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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
10 **IN AND FOR THE COUNTY OF MARICOPA**

11 ARIZONA SCHOOL BOARDS
12 ASSOCIATION, INC., an Arizona
13 nonprofit corporation, et al.,

14 Plaintiffs,

15 v.

16 STATE OF ARIZONA, a body politic,

17 Defendant.

No. CV2021-012741

**UNOPPOSED MOTION OF NATIONAL
SCHOOL BOARDS ASSOCIATION
FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE
IN SUPPORT OF PLAINTIFFS**

(Assigned to the Hon. Katherine Cooper)

18 The National School Boards Association (NSBA) moves this Court for leave to
19 participate as *amicus curiae* herein for the purpose of filing the attached Amicus Brief in
20 Support of Plaintiffs (“Amicus Brief”).

21 The attorneys of record for Plaintiffs and Defendant State of Arizona received timely
22 notice of NSBA’s intent to file the attached Amicus Brief and legal counsel for these parties
23 have consented to its filing. To NSBA’s knowledge, potential Intervenor Douglas Hestor is
24 not currently a party in this case.
25
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1 **MEMORANDUM IN SUPPORT OF MOTION**

2 NSBA is a non-profit organization representing state associations of school boards
3 and the Board of Education of the U.S. Virgin Islands. Its mission is to promote excellence
4 and equity in public education through school board leadership. Through its member state
5 associations, NSBA represents over 90,000 school board members governing nearly 14,000
6 local school districts serving approximately 51 million public school students. Through
7 legal and legislative advocacy and public awareness programs, NSBA promotes its
8 members' interests in ensuring excellent public education and effective school board
9 governance. It closely monitors legal issues that affect the authority of public schools and
10 regularly participates as amicus curiae in court cases.

11 As the national representative of state school boards associations, NSBA tracks and
12 reports to its members evolving legislative trends and cases affecting public schools,
13 including legislation involving mask policies in schools. This case presents this Court with
14 an opportunity to apply Arizona law in conjunction with longstanding precedent supporting
15 the authority and obligation of school boards to develop reasonable health and safety
16 policies school policies to keep school communities safe and free from unreasonable risk of
17 harm. NSBA offers the Court insights into the history of this authority and obligation, and
18 the crucial policy concerns supporting the need for local decision-making as school leaders
19 grapple with the threat of a global pandemic.

20 NSBA believes that the information and arguments set out in its Amicus Brief will
21 aid the Court with regard to the important issues to be decided in this case. For the reasons
22 stated above and given the fact that the parties have consented to the filing, the National
23 School Boards Association moves for an order directing the filing of the attached Amicus
24 Brief in support of Plaintiffs.
25
26

1 Respectfully submitted this 9th day of September, 2021.
2

3 DECONCINI MCDONALD YETWIN & LACY, P.C.
4

5 By: /s/ John C. Richardson
6

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12 ASSOCIATION, INC., an Arizona
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16 STATE OF ARIZONA, a body politic,
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No. CV2021-012741

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

(Submitted with the consent of Plaintiffs
and Defendant State of Arizona)

(Assigned to the Hon. Katherine Cooper)

18 **INTEREST OF AMICUS CURIAE**

19 The National School Boards Association (“NSBA”) is a non-profit organization
20 founded in 1940 that represents state associations of school boards and the Board of
21 Education of the U.S. Virgin Islands. Its mission is to promote excellence and equity in
22 public education through school board leadership. Through its member state associations,
23 NSBA represents over 90,000 school board members who govern nearly 14,000 local
24 school districts serving approximately 51 million public school students. NSBA strives to
25 promote public education and ensure equal educational access for all children. Through
26 legal and legislative advocacy, and public awareness programs, NSBA promotes its
members’ interests in ensuring excellent public education and effective school board

1 governance. It closely monitors legal issues that affect authority of public schools and
2 regularly participates as amicus curiae in court cases.

3 **INTRODUCTION**

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

11 As in other states, school-aged children in Arizona are required by law to attend
12 school. More than 1,151,000 children attended Arizona K-12 public schools in the 2019-
13 2020 school year.¹ The state’s 732 educational entities, which include 228 local school
14 districts,² are responsible for the health and safety of the students in their daily care.

15 Through the budget reconciliation bills (BRBs) challenged here, the Arizona
16 legislature has removed the authority of the state’s school districts to fulfill their most basic
17 and expected duty – to keep students, staff, and guests safe in school buildings. By
18 prohibiting schools from imposing mask mandates, the so-called “budget” bills have
19 usurped local authority and long-held standards about how branches of state government
20 ensure public health, and local school boards collaborate with those authorities. The
21 legislative action is unconstitutional, as argued by Plaintiffs, and dangerous. It imperils the
22

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

25 ² Arizona has 228 traditional school districts, 457 charter schools and 47 other education
26 organizations.” AZ School Report Cards, *Arizona Department of Education’s*
comprehensive school report card system <https://azreportcards.azed.gov/> (last visited Sept.
9, 2021).

1 health and safety of public school children and their communities. NSBA urges this court to
2 enjoin its enforcement as urged by Plaintiffs.

3
4 **ARGUMENT**

5 **I. The Ban on Mask Mandates Limits the Ability of School Boards to Keep**
6 **Their Communities Safe.**

7 **a. School districts, through their boards, have a legal obligation to**
8 **ensure the wellbeing of all students in their care.**

9 As Plaintiffs ably argue, inherent in the fundamental right to an education in
10 Arizona, as in other states, is the concomitant right to a safe educational environment.
11 School boards bear responsibility to provide and nurture that environment. Indeed, courts
12 have long recognized a school board’s legal obligation to ensure the wellbeing of all
13 students in its care. The Supreme Court of Nebraska said it well nearly 100 years ago, in a
14 challenge to a school board regulation restricting high school students from leaving campus
15 during the school day for lunch. Noting that the state legislature had authorized school
16 districts to hold and control property for school purposes, the court upheld the regulation:

17 During school hours, however, general education and the control of
18 pupils who attend public schools are in the hands of school boards,
19 superintendents, principals, and teachers. This control extends to
20 health, proper surroundings, necessary discipline, promotion of
21 morality and other wholesome influences, while parental authority is
22 temporarily superseded.

23 *Richardson v. Braham*, 125 Neb. 142, 249 N.W. 557, 559 (Neb. 1933).

24 Thirty-three years later, the Supreme Court of New Jersey followed a long line of
25 cases to hold that “the duty of school personnel to exercise reasonable supervisory care for
26 the safety of students entrusted to them, and their accountability for injuries resulting from
failure to discharge that duty, are well-recognized in our State and elsewhere.” *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 from a paper clip shot from a rubber band);

1 *Eastman v. Williams*, 124 Vt. 445, 207 A.2d 146 (1965)(a teacher owes his students the
2 duty of supervision, and if a failure to use due care results in injury to the student in his
3 charge, it makes him liable to such student); *Selleck v. Board of Education*, 276 App. Div.
4 263, 94 N.Y.S.2d 318 (1949)(due to lack of proper supervision, the principal and the board
5 of education were held liable for a student's injury by another student who ran into him
6 with his bicycle on the school grounds); *Doktor v. Greenberg*, 58 N.J. Super. 155, 158-159,
7 155 A.2d 793 (App. Div. 1959)(a public school teacher owes her students the duty of
8 supervision, and will be liable for injuries caused by failure to discharge that duty with
9 reasonable care), certif. denied 31 N.J. 548, 158 A.2d 450 (1960). The following year, it
10 held in *Jackson v. Hankinson & Bd of Ed. of Shrewsbury*, 51 N.J. 230 (1968) that school
11 authorities are obligated to take reasonable precautions for student safety. Other courts have
12 held similarly that although schools are not guarantors of students' safety, they owe
13 students a duty of care to prevent injuries inflicted either negligently or intentionally. *C.A.*
14 *v. William S. Hart Union High School Dist.*, 53 Cal.4th 861, 270 P.3d 699 (Cal.
15 2012)(student alleging sexual abuse adequately pleaded vicarious liability; school personnel
16 owe duty of reasonable care to protect students from foreseeable injury at hands of third
17 parties); *M.M. v. Fargo Public School Dist. No. 1*, 2010 ND 102, 783 N.W.2d 806 (N.D.
18 2010)(ninth grade student injured while performing bicycle stunt allegedly condoned by
19 history teacher was not precluded from bringing personal injury action against city school
20 district; school must exercise ordinary care to keep its premises and facilities in reasonably
21 safe condition for use of minors who foreseeably will make use of premises and facilities);
22 *Edson v. Barre Supervisory Union No. 61*, 2007 VT 62, 933 A.2d 200 (Vt. 2007)(high
23 school owed student a duty of ordinary care to prevent him from being exposed to an
24 unreasonable, foreseeable risk, but insufficient evidence that death of the student was
25 foreseeable); *Jachetta v. Warden Joint Consolidated School Dist.*, 142 Wash.App. 819, 176
26 P.3d 545 (Wash. App. 2008)(school districts must protect students from reasonably
anticipated dangers, but not foreseeable to school district that its response to student-to-

1 student death threat, which response fell short of expelling the other student, would result in
2 the threatened student developing post-traumatic stress disorder). Arizona courts have held
3 similarly in recent cases. *Dinsmoor v. City of Phoenix*, 50 Arizona Cases Digest 17, 492
4 P.3d 313 (Ariz. 2021) (school-student relationship imposes an affirmative duty on schools
5 to protect students from unreasonable risks of harm while fulfilling its roles as custodian,
6 land possessor, and quasi-parental figure, but no duty to protect student from boyfriend
7 while off-campus); *Hill v. Safford Unified Sch. Dist.*, 191 Ariz. 110, 112, 952 P.2d 754,
8 756 (App. 1997) (acknowledging that schools have a statutory and common law duty “not
9 to subject students within their charge” to “unreasonable risk of harm through acts,
10 omissions, or school policy”).

11 Local school districts are obligated to ensure the safety of their students and to take
12 reasonable steps to this end. In order to meet this duty, school boards are authorized to
13 develop school policies and regulations that may override direct parental control and may
14 limit certain constitutional freedoms. The authority of the public schools to exercise such
15 control over students is often attributed to the legal doctrine of *in loco parentis*, which
16 allows parents to delegate parental authority over their own children to the school. The
17 doctrine of *in loco parentis* in public schools has long been recognized by courts. As Justice
18 Thomas noted in *Morse v. Frederick*, 551 U.S. 393. 413-416 (2007), “The doctrine of *in*
19 *loco parentis* limited the ability of schools to set rules and control their classrooms in
20 almost no way. It merely limited the imposition of excessive physical punishment.”³ The
21 right of educators to exercise the same degree of control over a student that a parent is
22 privileged to exercise is found in many state laws. In California, teachers, vice principals,
23 principals, or other certificated employees of school boards are privileged to exercise the
24 same degree of physical control over children that their parent may legally use and are

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26 ³While Justice Thomas’ concurring opinion was in the context of student speech, the
doctrine of *in loco parentis* applies here.

1 immunized from criminal prosecution or criminal penalties when in the performance of
2 those duties.⁴

3 Although the majority of *in loco parentis* court decisions arise within the context of
4 school officials' authority to discipline students, the doctrine applies equally well to the
5 duty to protect students from unreasonable risks and harm. Indeed, the unique relationship
6 between teacher and student affords the student protection in this regard, as school districts,
7 administrators, and teachers have a legal obligation to take reasonable steps to ensure their
8 safety. *See Rogers v. Retrum*, 170 Ariz. 399, 401, 825 P.2d 20, 22 (App. 1991). "This
9 obligation includes the duty not to subject those students, through acts, omissions, or school
10 policy, to a foreseeable and unreasonable risk of harm." *Id.*; *see also Jesik v. Maricopa*
11 *County Community College Dist.*, 125 Ariz. 543, 546, 611 P.2d 547, 550 (1980) ("A public
12 school district in Arizona is liable for negligence when it fails to exercise ordinary care
13 under the circumstances."); *Chavez v. Tolleson Elementary Sch. Dist.*, 122 Ariz. 472, 476,
14 595 P.2d 1017, 1021 (App. 1979) (school personnel had duty of ordinary care to students in
15 their charge), *citing Delbridge v. Maricopa Cty. Cmty. Coll. Dist.*, 182 Ariz. 55, 58, 893
16 P.2d 55, 58 (Ct. App. 1994).

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22 _____
23 ⁴Cal. Educ. Code § 44807. An appellate court in California, in *In re Donaldson*, upheld the
24 statute maintaining that school officials stand *in loco parentis*, allowing the use of moderate
25 force in disciplining students just as parents have the right to use force to gain obedience
26 from their children. *In re Donaldson*, 269 Cal. App. 2d 509, 513 (Ct. App. 1969). Other
states, such as Georgia (§ 20–215) and West Virginia (§ 18A-5–1), also have codified *in*
loco parentis, wherein educators have the right to discipline students to the same degree
that parents may legally discipline their children.

1 In the COVID-19 pandemic era, this already-weighty responsibility to keep public
2 schools safe has become even heavier as the world faces a health crisis the likes of which
3 most older adults have not seen in their lifetimes. The illness caused by the coronavirus
4 (COVID-19) has killed more than 600,000 Americans, shut down in-school learning for
5 almost a year, and hobbled the economy. Although the disease was once thought primarily
6 to affect adults, it is now well understood that the disease does affect children and
7 adolescents and that they can become very ill with the virus and spread it. In March of
8 2021, a Centers for Disease Control (CDC) study revealed that the cumulative rate of the
9 coronavirus infection and COVID-19 symptomatic illness rates in children 5-17 years old
10 was comparable to infection and symptomatic illness rates in adults 18-49 and higher than
11 rates in adults 50 or older.⁵

12 Against the backdrop of this dangerous virus, school districts are now called upon to
13 assess duties and responsibilities through the familiar *in loco parentis* lens and to explore
14 the best ways to minimize preventable spread. School boards have a clear obligation to
15 develop policies, practices, and procedures that protect their students from contracting
16 coronavirus and either becoming very ill and/or spreading the disease to others. Using local
17 health and demographic data and input from families, staff, and local health authorities,
18 districts can take the necessary steps to protect students, staff, and visitors. After an analysis
19 of all available data, if a local school district deems it necessary to mandate masks to meet
20 its legal obligation to protect students and others from a transmissible virus, then a district
21 should have the right to make that informed decision. To do otherwise, districts arguably
22 have failed to meet the duty of care to address a foreseeable risk of harm to its students.
23 According to a recent report, state or district-wide mask mandates have been imposed in

24 _____
25 ⁵ Centers for Disease Control, *Transmission of SARS COV-12 in K-12 Schools*, (Update July
26 9, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/transmission_k_12_schools.html.

1 every state with the exception of North Dakota.⁶ Under the recently passed Arizona
2 legislation, school districts may not provide these protections when needed. In addition to
3 their constitutional impairments noted by Plaintiffs, the budget reconciliation bill
4 eviscerates local school board's *in loco parentis* duty and authority to provide for the safety
5 and welfare of its students.

6 Pursuant to its duty to provide for the well-being of its citizens and its concomitant
7 obligation to create and maintain public schools, the state of Arizona can establish laws
8 regulating behavior and conduct for the public good in general, and specifically for the
9 good of public schools. *See generally* Ariz. Const. Art. XI. In the context of this pandemic,
10 the “public good” requires Arizona to give its school districts authority to implement
11 appropriate health protocols to keep their constituents safe. Arizona has recognized
12 education as a fundamental right, *Roosevelt v. Bishop*, 179 Ariz. 233, 238 (1994); *Magyar*
13 *By & Through Magyar v. Tucson Unified Sch. Dist.*, 958 F. Supp. 1423, 1442 (D. Ariz.
14 1997), a basic component of which is the right to a safe educational setting. *See Abbeville*
15 *Cty. Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999) (finding that “adequate and safe
16 facilities” were minimum requirements for similar constitutional provision). Section 12 of
17 HB2898, recently passed by the Arizona legislature, prohibits public school boards from
18 requiring universal indoor masking, which the CDC recommends for all students age two
19 and older, all staff, and all visitors to school buildings due to the circulation of the highly
20 contagious Delta variant of the potentially lethal virus.⁷ By doing so, it has sidestepped its
21 responsibility to enact legislation for the public good in a way that is likely to cause harm to
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23 ⁶ Zalaznick, Matt, “School mask tracker: Who is and isn’t loosening the rules,” District
24 administration (Sept. 7 2021) <https://districtadministration.com/track-school-mask-rules-requirements-state-by-state/>.

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

1 public school students, and to the public. This court should enjoin it as asserted by
2 Plaintiffs.

3
4 **b. School districts must be able to take measures to keep their students,
staff, and communities safe during an acute health emergency.**

5
6 A school district simply must be able to take measures to keep students safe,
7 especially when those measures are crucial to school and community health. In the COVID-
8 19 era, this means individual districts must be able to evaluate the level of risk in their
9 borders, consult their school communities, and tailor the necessary policies to maintain a
10 healthy and safe environment for all who enter their facilities. Already this fall, COVID-19
11 outbreaks in numerous school districts have resulted in the temporary closing of in-person
12 schools for periods of time.. In Mississippi, the month of August saw dozens of districts
13 imposing mask mandates and others temporarily suspending in-person learning due to a
14 surge in COVID cases and exposures. One eighth-grade student, age 13, died after
15 developing symptoms very rapidly.⁸ In Texas, the Connally Independent School District
16 started school on August 18, only to close its schools for in-person classes not two weeks
17 later after two teachers died of COVID-19.⁹ In Miami-Dade County Public Schools in
18 Florida has reported at least 13 employee deaths from COVID-19 since mid-August.¹⁰

19 While the long-term effects of school closures and virtual learning upon student
learning has yet to be determined, the short-term impact unquestionably stresses the

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

23 ⁹ Silva, Daniella, “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>.

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

1 learning environment, increases the demands upon families and staff, and imposes costs
2 districts can ill afford. To mitigate the adverse impact of COVID-19, districts need the
3 flexibility to explore preemptive measures, such as mask mandates. This approach has been
4 shown to be effective in reducing infection rates where consistently employed.¹¹ Recent
5 studies in the review stage strongly suggest that in schools without universal masking and
6 weekly COVID-19 testing, and where a majority of students have not already been
7 vaccinated or had the virus, staff and students will become infected with the virus at higher
8 rates, and absenteeism will rise significantly.¹²

9 The CDC recently updated its guidance for COVID-19 Prevention in K-12 Schools.
10 The shift comes in response to rising concerns about the Delta variant of the coronavirus.
11 The updated guidance recommends universal indoor masking for all teachers, staff,
12 students, and visitors to K-12 schools, regardless of vaccination status.¹³ The CDC
13 emphasizes layered prevention strategies (e.g., using multiple prevention strategies together
14 consistently) to protect students, teachers, staff, visitors, and other members of their
15 households and support in-person learning, and also encourages localities to monitor
16 community transmission, vaccination coverage, screening testing, and occurrence of
17 outbreaks to guide decisions on the level of layered prevention strategies (e.g., physical
18 distancing and screening testing).¹⁴

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

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

26 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.*

1 The change in federal guidance prompted many school districts across the country to
2 tighten their restrictions.¹⁵ The Las Vegas and New Orleans school districts announced
3 mandatory mask requirements. Several other large urban districts, including those in New
4 York City, Los Angeles, and Chicago, already had universal masking requirements. By
5 adopting policies consistent with the CDC guidance, school districts monitor vaccination
6 rates, the growth of coronavirus variants, virus spread, and additional public health
7 guidance to make informed decisions about masking policies.

8 Yet the Arizona legislature has required school districts to ignore this data, and to
9 place students, staff, and families at risk of serious illness or death. This legislative
10 command—with no exceptions regardless of circumstance—is arbitrary and capricious. No
11 legislative deference is owed to a legislative command so injurious to student health and
12 inconsistent with the longstanding obligation of local school districts to provide a safe
13 learning environment. Decisions about whether to employ measures like universal indoor
14 masking are best left to school districts that understand the local community health needs
15 and the steps necessary to facilitate in-person learning while preventing the spread of
16 COVID-19. The Arizona legislative ban offers neither guidance nor remedy to the current
17 health, safety, and logistical learning challenges district face. Without the authority to
18 exercise mask mandates which needed, districts are foreclosed from effectively minimizing
19 the risk of harm to their communities.

- 20 **c. School districts must be able to collaborate with local and state**
21 **agencies to limit the spread of COVID-19, not only in schools but also**
22 **in their communities.**

23
24 _____
25 ¹⁵ Balingit, Moriah and Valerie Strauss, “CDC changes course on school guidance, advising
26 everyone to wear ,” *The Washington Post*, July 27, 2021,
<https://www.washingtonpost.com/education/2021/07/27/school-masks-cdc-guidelines/>

1 As part of the executive branch, public health agencies implement and enforce
2 relevant laws, within the scope of authority described by the legislature. Public health
3 agencies have the expertise and long-range perspective to address highly complex health
4 risks, and as a result can act expeditiously in responding to public health emergencies.
5 When school districts develop school health policies, they often work closely with local and
6 state public health agencies to gather and understand disease tracking data, current health
7 standards, injury prevention protocols, and the like.¹⁶ Public health officials are trained and
8 experienced in developing scientific evidence-based policies to address public health
9 emergencies and consequently best positioned to coordinate statewide and local responses.
10 For this reason, schools rely on information and recommendations from public health
11 agencies as they address public health issues in schools, thereby fulfilling in part their duty
12 to protect the welfare of students.

13 Schools in Arizona, like those in other states, will face COVID-19 hurdles again this
14 fall. There is significant anecdotal data that the number of infections of the highly
15 contagious Delta variant has increased with early school openings. *The Wall Street Journal*

16 ¹⁶ The Arizona Public Health and Safety Act is the driver for the collaboration between
17 schools and the local public health agency. “Modern public health agencies use their
18 authority for more than preventing epidemics and tracking, investigating and stopping the
19 spread of disease and other health threats (e.g. foodborne illness, HIV/AIDS, measles).
20 These agencies serve many other critical functions, such as preventing injuries; promoting
21 and encouraging healthy behaviors such as diet and exercise; preventing chronic diseases,
22 including cancer and diabetes; planning for and responding to disasters and assisting
23 communities in recovery; protecting against environmental hazards; assuring the quality
24 and accessibility of services, and advancing health equity. Public health agencies inspect
25 restaurants; enforce smoke-free air laws; and test children for lead exposure. They also
26 collect data on how diseases and conditions affect the populations they serve, and
implement programs to ensure that people who are disproportionately impacted can have
equitable health outcomes. School districts oftentimes to turn public health agencies for
their expertise and guidance to ensure student safety.” 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](https://www.networkforphl.org/wp-content/uploads/2021/06/Proposed-Limits-on-Public-Health-Authority-Dangerous-for-Public-Health-FINAL.pdf).

1 reports that at least 1,000 schools across 31 states have closed because of COVID-19.¹⁷ In
2 Mississippi alone, 13,715 students have tested positive for COVID since the beginning of
3 the school year.¹⁸ In an effort to ward off such drastic consequences, like the CDC, the
4 Arizona Department of Health Services (Department) encourages the use of masks in
5 schools.¹⁹

6 The Arizona legislature, however, has stripped school and public health officials of
7 authority to fulfill their duty to protect communities, altered the nature and allocation of
8 emergency powers and public health authority among the executive, legislative, and judicial
9 branches of state and local governments, and impeded effective governmental response to
10 public health emergencies. It has short-circuited action based on a trusted flow of expertise,
11 taking any recommendation by health authorities for mask mandates off the table—
12 regardless of evolving circumstances. By impeding the ability of local school districts to
13 confer with public health agencies and adopt the most viable approaches to combat local
14 COVID concerns, the Arizona legislature arbitrarily removed a trusted, invaluable resource
15 for schools to keep school communities safe. In so doing, it has infringed upon the
16 constitutional separation of powers, essentially nullifying the executive role of health
17 agencies and the local authority of public school districts.²⁰ Above all, the challenged

18 ¹⁷ Koh, Yoree, The Wall Street Journal, *Child Covid-19 Cases Rise in States Where Schools*
19 *Opened Earliest* (Sept. 5, 2021) <https://www.wsj.com/amp/articles/child-covid-19-cases-rise-in-states-where-schools-opened-earliest-11630834201>.

20 ¹⁸ *Id.*

21 ¹⁹ Arizona Department of Health Services, Schools (K-12) & Childcare – Guidance,
<https://www.azdhs.gov/covid19/index.php#schools-guidance>.

22 ²⁰ See Ariz. Const. art. III. The Supreme Court determined courts should defer to reasonable
23 orders issued by public health authorities in its landmark ruling in *Jacobson v.*
24 *Massachusetts*, 197 U.S. 11 (1905), where it found that states could enforce vaccination
25 laws, as “[t]he liberty secured by the constitution does not import an absolute right in each
26 person to be at all times and in all circumstances wholly freed from restraint.” *Id.* at 12.
“The authority to determine for all what ought to be done in such an emergency must have
been lodged somewhere or in some body;” explained the seven-justice majority, “and surely
it was appropriate for the legislature to refer that question, in the first instance, to a board of

1 provisions of HB2898 unreasonably undermine the efforts of public health officials to battle
2 the COVID-19 pandemic and create an immediate threat to life and health in contravention
3 of the districts' express duty to protect students.

4 **II. Local Governance of Public Schools Ensures That School Boards Can Keep**
5 **Students Safe.**

6 **a. Section 12 of HB2898 prevents individual school districts from reacting**
7 **with all deliberate speed to address COVID-19 spread after weighing all**
8 **the factors at play in their communities.**

9 As COVID-19 continues to ravage certain communities more rapidly and intensely
10 than others, it is clear that a single path forward for all school districts in a state may not be
11 possible during the 2021-22 school year. One school board in a community with relatively
12 high vaccination rates and low community spread of the virus may decide against requiring
13 universal masking, while another with low vaccination rates and high community spread
14 may decide universal masking is crucial to maintain safe learning environments. And the
15 two districts could switch positions as conditions change in the coming weeks and months.
16 Individual school districts need flexibility to make localized decisions regarding safety
17 protocols based on emerging data and local conditions. A blanket prohibition against
18 requiring masks in public school districts is an intrusion on local authority and presents an
19 arbitrary impediment to the ability of school districts to address their responsibility for the
20 safety of a largely unvaccinated school-aged population.

21 School boards are composed of members of a community who are elected by their
22 neighbors to be responsible for the education of the children in that community. School
23 board members know their neighbors personally. They talk to them at the grocery store, the
24 gas station, and the post office. Many work with local agencies and organizations so that
25 they remain informed about circumstances that affect their communities. As a part of their

26 health composed of persons residing in the locality affected, and appointed, presumably,
because of their fitness to determine such questions.” *Id.* at 27.

1 school board role, and in an attempt to fully serve all students, many school board members
2 and school districts have developed relationships with state and local health and welfare
3 agencies. Those existing relationships put them in a position to be the first to know how the
4 coronavirus is affecting communities surrounding their school districts, when it is
5 spreading, and what measures to put in place stop the spread of the disease.

6 By adopting a one-size-fits-all prohibition on mask mandates, the Arizona legislature
7 deprives school boards of their ability to weigh the factors at play in their communities, to
8 react with all deliberate speed to address issues in the transmission of the disease, and by
9 doing so, to take steps to fight the spread of COVID-19. In some school districts, this will
10 lead to irreparable harm in the form of illness and potentially the deaths of children and
11 adults in the communities these boards serve. To prevent the unnecessary spread of this
12 disease, potential massive school closures, and the economic consequences that naturally
13 follow the spread of this disease, this court must enjoin the enforcement of this legislation
14 and allow school boards to regain control and take the steps they need to keep their
15 students, employees, and community members safe and healthy.

16 **b. Section 12 of House Bill 2898 leaves school boards without a key safety**
17 **measure for facilities management to prevent COVID-19 spread to their**
18 **local communities.**

19 Since Americans erected single-room school houses, public school facilities have
20 served as community resources. School boards have long allowed community members and
21 groups to use school district facilities when school is not in session. This use of school
22 facilities is so common that it has been codified by the provisions of the Equal Access Act,
23 20 U.S.C. § 4071. The United States Supreme Court, in *Good News Club v. Milford*, 533
24 U.S. 98 (2001) and *Lamb's Chapel v. Center for Moriches Union Free School District*, 508
25 U.S. 384 (1993), clearly held that a school board's attempt to deny religious groups the use
26

1 of school facilities when it allows nonreligious groups to use its facilities violates the First
2 Amendment of the United States Constitution.

3 Because school facilities are used not only to educate students, but also to house
4 students' after school curricular and non-curricular meetings, and to host community club
5 meetings, sports practices, church, and other events, a school board has the responsibility to
6 implement policies that protect not only students and school employees, but all the potential
7 community members who might use its facilities. Prohibiting a school board from
8 determining whether masks are appropriate or necessary for students and school employees
9 may therefore contribute to the spread of COVID-19 throughout the community.

10 **c. The mask mandate ban conflicts with federal funding requirements.**

11 The legislature's ban on mask mandates places the state at risk of violating federal
12 requirements tied to pandemic relief funding. U.S. Secretary of Education Miguel Cardona
13 explained in August 2021 communications to eight states prohibiting universal mask
14 mandates (including Arizona) that "actions to block school districts from voluntarily
15 adopting science-based strategies for preventing the spread of COVID-19 that are aligned
16 with the guidance from the CDC may infringe upon a school district's authority to adopt
17 policies to protect students and educators as they develop their safe return to in-person
18 instruction plans required by Federal law."²¹ Because each local school district is required
19 as a condition of receipt of federal relief funds to offer a plan that details how the district
20 will provide for student safety during the continuing pandemic, restrictions on districts'
21 ability to implement mask mandates put those plans in question. Each district must explain
22 its local policies and practices with regard to safety recommendations by the Center for
23 Disease Control, including the "universal and correct wearing of masks." By preventing a

24 ²¹ Cardona, Miguel, "Meeting the President's Call to Support the Safe and Sustained
25 Reopening of Schools," U.S. Department of Education, Aug. 18, 2021,
26 <https://blog.ed.gov/2021/08/meeting-the-presidents-call-to-support-the-safe-and-sustained-reopening-of-schools/>.

1 local school board from exercising its policy-making authority to impose a requirement for
2 the universal and correct wearing of masks (or other rule), Section 12 of HB2898 prevents
3 local districts from following a key CDC recommendation for safe school operations.

4 CONCLUSION

5 It should be axiomatic that a school district must be able to take reasonable measures
6 to keep students, staff, and visitors within its facilities safe during a global health crisis. By
7 removing local school districts' authority to impose mask mandates per federal guidelines
8 when local conditions call for it, the legislature has shirked its public safety responsibility,
9 and ignored the crucial necessity of local decision-making in the face of an acute health
10 emergency.

11 Schools across the country face extraordinary challenges this school year:
12 remediation of students who have fallen behind, severe limitations on capacity and
13 authority to implement remote instruction, and a resurgence of COVID-19 cases. School
14 districts must have the flexibility to set guidelines for student, staff, and guest health
15 measures when their communities are demanding it and when school leaders determine it
16 would be best for their students and educators. It is the most efficient way to maintain
17 healthy learning environments where students can re-engage in learning.

18 Based on the foregoing, NSBA respectfully requests that this Court enjoin the State
19 and its agents from implementing or enforcing the aforesaid budget reconciliation bills.

20 Respectfully submitted this 9th day of September, 2021.

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