

ARIZONA SUPREME COURT

ARIZONA SCHOOL BOARDS
ASSOCIATION, INC., et al.,

Plaintiffs/Appellees,

v.

STATE OF ARIZONA, a body
politic,

Defendant/Appellant.

No. CV-21-0234-T/AP

Court of Appeals, Division One
No. 1 CA-CV 21-0555

Maricopa County Superior Court
No. CV2021-012741

**BRIEF OF AMICUS CURIAE NATIONAL SCHOOL BOARDS
ASSOCIATION FILED IN SUPPORT OF PLAINTIFFS**

(Submitted with the consent of Defendant-Appellant and Plaintiff-Appellees)

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INTEREST OF AMICUS CURIAE

The National School Boards Association (“NSBA”) is a non-profit organization founded in 1940 that represents state associations of school boards across the country and the Board of Education of the U.S. Virgin Islands. NSBA’s mission is to promote excellence and equity in public education through school board leadership. Through its member state associations, NSBA represents over 90,000 school board members who govern nearly 14,000 local school districts serving approximately 51 million public school students. NSBA closely monitors legal issues that affect public schools and regularly participates as amicus curiae in court cases.

The parties to this case have consented to the filing of this amicus brief.

INTRODUCTION

No single event in the last half-century has affected students, families, and communities in public school districts more profoundly than the COVID-19 pandemic. School boards are now endeavoring to bring students and staff back to school buildings so that in-person learning may resume, and communities can move forward. Some are doing so at great public and personal peril, as they face state mandates that conflict with federal guidance and their own science-based judgements about appropriate measures to ensure people are safe in school buildings.

As in other states, school-aged children in Arizona are required by law to attend school. More than 1,151,000 children attended Arizona K-12 public schools in the 2019-2020 school year.¹ The state's 732 educational entities, which include 228 school districts,² are responsible for the health and safety of the students in their daily care.

Through the budget reconciliation bills (BRBs) challenged here, the Arizona legislature sought to remove the authority of the state's school districts to fulfill their most basic duty – to keep students, staff, and guests safe in school buildings. By prohibiting schools from imposing mask mandates, the BRBs usurped local authority and long-held standards about how state and local governments ensure public health, and how local school boards collaborate with health authorities. NSBA urges this court to uphold the lower court's decision in this case.

ARGUMENT

I. The Mask Mandate Ban Limits the Ability of School Boards to Keep Their Communities Safe.

- a. School districts have a legal obligation to ensure the wellbeing of students in their care.**

¹ AZ School Report Cards, Arizona Department of Education's comprehensive school report card system, <https://azreportcards.azed.gov/state-reports> (last visited Sept. 9, 2021).

² *Id.*

As Plaintiff-Appellees ably argue, inherent in the fundamental right to an education in Arizona is the concomitant right to a safe educational environment. School boards bear responsibility to provide that environment. Indeed, courts throughout the nation have long recognized a school board's legal obligation to ensure the wellbeing of all students in its care and control: "This control extends to health, proper surroundings, necessary discipline, promotion of morality and other wholesome influences, while parental authority is temporarily superseded." *Richardson v. Braham*, 125 Neb. 142, 249 N.W. 557, 559 (Neb. 1933).

Courts have recognized "the duty of school personnel to exercise reasonable supervisory care for the safety of students entrusted to them, and their accountability for injuries resulting from failure to discharge that duty...." *Titus v. Linberg*, 49 N.J. 66, 68, 228 A.2d 65 (1967) (school board's lack of supervision was a proximate cause of guest student's injury). *See also, e.g., C.A. v. William S. Hart Union High School Dist.*, 53 Cal.4th 861, 270 P.3d 699 (Cal. 2012) (duty of reasonable care to protect students from foreseeable injury); *M.M. v. Fargo Public School Dist. No. 1*, 2010 ND 102, 783 N.W.2d 806 (N.D. 2010) (school must exercise ordinary care to keep its premises and facilities in reasonably safe condition); *Jachetta v. Warden Joint Consolidated School Dist.*, 142 Wash.App. 819, 176 P.3d 545 (Wash. App. 2008) (school districts must protect students from reasonably anticipated dangers); *Edson v. Barre Supervisory Union No. 61*, 2007

VT 62, 933 A.2d 200 (Vt. 2007) (duty of ordinary care to prevent student from being exposed to an unreasonable, foreseeable risk); *Jackson v. Hankinson & Bd of Ed. of Shrewsbury*, 51 N.J. 230 (1968) (duty to take reasonable precautions for student safety).

This Court recently affirmed the principle that the school-student relationship imposes an affirmative duty on schools to protect students from unreasonable risks of harm. *Dinsmoor v. City of Phoenix*, 251 Ariz. 370, 50 Arizona Cases Digest 17, 492 P.3d 313, 317-318 (Ariz. 2021). Arizona courts historically have recognized the obligation of school district governing board members, administrators and teachers to take reasonable steps to protect students. *See Rogers v. Retrum*, 170 Ariz. 399, 401, 825 P.2d 20, 22 (App. 1991) (“This obligation includes the duty not to subject those students, through acts, omissions, or school policy, to a foreseeable and unreasonable risk of harm.”).

To meet this duty, school boards are authorized to develop school policies that in some situations may override direct parental control and limit certain freedoms.³ The ability of public schools to exercise such control over students is

³ *See* Ariz. Const. art. III. The United States Supreme Court has recognized that in matters of public health, “The liberty secured by the constitution does not import an absolute right in each person to be at all times and in all circumstances wholly freed from restraint.” *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905); *see also Zucht v. King*, 260 U.S. 174, 177 (1922) (upholding ordinance excluding children

based not only on express statutory authority but also on the doctrine of *in loco parentis*, under which educators are granted a degree of control over students at school that is analogous to that exercised by their parents in other environments. The ability to regulate a student's actions, however, comes with a concomitant duty to protect.

In the COVID-19 pandemic era, this already-weighty responsibility to protect students has become even heavier as the world faces an unprecedented health crisis. COVID-19 has killed more than 700,000 Americans, shut down in-school learning, and hobbled the economy. It is now well understood that children and adolescents can become very ill with the virus and spread it. A Centers for Disease Control (CDC) study⁴ revealed that the cumulative rate of the coronavirus infection and COVID-19 symptomatic illness rates in children 5-17 years old was comparable to those same rates in adults between 18 and 49 years of age and higher than the rates in adults 50 years of age or older.⁵

from public school if they did not present a certificate of vaccination, as it conferred not arbitrary power, but “only that broad discretion required for the protection of the public health”).

⁴ Centers for Disease Control and Prevention, *Transmission of SARS COV-12 in K-12 Schools*, (Update July 9, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/transmission_k_12_schools.html.

⁵ *Id.*

Against the backdrop of this dangerous virus, school districts are called upon to assess duties and responsibilities through the familiar *in loco parentis* lens and fulfill their obligation to develop policies, practices, and procedures that protect their students from contracting the coronavirus and either becoming very ill and/or spreading the disease. Using local health and demographic data and input from families, staff, and local health authorities, districts can take the necessary steps to protect students, staff, and visitors. If a local school district deems it necessary to mandate masks to meet its legal obligation to protect students and others from a transmissible virus, then a district should have the authority to make that informed decision. Districts choosing not to impose mask mandates are in some cases being sued for allegedly violating students' civil rights.⁶ Three separate federal courts in Tennessee have enjoined school districts' lack of mask mandates, and the governor's executive order prohibiting them, determining that such actions impede school districts from complying with federal law. *S.B. v. Lee*, No. 3:21-CV-00317,

⁶ *E.g.*, Alia Wong, 'A decision no parent should ever have to make': Families are suing over mask mandate bans, USA Today (Aug. 20, 2021), <https://www.usatoday.com/story/news/education/2021/08/29/school-mask-mandate-disability-special-education-lawsuit/5621647001/>; Maria Mendez, *Parents in Lago Vista, North Texas sue school districts over lack of COVID-19 mask mandates*, Austin American-Statesman (Oct. 1, 2021), <https://www.statesman.com/story/news/2021/10/01/north-texas-lago-vista-parents-lawsuit-school-districts-covid-masks/5932107001/>.

2021 WL 4346232 at *15 (E.D. Tenn. Sept. 24, 2021) (presenting the issue as whether “in light of the heightened lethality that COVID-19 poses to Plaintiffs because of their disabilities,” the county had made reasonable modifications “so that Plaintiffs [could] safely access [the] public school.”); *R.K. v. Lee*, No. 3:21-CV-00725, 2021 WL 4391640 (W.D. Tenn. Sept. 24, 2021); *G.S. v. Lee*, No. 21-CV-02552, 2021 WL 4268285 (W.D. Tenn. Sept. 17, 2021). A federal court in Iowa similarly enjoined a state statutory mask mandate ban. *The Arc of Iowa v. Reynolds*, No. 4:21-CV-00264, 2021 WL 4166728 (S.D. Iowa Sept. 13, 2021).

In addition to the constitutional impairments noted by Plaintiff-Appellees, the school district mask mandate ban challenged in this case eviscerates local school boards’ *in loco parentis* duty and their ability to provide for the safety and welfare of their students and staff. In Arizona, public school education is a fundamental right. *Roosevelt v. Bishop*, 179 Ariz. 233, 238 (1994); *Magyar By & Through Magyar v. Tucson Unified Sch. Dist.*, 958 F. Supp. 1423, 1442 (D. Ariz. 1997). A basic component of this right is the right to a safe educational setting. *See Abbeville Cty. Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999) (finding that “adequate and safe facilities” were minimum requirements for a similar constitutional provision). By prohibiting public school boards from requiring universal indoor masking, which the CDC recommends for all students aged two and older, all staff, and all visitors to school buildings due to the circulation of the

highly contagious Delta variant of the potentially lethal virus,⁷ the state also has sidestepped its responsibility to enact legislation for the public good. See generally Ariz. Const. Art. XI.

b. School districts must be able to take measures to protect their students, staff, and communities during an acute health emergency.

This fall, COVID-19 outbreaks in numerous school districts have resulted in the temporary closing of in-person schools for periods of time. In Mississippi, August saw dozens of districts imposing mask mandates and others suspending in-person learning due to a surge in COVID-19 cases and exposures. One eighth-grade student died after developing symptoms very rapidly.⁸ In Texas, a school district started school on August 18, only to close its schools for in-person classes not two weeks later after two teachers died of COVID-19.⁹ The Miami-Dade

⁷ Centers for Disease Control and Prevention, *COVID-19 Prevention in K-12 Schools* (updated Aug. 5, 2021) <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>.

⁸ Ashton Pittman, *Mississippi Has Quarantined 15% of All K-12 Students For COVID Cases or Exposures*, Mississippi Free Press (Aug. 25, 2021), <https://www.mississippifreepress.org/15173/mississippi-has-quarantined-15-of-all-k-12-students-for-covid-cases-or-exposures/>.

⁹ Daniella Silva, *Schools grapple with thousands in isolation or quarantine as delta variant rages*, NBCnews.com (Sept. 4, 2021), <https://www.nbcnews.com/news/us-news/schools-grapple-thousands-isolation-or-quarantine-delta-variant-rages-n1277882>.

County Public Schools in Florida has reported at least 13 employee deaths from COVID-19 since mid-August.¹⁰

While the long-term effects of school closures and virtual learning upon student development has yet to be determined, the short-term impact unquestionably stresses the learning environment, increases the demands upon families and staff, and imposes costs districts can ill afford. To mitigate the adverse impact of COVID-19, districts need the flexibility to adopt preemptive measures such as mask mandates, which have been shown effective in reducing infection rates where consistently employed.¹¹ Recent studies in the review stage strongly suggest that in schools without universal masking and weekly COVID-19 testing, and where a majority of students have not already been vaccinated or had the virus, staff and students will become infected with the virus at higher rates, and absenteeism will rise significantly.¹²

¹⁰ Kim Bellware, *13 Miami-area school staffers have died of covid-19 this school year*, The Washington Post (Sept. 7, 2021) <https://www.washingtonpost.com/health/2021/09/07/miami-dade-school-workers-covid-19/>.

¹¹ Jeremy Howard, Huang Austin & Li Zhiyuan, *An Evidence Review of Face Masks Against COVID-19*, National Academy of Sciences, ISSN: 1091-6490, Jan. 2021, <https://www.pnas.org/content/118/4/e2014564118>.

¹² Sparks, Sarah D., *Higher Rates of Delta Infection Projected in Schools with No Mask Mandate or COVID Testing*, EdWeek (Sept. 1, 2021) <https://www.edweek.org/leadership/higher-rates-of-delta-infection-projected-in-schools-with-no-mask-mandate-or-covid-testing/2021/09>.

The CDC recently updated its guidance for COVID-19 Prevention in K-12 schools and recommends universal indoor masking for all teachers, staff, students, and visitors to K-12 schools, regardless of vaccination status.¹³ CDC's guidance supports in-person learning by emphasizing layered prevention strategies to protect students, teachers, other school staff, visitors, and other members of their households. The guidance also encourages localities to monitor community transmission, vaccination coverage, screening testing, and occurrence of outbreaks to guide decisions.¹⁴

The change in federal guidance prompted many school districts across the country to tighten their COVID-19 related restrictions.¹⁵ The legislation challenged in this case, however, requires school districts to ignore pertinent data and public health recommendations and in some cases places students, staff, and families at risk of serious illness or death. This legislative command—with no exceptions regardless of circumstance—is inherently arbitrary and improperly eviscerates local governance. Decisions about whether to employ measures such as

¹³ Centers for Disease Control and Prevention, *COVID-19 Prevention in K-12 Schools* (updated Aug. 5, 2021) <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>.

¹⁴ *Id.*

¹⁵ Balingit, Moriah and Valerie Strauss, *CDC changes course on school guidance, advising everyone to wear masks*, The Washington Post, July 27, 2021, <https://www.washingtonpost.com/education/2021/07/27/school-masks-cdc-guidelines/>.

universal indoor masking are best left to school districts that understand local community health needs and the steps necessary to facilitate in-person learning while limiting the spread of COVID-19.

c. School districts must collaborate with local and state agencies to limit the spread of COVID-19 in their communities.

Like most state public health agencies, the Arizona Department of Health Services (ADHS) “promotes and protects the health of Arizona’s children and adults,” by striving to “set the standard for personal and community health through direct care, science, public policy, and leadership.”¹⁶ County-based health departments provide additional support, focusing on the particular circumstances encountered in their respective areas. As the public health officials with the expertise and long-range perspective to address highly complex health risks, state and county health department officials develop scientific evidence-based policies to address public health emergencies, and coordinate statewide and local responses. When school districts develop school health policies, they often work closely with state and county public health officials to gather and understand

¹⁶ <https://www.azdhs.gov/about.php>.

disease tracking data, current health standards, injury prevention protocols, and the like.¹⁷

Schools in Arizona, like those in other states, continue to face COVID-19 hurdles. Significant anecdotal data suggest that the number of infections of the highly contagious Delta variant has increased with early school openings. At least 1,000 schools across 31 states closed because of COVID-19 by the first week in September.¹⁸ In Mississippi, at least 22,800 students tested positive for COVID since the beginning of the school year.¹⁹ In an effort to ward off such drastic consequences, the ADHS—like the CDC—encourages the use of masks in schools.²⁰

¹⁷ The Network for Public Health Law & National Association of County & City Health Officials, *Proposed Limits on Public Health Authority: Dangerous for Public Health* (May 2021), <https://www.networkforphl.org/wp-content/uploads/2021/06/Proposed-Limits-on-Public-Health-Authority-Dangerous-for-Public-Health-FINAL.pdf> (“School districts oftentimes turn to public health agencies for their expertise and guidance to ensure student safety.”).

¹⁸ Joseph Choi, *At least 1,000 US schools have closed due to Covid since late July: report*, The Hill (Sept. 6, 2021), <https://thehill.com/policy/healthcare/public-global-health/570946-at-least-1000-us-schools-have-closed-due-to-covid>.

¹⁹ Sarah Haselhorst, *Nearly 22,800 Mississippi students have tested positive for COVID-19 since school started*, Mississippi Clarion Ledger (Sept. 28, 2021), <https://www.clarionledger.com/story/news/2021/09/28/1-240-mississippi-students-staff-and-teachers-test-covid-19-positive/5888638001/>

²⁰ Arizona Department of Health Services, Schools (K-12) & Childcare – Guidance, <https://www.azdhs.gov/covid19/index.php#schools-guidance>.

The legislation challenged in this case—specifically Section 12 of House Bill 2898 (“HB2898”)—strips both school and public health officials of authority to fulfill their duty to protect their respective communities and drastically alters the nature and allocation of state and local emergency powers to respond to public health emergencies. It short-circuits action based on a trusted flow of expertise, arbitrarily taking any recommendations from health authorities for mask mandates off the table—regardless of evolving circumstances. In so doing, HB2898 improperly nullified the executive role of state and local health agencies and school boards to address the safety needs of the members of the communities they serve.

d. Section 12 of HB2898 prevents individual school districts from complying with federal funding requirements.

The legislature’s ban on mask mandates places the state at risk of violating federal requirements tied to pandemic relief funding. As U.S. Secretary of Education Miguel Cardona explained in August 2021 communications directed to eight states prohibiting universal mask mandates (including Arizona), “Actions to block school districts from voluntarily adopting science-based strategies for preventing the spread of COVID-19 that are aligned with the guidance from the CDC may infringe upon a school district’s authority to adopt policies to protect students and educators as they develop their safe return to in-person instruction

plans required by Federal law.”²¹ Because each local school district is required as a condition of receipt of federal relief funds to offer a plan that details how it will provide for student safety during the continuing pandemic,²² restrictions on districts’ ability to implement mask mandates put those plans in question. Each district must explain its local policies and practices in relation to CDC safety recommendations, including the “universal and correct wearing of masks.” By preventing a local school board from exercising its policy-making authority to impose a requirement for the universal and correct wearing of masks (or other rule), the legislative enactment challenged here prevents local districts from following a key CDC recommendation for safe school operations.

²¹ U.S. Department of Education, *Meeting the President’s Call to Support the Safe and Sustained Reopening of Schools*, by Miguel Cardona, Aug. 18, 2021, <https://blog.ed.gov/2021/08/meeting-the-presidents-call-to-support-the-safe-and-sustained-reopening-of-schools/>. The Department launched a grant program to which school districts may apply if they are denied funding by their state after implementing measures such as mask mandates consistent with CDC guidance U.S. Department of Education, *U.S. Department of Education Announces New Grant Program to Provide Funding to School Districts Being Penalized for Implementing COVID Safety Measures* (Sept. 9, 2021), <https://www.ed.gov/news/press-releases/us-department-education-announces-new-grant-program-provide-funding-school-districts-being-penalized-implementing-covid-safety-measures>.

²² 86 Fed. Reg. 21195, 21201 (Apr. 22, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-04-22/pdf/2021-08359.pdf>.

CONCLUSION

Based on the foregoing, NSBA respectfully requests that this Court affirm the ruling below.

Respectfully submitted this 14th day of October, 2021.

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