiffs also appear to argue that, because they found additional laws that apply to both public and private schools, then the distinction is necessarily irrational. *See* Counter-Appellants' Br. at 20 n.5. Some of their citations are not quite right.[4] Nevertheless, even assuming they have some valid citations, the argument misstates Defendants' position. Defendants acknowledged that private schools are not free from regulation, but noted they have long been subject to a lesser set

[4] For example, additional penalties for drug distribution near a school are hardly a regulation of a private school. No one is arguing that private schools are exempt from general criminal laws.

of regulations. Even if they are sometimes treated the same, throughout the law public and private schools are also often subject to different treatment. Nothing in Plaintiffs' brief rebuts that fact.

C. Plaintiffs fail to refute that Oklahoma rationally distinguishes between public and private schools.

Plaintiffs contest that strict scrutiny applies, but then they largely fail to respond to Defendants' arguments about why SB 658 survives rational basis review. Defendants will address the standard of review and then briefly reiterate the conceded points before turning to Plaintiffs' limited arguments on rational basis.

1. If the equal protection question is justiciable, then rational basis review applies.

Before reaching the strict scrutiny issue, Defendants first maintain that no justiciable equal protection question is presented because SB 658 does not deny anyone a basic adequate education. *See* Appellants' Br. at 8. Plaintiffs only contest that standard with a mistaken distinction of *Fair Sch. Fin. Council* addressed previously. *See supra* Part III.A. Thus, under this Court's precedent and the lack of argument from Plaintiffs, the district court erred by reaching the equal protection issue.

Even if there were a justiciable question, this Court should note that Plaintiffs do not defend the district court's decision to impose heightened scrutiny on the public school / private school distinction. They never defend it as a suspect classification. Instead, Plaintiffs argue that the application of strict scrutiny should be affirmed on the alternative ground that fundamental rights were at issue rather than suspect classifications. *See* Counter-Appellants' Br. at 15-16.

Plaintiffs misunderstand the relevant analysis for rights. In Plaintiffs' view, strict scrutiny applies whenever there is an "impact[]" on fundamental rights. Counter-Appellants' Br. at 15. That argument misstates the test: strict scrutiny applies if the classification "abridge[s] a fundamental right," not if it has any effect on it. *Gladstone v. Bartlesville Indep. Sch. Dist. No. 30*, 2003 OK 30, ¶ 9 & n.22. The distinction matters because only laws that infringe a fundamental right, not laws that

further a fundamental right, are subject to strict scrutiny. This rule makes sense because the Oklahoma Constitution protects rights from being limited but does not prevent them from being expanded.

SB 658 does not infringe any fundamental right. The law does not infringe on parental liberty interests, and no other fundamental rights are at issue. The mere mention of education in the Constitution did not make it a fundamental right. *Fair Sch. Fin. Council*, 1987 OK 114, ¶ 56. Even assuming education is a fundamental interest, the only educational right in our Constitution is the right to a basic, adequate education—nothing more. *See id.* ¶ 60. SB 658 does not infringe that right, meaning again that strict scrutiny does not apply.

It is also not clear how strict scrutiny would apply to the balancing of both rights. A non-justiciable political question arises whenever there are no judicially manageable standards for resolving the conflict. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019). Strict scrutiny is not the proper test because it accounts for competition between a right and state interests, not competition between rights. Plaintiffs still have not otherwise provided a judicially manageable standard for weighing competing rights. Plaintiffs' argument that the liberty interest is not absolute, Counter-Appellants' Br at 16-17, is no response because it is necessarily true that if both rights can be balanced, neither is absolute. That is why courts have acknowledged that a Legislature can properly balance those competing rights as it sees fit, whether in favor of or opposed to parental interests or safety interests. Plaintiffs offer no standard regarding competing rights because there is none, of course: balancing competing rights is a core policy function of the Legislature, not courts. *Cf. Miller v. Schoene*, 276 U.S. 272, 279 (1928).

Nevertheless, if any standard applied, it would be rational basis because no fundamental right is being infringed and no suspect classification is at issue. Indeed, Plaintiffs have waived any

defense of the district court's finding of a suspect classification. Thus, the district court committed reversible error by applying heightened scrutiny. *See* Appellants' Br. at 10.

2. Defendants' distinction between public and private schools survives rational basis review.

Plaintiffs failed to contest both of Defendants' reasons for distinguishing between public and private schools. Defendants argued in their opening brief that (1) public schools should be treated differently than private schools because they exercise state power and use state funds, and (2) the Legislature needs to be more protective of parents' liberty interests in public schools than in private schools. *See* Appellants' Br. at 10-11. Plaintiffs never answer the first argument at all. Because one valid reason for the distinction is sufficient for SB 658 to survive rational basis review, this Court can reverse the injunction based on that concession alone. Should the Court examine the issue further anyway, it could also hold that both rationales proffered by Defendants support SB 658. Plaintiffs offer a few responses to the Legislature's need to be more protective of parents' liberty interests in public schools, but none of those responses have merit.

Plaintiffs respond to the second argument by making the peculiar argument that they have a liberty interest in seeking a mandate. *See* Counter-Appellants' Br. at 18. But SB 658 does not prevent anyone from wearing a mask; Plaintiffs are free to wear a mask without a mandate in place. Rather, SB 658 prevents someone from compelling *other* people to wear a mask. No authority supports the proposition that there is a liberty interest in controlling one's neighbors or classmates.

Plaintiffs make the additional argument that, if SB 658 helps parents, then it should be applied to all schools. *See* Counter-Appellants' Br. at 22-23. That is incorrect, as no law compels a state to legislate all good laws to reach private schools. In fact, the authority in this state and its sister states is to the contrary. *See* Appellants' Br. at 7-8. Defendants also addressed this issue with the IDEA example in the opening brief. *See id.* Under federal law, public schools are regulated in a way that benefits students with disabilities, and private schools are not subjected to the same

regulations. *See id.* As a result, students either receive the benefits of the law or are denied the benefits of the law based on whether they attend public or private schools. *See id.* In some sense, the lack of regulation disadvantages private school students, but that is not a constitutional issue because public and private schools can rationally be treated differently. *See id.* Again, Oklahoma is simply following in a longstanding tradition of its sister states and the federal government of rationally distinguishing between public and private schools.

Plaintiffs assume without explanation that parents' liberty interest would be the same at public schools and at private schools. *See* Counter-Appellants' Br. at 22-23. That is not true: private school parents can move their children (and their money) if they do not agree with a school policy. Public school parents often do not have that option, either because of their own resource constraints or because of a lack of viable local options. Private school parents can use their resources to protect their liberty interests, while public school parents need greater protection of their liberty interests because only the state can offer that protection in public schools.

Finally, Oklahoma's vaccine laws do not compel it to apply all public school health and safety laws to private schools to survive rational basis review. *See supra* Part III.B. The result of such a rule would be that the Legislature is restrained to only pass health and safety regulations for public schools that could also survive the scrutiny applied to private school regulations. That outcome cannot be correct because it would be directly contrary to the Oklahoma Constitution's grant of plenary power over public schools alone. *See supra* Part III.A.

That argument does not mean that Defendants *cannot* regulate private school health and safety in any manner, *contra* Counter-Appellants' Br. at 20-21, but rather that it is not irrational for Defendants to separately treat the two types of schools. Other states and the federal government agree, holding not only that states can treat the two types differently but also that they *must* treat them differently in issues involving parental liberty interests. *See* Appellants' Br. at 7-8. Plaintiffs

complain that several of those citations are not about a pandemic in particular, Counter-Appellants' Br. at 22 n.7, but they otherwise fail to offer any contrary authority.

Plaintiffs lack contrary authority from other states because there is none: Oklahoma, like its sister states, rationally distinguishes between public and private schools. The district court erred by concluding otherwise, and its injunction rests on its faulty legal ruling regarding private schools.

IV. Plaintiffs fail to justify piercing sovereign immunity.

Plaintiffs fail to show any legislative waiver of the State's immunity. *See Freeman v. State ex rel. Dep't of Hum. Servs.*, 2006 OK 71, ¶ 8. They offered no argument on the point in district court, and their response for the first time on appeal is that because a court has power to issue injunctions for unconstitutional laws, that power must be able to reach the State. *See* Counter-Appellants' Br. at 7 n.2. Defendants already agreed that, under existing precedent, the court can adjudicate constitutionality when deciding whether to enjoin officials like the Governor in his official capacity. That general rule does nothing to abrogate the sovereign immunity of the State itself. Thus, the district court erred by enjoining the State as a party.

V. Plaintiffs' argument regarding Section 1210.189 is irrelevant.

It is wholly unclear what Plaintiffs are seeking from their brief discussion of a purported conflict between Sections 1210.189 and 1210.190. *See* Counter-Appellants' Br. at 23. Defendants are seeking reversal of the injunction as to both, and Plaintiffs are seeking an injunction as to both. No relief sought in this appeal relies on any distinction.

To the extent Plaintiffs meant it as a rational basis argument, they are simply misreading the statute. Section 1210.189 as a whole prevents certain institutions from discriminating against people for not receiving the COVID-19 vaccine. The first part prohibits discrimination through a vaccine requirement that singles out the unvaccinated for disparate treatment. 70 O.S. § 1210.189(A)(1). The second part prohibits discrimination through a vaccine documentation

requirement that singles out the unvaccinated for disparate treatment. *Id.* § 1210.189(A)(2). The third part prohibits discrimination though a mask mandate that singles out the unvaccinated for disparate treatment. *Id.* § 1210.189(A)(3). A universal mask mandate would not violate the statute because a universal mandate is not discriminatory. That is why universal mandates are addressed in a separate statute. *Id.* § 1210.190(A).

Plaintiffs also disclaimed any interest in a discriminatory mask mandate that § 1210.189 prohibits. Plaintiff Ritter explicitly testified that mask mandates should be imposed "regardless of vaccination status." Ritter Decl. ¶ 16; *see also id.* ¶¶ 14-15. Plaintiff Butler expressed concern about harms from "not requiring *all students* to wear masks." Butler Decl. ¶ 2 (emphasis added). Plaintiff Martin agrees. *See* Martin Decl. ¶ 5 ("universal masking"). Thus, Plaintiffs' own declarations indicate that they have no real injury from § 1210.189.

If anything, the distinction merely indicates another reason that the district court should have not granted an injunction: that Plaintiffs have asserted no injury from the mask provisions of § 1210.189.

VI. Plaintiffs offer nothing to contest that equity favors reversal of the injunction.

Plaintiffs effectively concede the equitable factors, offering little argument on this score. Their sole argument on the equitable factors is that the lack of a mask mandate helps spread COVID. *See* Counter-Appellants' Br. at 23-26. But as explained previously, the core factual issue contested in the district court was whether masks help or harm children—with most of the science in *this* record showing it harms children. At best, their equitable arguments might support a remand if they had sought overruling *Hodge*.

Otherwise, they do not dispute that the district court's legal ruling regarding private schools helps no one. It is clear from their many references in their brief to masks that they would not be satisfied if the State extended public school laws to private schools. They are seeking a

fundamental reworking of private education law in Oklahoma solely because they like the resulting interference with public education law that is happening in this one topic. Their personal interest in this narrow topic is hardly a sufficient basis for a fundamental reworking of Oklahoma law regarding private schools.

Their counter-appeal is similarly just an exercise in ignoring the equitable factors. Their one-sided approach on masks displays open contempt for all the parents and students who do not want masks forced upon students despite medical, religious, or personal objections to them. Plaintiffs are required to discuss the public interest—the effects on non-parties, like their fellow students and parents—but they expressly decline. *See* Counter-Appellants' Br. at 7 n.2. They avoid the issue because equity counsels against their position.

A fair reading of the Oklahoma Constitution would not support the district court's reasoning regarding private schools or the Plaintiffs' desired extension of that reading. This Court has long correctly construed the Oklahoma Constitution's provisions on public education to require deference to the Legislature. It should rule in continuity with its precedent, maintaining the Legislature's plenary power is over public schools *alone*, reversing the injunction for legal error.

CONCLUSION

For the reasons stated, this Court should affirm that the district court correctly applied this Court's precedent in rejecting most of Plaintiffs' challenges. Then, this Court should further hold that the Oklahoma Constitution grants the Legislature plenary authority over public schools alone and that Defendants can reasonably regulate public schools differently from private schools as a result, reversing the sole legal basis for the district court's injunction and, for that reason, vacating the injunction.

DATED: November 29, 2021.

Respectfully submitted,

MITHUN MANSINGHANI, OBA NO. 32453
Solicitor General
BRYAN CLEVELAND, OBA NO. 33860
Assistant Solicitor General

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 522-1961
bryan.cleveland@oag.ok.gov

Counsel for Defendants/Appellants/Counter-Appellees

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Brief of Appellants was transmitted by electronic mail to:

Robert A. Nance
Chad C. Taylor
Riggs, Abney, Neal, Turpen, Orbison & Lewis
528 NW 12th Street
Oklahoma City, OK 73103
rnance@riggsabney.com
ctaylor@riggsabney.com

Donald M. Bingham
Thomas M. Askew
Wm. Gregory James
Sharon K. Weaver
Stephanie L. Theban
Riggs, Abney, Neal, Turpen, Orbison & Lewis
502 West 6th Street
Tulsa, OK 74119-1010
don_bingham@riggsabney.com
taskew@riggsabney.com
gjames@riggsabney.com
SWeaver@riggsabney.com
gjames@riggsabney.com

Bryan Cleveland

BRYAN CLEVELAND
Assistant Solicitor General