



Almost seventy (70) years later, it appears that Defendant Katy ISD Superintendent Kenneth Gregorski has forgotten the lessons of *Brown v. Board of Education*, by implementing a policy that fails to make education available to all on equal terms. Plaintiffs bring this lawsuit not only to empower parents, but to recapture their rights to make decisions they believe are in their children's best interest. To date, there is no documented case where one single school teacher has contracted the novel coronavirus ("COVID-19") from a student. This lawsuit seeks to protect children from an irrational and unconstitutional policy that provides a false sense of security, but has the actual effect of harming children.

### **I. DISCOVERY CONTROL PLAN**

1. Plaintiffs intend to conduct discovery under Level 2 of Rule 190 of the Texas Rules of Civil Procedure.

### **II. TRCP 47 STATEMENT**

2. Plaintiffs are suing for injunctive relief and declaratory relief.
3. Plaintiffs are seeking monetary relief of less than \$100,000.00.

### **III. JURISDICTION AND VENUE**

4. The Court has subject-matter jurisdiction under the Texas Constitution, Article V, § 8, as the amount in controversy exceeds the minimum jurisdictional limits of the court exclusive of interest. The Plaintiffs seek relief that can be granted by courts of law or equity.

5. The Court has jurisdiction over the Plaintiffs' request for declaratory relief against Defendants because the Declaratory Judgment Act waives governmental immunity when the plaintiff is challenging the validity of an ordinance or order. *See* Tex. Civ. Prac. & Rem. Code §§ 37.004, 37.006; *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628 (2010); *Texas Ed. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994).

6. The Court has jurisdiction over the Plaintiffs' request for injunctive relief against Defendants because they are acting *ultra vires* by requiring students to wear face coverings. *See City of El Paso v. Heinrich*, 284 S.W.3d 366-368-69 (Tex. 2009).

7. Plaintiffs have standing to seek declaratory and injunctive relief because Defendants seek to force students to wear face coverings. Plaintiffs seek declaratory and injunctive relief requiring Defendants to remove their requirement that students wear face coverings.

8. The Court has personal jurisdiction over Defendants.

9. Venue is proper because a substantial portion of the events giving rise to the claims occurred in Waller County, Texas. *See* Tex. Civ. Prac. & Rem. Code §§ 15.002, 15.008, 15.035.

10. Plaintiffs request the Court provide notice of this lawsuit to the Texas Attorney General as required by Texas Government Code §402.010.

#### **IV. PARTIES**

11. Plaintiff Bonnie Anderson is a resident of Texas and lives within Katy Independent School District. Her child attends a school located in the Katy Independent School District.

12. Plaintiff Jenny Alexander is a resident of Texas and lives within Katy Independent School District. Her child attends a school located in the Katy Independent School District.

13. Plaintiff Doug Alexander is a resident of Texas and lives within Katy Independent School District. His child attends a school located in the Katy Independent School District.

14. Plaintiff Heather Calhoun is a resident of Texas and lives within Katy Independent School District. Her child attends a school located in the Katy Independent School District.

15. Plaintiff Stephen Calhoun is a resident of Texas and lives within Katy Independent School District. His child attends a school located in the Katy Independent School District.

16. Defendant Katy Independent School District (“KISD”) is a duly incorporated Texas Governmental entity and operates public schools in the cities of Katy, Brookshire, Fulshear and Houston, Texas. KISD schools are located in Waller, Fort Bend, and Harris counties. Plaintiffs request that service of process be issued upon Defendant KISD, by serving its Superintendent, Kenneth Gregorski, at the central office of Katy Independent School District, 6301 South Stadium Lane, Katy, Texas 77494, or wherever it may be found.

17. Defendant Kenneth Gregorski, in his official capacity as superintendent for Katy Independent School District (“Gregorski”), is an individual resident of the State of Texas. Plaintiffs request service of process be issued upon Defendant Gregorski at the central office of Katy Independent School District, 6301 South Stadium Lane, Katy, Texas 77494, or wherever he may be found.

18. Defendant Board of Trustees for the Katy Independent School District can be served with process at 6301 South Stadium Lane, Katy, Texas 77494, or wherever it may be found.

## **V. FACTUAL BACKGROUND**

### **A. KATY INDEPENDENT SCHOOL DISTRICT**

19. KISD is a public school district with an enrollment of over 85,700 students. KISD includes parts of Waller County, Fort Bend County, and Harris County, Texas.

### **B. DEFENDANTS IMPOSE MASK MANDATE ON CHILDREN**

20. On March 2, 2021, Governor Greg Abbott (“Abbott”) issued executive order GA-34 which, among other things, states “[T]here are no COVID-19-related operating limits for any business or other establishment” and “no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering.” (Exhibit “A”) GA-34 rescinded executive order GA-29 which required, among other things, “[e]very person in Texas shall wear a face covering over the

nose and mouth when inside a commercial entity or other building or space open to the public, or when in an outdoor public space, wherever it is not feasible to maintain six feet of social distancing from another person not in the same household....” (Exhibits “A” and “B”)

21. On March 29, 2021, Despite Governor Abbott’s order repealing the statewide mask mandate, Defendants issued Katy ISD COVID-19 MITIGATION PLAN (“Mitigation Plan”). (Exhibit “C”) Among other things, the Mitigation Plan adopted Phase 1 Safety Protocols that mandated the following: “All staff and students (grades PK-12) are required to wear face coverings upon arrival and dismissal, on buses, in hallways and common areas, and when social distancing is not feasible.” (Exhibit “C”)

22. KISD’s Mitigation Plan further states:

“Katy ISD is offering parents the option of virtual or in-person learning. However, the District is NOT offering in-person instruction for those students who won’t comply with our safety protocols. **Students who refuse to wear a face covering will be moved to Katy Virtual Academy for the duration of the grading period.** Further, students who do not wear face coverings as required by our safety protocols will not be allowed to participate in other student activities, such as athletic or fine arts events.”

(Exhibit “C”) (emphasis added)

23. If Plaintiffs do not wish to follow the mask mandate, their children are sentenced to the “Katy Virtual Academy”, an online school system where students are confined to their home, banished from their peers, and the parents are forced to leave their jobs if they want their children to be educated. (Exhibit “C”)

24. Defendants’ policy is shocking when one considers that the best currently available medical evidence indicates that children have not and continue not to play a role in the spread of COVID-19, children, when compared to the flu, are less likely to be infected with COVID-19, less

likely to be symptomatic if infected with COVID-19, and less likely to spread infection of COVID-19 than adults.<sup>1</sup>

25. As the Center for Disease Control (“CDC”) stated, it does not appear that children are the primary spreaders of COVID-19 among family members and research in other countries supports the notion that it is not common for students to spread COVID-19 to their teachers.<sup>2</sup>

### **C. DEFENDANTS’ MASK MANDATE DOES NOT PREVENT PERCEIVED HARM**

26. The evidence (including the peer-reviewed evidence) leans heavily toward masks having no significant impact in stopping the spread of COVID-19. In fact, it is now reasonable to conclude that surgical and cloth masks, used as they currently are, have absolutely no impact on controlling the transmission of COVID-19, among school children.<sup>3</sup> There is no clear scientific evidence that masks (surgical or cloth) work to mitigate risk to the wearer or to those coming into contact with the wearer, as they are currently worn in everyday life and specifically as we refer to COVID-19.<sup>4</sup>

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<sup>1</sup> Itai Dattner et al., *The role of children in the spread of COVID-19: Using household data from Bnei Brak, Israel, to estimate the relative susceptibility and infectivity of children*, PLOS Computational Biology, February 11, 2021.

<sup>2</sup> The CDC’s own recent conclusion on the use of nonpharmaceutical measures such as face mask in pandemic influenza, warned that scientific “evidence from 14 randomized controlled trials of these measures did not support a substantial effect on transmission...” Jingyi Xiao et. al, Centers for Disease Control and Prevention, Emerging Infectious Diseases, *Nonpharmaceutical Measures for Pandemic Influenza in Nonhealthcare Settings—Personal Protective and Environmental Measures*, Vol. 26, Number 5-May 2020.

<sup>3</sup> *Id.* A comprehensive documentation has been prepared by Dr. Roger W. Koops in a recent American Institute of Economic Research (AIER) publication, stating there is no clear scientific evidence that masks (surgical or cloth) work to mitigate risk to the wearer or to those coming into contact with the wearer, as they are currently worn in everyday life and specifically as we refer to Covid-19. Roger W. Koops, *The year of Disguises*, AIER, October 16, 2020.

<sup>4</sup> *Id.*

27. The scientific evidence overwhelming supports the proposition that school kids do not transmit the coronavirus to peers or teachers. Scientists at Institut Pasteur studied 1,340 people in Crepy-en-Valois, a town northeast of Paris that suffered an outbreak in February and March, 2020, including 510 students from six primary schools.<sup>5</sup> They found three probable cases among kids that did not lead to more infections among other pupils or teachers. The study confirms that children appear to show fewer telltale symptoms than adults and to be less contagious, providing justification for school re-openings in countries from Denmark to Switzerland and additional reasons not to force a mask mandate on children.<sup>6</sup>

28. The New England Journal of Medicine (NEJM) recently published an article on COVID-19 and masks which suggests that masks have become no more than a psychological crutch, stating, “We know that wearing a mask outside health care facilities offers little, if any, protection from infection. The chance of catching Covid-19 from a passing interaction in a public space is therefore minimal. In many cases, the desire for widespread masking is a reflexive reaction to anxiety over the pandemic.”<sup>7</sup> The NEJM further states, “[I]t is also clear that masks serve symbolic roles. Masks are not only tools, they are also talismans that may help increase health care workers’ ‘perceived’ sense of safety, well-being, and trust in their hospitals. Although such reactions may not be strictly logical, we are all subject to fear and anxiety,

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<sup>5</sup> Arnaud Fontanet, MD, Dr. Phd, et al., *SARS-CoV-2 Infection in primary schools in northern France: A retrospective cohort study in an area of high transmission*, Institut Pasteur, June 23, 2020.

<sup>6</sup> A comprehensive documentation has been prepared by Dr. Roger W. Koops in a recent American Institute of Economic Research (AIER) publication, stating there is no clear scientific evidence that masks (surgical or cloth) work to mitigate risk to the wearer or to those coming into contact with the wearer, as they are currently worn in everyday life and specifically as we refer to Covid-19. Roger W. Koops, *The year of Disguises*, AIER, October 16, 2020.

<sup>7</sup> Michael Klompas, M.D., M.P.H., et al., *Universal Masking in Hospitals in the Covid-19 Era*, N Engl J Med 2020; 382:e63, DOI:10.1056/NEJMp2006372 (May 21, 2020).

especially during times of crisis. One might argue that fear and anxiety are better countered with data and education than with a marginally beneficial mask.”<sup>8</sup>

29. In August 2020, a survey by Pew indicated that 85% of Americans wore masks when in public all or most of the time. So, the public has been using masks extensively. Despite wide-spread use of surgical and cloth masks, the incidence of COVID-19 (or actual disease; and they are not the same thing) escalated rapidly.

30. There is little evidence across the United States and other countries demonstrating that when mask use is mandated (or not mandated given the general uptake of masking by the public), this contributes to reduced viral transmission. Accordingly, Governor Abbott issued GA-34, removing his facial covering/mask mandate. (Exhibit “A”)

### **1. Infection Fatality Rate/IFR**

31. By mandating facial coverings, Defendants are fostering highly irrational, punitive, capricious, and groundless restrictions for a virus with an infection fatality rate (IFR), based on Stanford University John Ioannidis’s calculations, of 0.05% in persons under 70 years old (across different global nations).<sup>9</sup>

32. Ioannidis’s research was followed up by a reported non-institutionalized IFR in the state of Indiana (persons aged > 12 years) of 0.12% (95% CI 0.09 to 0.19) when age 40-59/60 years (reported in the *Annals of Internal Medicine*), and an IFR when < 40 years old of

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<sup>8</sup> *Id.*

<sup>9</sup> John Ioannidis, Stanford University, *The infection fatality rate of COVID-19 inferred from seroprevalence data*, Bulletin of World Health Organization doi: 10.2471/BLT.20.265892 (July 14, 2020 (original date of publication)). medRxiv, Stanford University.



0.01% (95% CI 0.01 to 0.02). Persons 60 or older had an IFR of 1.71% (overall IFR was 0.26%).<sup>10</sup>

33. The infection fatality rate (IFR) which is a more accurate and realistic reflection of mortality than CFR, is really no worse than the annual influenza. However, Defendants do not mandate masks or facial coverings annually for influenza.

## **2. Risk to children is minimal**

34. Quality research results in the leading journal *Nature* estimated the COVID-19 survival rate to be approximately 99.995% in children and teens. The recent publication by the CDC reported that among 90,000 students and staff in 11 North Carolina school districts, they found that in-school virus transmission was “very rare.”<sup>11</sup> A similar finding emerged in 17 rural Wisconsin schools.

35. Defendants have known for months that children are less susceptible to serious infection and less likely to transmit COVID-19. The CDC recently came out supporting school re-openings when the long-term data was clear that the risk was very low, if at all. However, the long term data shows that children have been injured and suffer serious collateral damage.

36. Additionally, Plaintiffs’ children and others in KISD have suffered catastrophic long-term losses regarding their educational, social, and emotional/psychological development. Among other things, suicide among children continues to escalate under the mask mandate. This type of unfounded fear has been behind policies like those adopted by Defendants despite scientific evidence to the contrary.

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<sup>10</sup> *Id.*

<sup>11</sup> Margaret A. Honein, PhD, et al., *Data and Policy to Guide Opening Schools Safely to Limit the Spread of SARS-CoV-2 Infection*; JAMA. 2021;325 (9):823-824. Doi:10.1001/jama.2021.0374 (January 26, 2021).

37. The data consistently and clearly shown from just after the start of the pandemic that there is far less susceptibility for children, or severe illness for children, and very low risk of hospitalization or death for children when it comes to COVID-19.<sup>12</sup>

38. Again, despite this data, Defendants continue to force policies on Plaintiffs and their children that are inconsistent with the science which are detrimental to children's health.

39. When considering Defendants' mandatory mask policy, one must ask why has this happened to our children yet did not happen for seasonal influenza each year which is far deadlier than COVID-19 for children; or for H1N1 when it struck in 2009.<sup>13</sup>

40. While children drive seasonal influenza and do take influenza home, this is not the case with COVID-19. Yet, if you watch the daily television news you will not know this because the message being sent out on practically a 24/7 basis is one of doom and gloom for our children. Unfortunately, Defendants have adopted and perpetuated this same "doom and gloom" mantra by forcing facial coverings for children.

#### **D. MASK MANDATE HARMS PLAINTIFFS' CHILDREN**

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<sup>12</sup>Research points to less expression of ACE2 receptor proteins on the surface of the nasal epithelium in children (4-9 years old). This is well known globally for many, many months that children are at very low risk of spreading infection to classmates, to their adults, teachers, or even taking it home. Secondary transmission evidence is nonexistent. Based on a high-quality McMaster University review, researchers found that "Transmission was traced back to community and home settings or adults, rather than among children within daycares or schools, even in jurisdictions where schools remained open or have since reopened."

<sup>13</sup> The recent repeated sparring between Senator Rand Paul and Dr. Anthony Fauci whereby the senator has been ongoingly pilloried by the media for calling out Dr. Fauci who has routinely changed statements and been confusing on a range of issues and particularly on the issue of school closures. Dr. Fauci replied: "We don't know everything about this virus, and we really ought to be very careful, particularly when it comes to children." Surely Dr. Fauci was aware of the global Covid data as it related to risk in children.

41. As regards to masking, it is simply impossible to understand Defendants' mask mandate when it has been shown clearly that *after* implementing mask mandates (indoor and outdoor), the number of cases went up. At one point, there were 37 states including but not limited to California, Texas, Hawaii, Main, Delaware, Florida, Oregon, and Pennsylvania that mandated face coverings in public. Outside of the United States there were also global data showing that when mask mandates were implemented in Austria, Germany, France, Spain, UK, Belgium, Italy, to name only a few, COVID-19 case numbers went up, not down.

42. Moreover, it has been reported that "in states (US) with a mandate in effect, there were 9,605,256 confirmed Covid-19 cases, which works out to an average of 27 cases per 100,000 people per day. When states did not have a statewide order—including states that never had mandates, coupled with the period of time masking states didn't have the mandate in place—there were 5,781,716 cases, averaging 17 cases per 100,000 people per day; a notable reduction as compared to the number of cases observed during mask mandates.

43. States with mandates in place produced an average of 10 more reported infections per 100,000 people per day than states without mandates."<sup>14</sup> To justify their blind acceptance of the current and scientifically opposed rhetoric, the Defendants and others espouse that if COVID-19 cases do go up, the mask mandate prevented even more cases from occurring; this is truly incredible nonsense and has no basis in fact.

#### **E. PLAINTIFFS ARE ADVERSELY IMPACTED BY DEFENDANTS' ACTIONS**

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<sup>14</sup> Matthew Vadum, Mask Mandates Seem to Make CCP Virus Infection Rates Climb, Study Says, EPOCH Times (December 22, 2020) (citing report from RationalGround.com a clearinghouse of COVID-19 data).

44. KISD's decision to force Plaintiffs and students to wear masks and/or face coverings, has severe ramifications for students and parents whose children attend a KISD school, such as Plaintiffs, including breathing issues, headaches, depression, dermatitis, dizziness, bacterial infections, and concentration issues.

It is a leap to conclude that a mandate to wear masks will do more good than harm, even as a strictly biological or epidemiological matter. Mask mandates may not be followed; masks worn as a result of a mandate may not be used properly; some mask practices like double masking can do harm, particularly to children; and even if a mask mandate results in some increased number of masks being worn and worn properly, the mandate and the associated publicity may reduce the public's attention to other proven and effective safeguards, such as hygiene practices.

45. Thus, it is not surprising that the CDC's own recent conclusion on the use of nonpharmaceutical measures such as face masks in pandemic influence, warned that scientific "evidence from 14 randomized controlled trials of these measures did not support a substantial effect on transmission..." Moreover, in the World Health Organization's("WHO'S") 2019 guidance document on nonpharmaceutical public health measures in a pandemic, they reported as to face masks that "there is no evidence that this is effective in reducing transmission..." Similarly, in the fine print to a recent double-blind, double-masking simulation, the CDC stated that "The findings of these simulations [supporting mask usage] should neither be generalized to the effectiveness ...nor interpreted as being representative of the effectiveness of these masks when worn in real-world settings."

#### **F. TEXAS EDUCATION AGENCY PROHIBITS THE USE OF FACE COVERINGS**

46. Texas has previously established that requiring a student to wear a mask is an unacceptable practice. Texas Education Code § 37.0023 prohibits a school district or school district

employee or volunteer or an independent contractor of a school district from applying an adverse technique to a student. Tex. Educ. Code § 37.0023(b). An “adverse technique” is a technique or intervention that is intended to reduce the likelihood of a behavior reoccurring by intentionally inflicting on a student significant physical or emotional discomfort or pain. Tex. Educ. Code § 37.0023 (a). The term includes a technique or intervention that...impairs the student’s airway, including placing an object...over the student’s mouth or nose or placing a...cover, or mask over the student’s face....” Tex. Educ. Code § 37.0023 (a)(7). The Texas Education Code recognizes the harm to the student associated with mask coverings and, therefore, prohibits them. Shockingly, Defendants are now making this proscribed mandate mandatory in violation of the law.

#### **G. CAUSES OF ACTION**

47. The Founding Fathers of this great nation:

... foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. . . . No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence...

*Ex parte Milligan*, 71 U.S. 2, 120-121 (1866).

48. “The Constitution is not suspended when the government declares a state of disaster.” *In re Abbott*, No. 20-0291, 2020 WL 1943226, at \*1 (Tex. Apr. 23, 2020). Accordingly:

During a pandemic, the judiciary, the other branches of government, and our fellow citizens—must insist that every action our governments take complies with the Constitution, especially now. If we tolerate unconstitutional government orders

during an emergency, whether out of expediency or fear, we abandon the Constitution at the moment we need it most.

*In re Salon A La Mode et al.*, No. 20-0340, 2020 WL 2125844, at \*1 (concurring opinion, J. Blacklock) (Tex. May 5, 2020). Any government that has made the grave decision to suspend the liberties of a free people must demonstrate that its chosen measures are ***absolutely necessary*** to combat a threat of overwhelming severity. *Id.* Before suspending freedoms protected from infringement by the Constitution, the government is also required to demonstrate that less restrictive measures cannot adequately address the threat. *Id.* Whether it is strict scrutiny or some other rigorous form of review, courts must identify and apply a legal standard by which to judge the constitutional validity of the government’s anti-virus actions.

49. Justice Blacklock further stated: “[W]hen constitutional rights are at stake, courts cannot automatically defer to the judgments of other branches of government. When properly called upon, the judicial branch must not shrink from its duty to require the government’s anti-virus orders to comply with the Constitution and the law, no matter the circumstances.” *Id.* Government power cannot be exercised in conflict with the constitution, even in a pandemic. *In re Abbott*, 601 S.W.3d 802 (Tex. 2020).

50. Viewed through this Constitutional framework, the Mitigation Plan is improper and unenforceable. Plaintiffs are seeking relief entirely under state law and are not asserting any claims that arise under federal law.

**1. Defendants’ Policy Violates the Constitutional Requirement of Providing a Free Public Education**

51. The Texas Constitution, Article VII, section 1 states:

SUPPORT AND MAINTENANCE OF SYSTEM OF PUBLIC FREE SCHOOLS. A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people,

it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

52. Because a free public education is guaranteed in the Texas Constitution, and impediments to receiving that education must have a compelling interest and be narrowly tailored to meet that interest. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

53. The CDC has made clear that “Schools are an important part of the infrastructure of communities and play a critical role in supporting the whole child, not just their academic achievement.”<sup>15</sup>

54. Children cannot be expected to wear masks of any kind for the duration of a school day. At some point, the mask has to come off; even adult medical professionals take breaks. Anyone who’s worked with young children knows they will play with their masks and not even realize they are doing it. It is simply unrealistic to expect otherwise. What occurs is that minor children will touch their face far more often than they would.

55. Parents, and not the Defendants, are in the best position to determine whether or not their minor children are capable of wearing a face covering and if they have the ability to do so for up to seven (7) hours a day, five days a week.

56. Because many parents strongly object to their minor children wearing facemasks for extended periods of time, every day of the school year, children are being forced to unenroll from attending public school in person in favor of virtual learning. Virtual learning does not

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<sup>15</sup> Preparing K-12 School Administrators for a Safe Return to School in Fall 2020. Guidance from the CDC to school districts.

provide the same level of education as those receiving classroom instruction. If it did, there would not be the need to have brick and mortar schools.

57. The Defendants' facemask policy is irrational because it does not protect students. To the contrary, all evidence suggest that children are less susceptible to catching COVID-19, or spreading it, and on the rare occasion that they contract COVID-19, received the virus from adults, rather than spreading COVID-19 to one another or to other adults.<sup>16</sup>

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<sup>16</sup> How easily children catch the disease? On this front, we have five studies (three published and two pre-print) to help inform us. These studies all look more-or-less at the same thing, which is contact tracing. From cases that have been confirmed positive (an index case), they trace back all the people who that case has been in contact with over the recent past and test all of them for COVID-19 to see how many of them caught the illness from exposure to that index case. The proportion of people who have had contact that subsequently became infected is referred to as the Attack Rate(AR). Broadly speaking contacts can be split into two groups: household and non-household (this is important as obviously you are much more likely to transmit to someone in your house). We can also split them up according to age, and see if there is any difference in the number of children who catch the illness compared to adults.

A study from Shenzhen in China was the first to be released in pre-print in March and is now published in the Lancet ID. This study assessed 1286 contacts of 391 initial cases and showed children had a similar attack rate to the population average (7.4% vs 7.9%), but interestingly were much less likely to be symptomatic. This finding caused a lot of concern, but more data has emerged since.

A pre-print study from Japan was released shortly after. They examined 2496 contacts of 313 domestically acquired cases and found a much lower attack rate in children (7.2% males, 3.8% females) compared to adults (22% in people aged 50 -59 years).

Another pre-print study from Guangzhou in China examined 2017 close contacts of 212 confirmed cases. The overall attack rate was 12.6%, however, the attack rate in children was 5.3%. They calculated an odds ratio of acquiring infection in children of 0.27 (0.13 – 0.55) compared to adults >60 years of age.

A study published in Clinical Infectious Diseases assessed household contacts in particular. They assessed 392 contacts of 105 index cases in Wuhan, China (they had more stringent eligibility criteria to ensure they had correctly identified the index case in the household i.e. the person who brought the infection in). Of the 100 contacts under 18 years of age, only four became infected. This was compared to an attack rate of 21.9% among adult household contacts (making an overall attack rate of 16%).



58. The evidence in fact points out that minor children rarely contract COVID-19.<sup>17</sup> On those occasion when a minor contracts COVID-19, the symptoms are often relatively minor, and rarely if ever led to death. In fact, the science indicates that the Flu is up to seven (7) times deadlier to minor children than COVID-19.

59. Scientists are yet to find a single confirmed case of a teacher catching coronavirus from a pupil anywhere in the world, according to Dr. Mark Woolhouse, an infectious disease epidemiologist at Edinburgh University. Professor Woolhouse, a member of the UK government's scientific advisory group, Sage, said that in hindsight closing schools in March was probably a

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A further study published in Science included some far-reaching assessments of transmission, but for our purposes, we will look at their findings regarding secondary attack rates in children. This was a contact tracing study from the Hunan CDC in China. They assessed 114 clusters (some clusters had more than one index case) and 7375 contacts. A regression analysis to adjust for other factors that influence AR (the type of transmission, travel history, etc.) to determine the odds of becoming infected at different age groups. They found an odds ratio of 0.34 (0.24–0.49) for children under 14 years, compared to the reference group of 15-64 years (consistent across models).

<sup>17</sup> Iceland tested 6% of their entire population and found dramatically lower number of cases in children, including 6.7% children under 10 positive in “targeted testing” (symptomatic or high risk due to contacts”) compared to 13.7% of those 10 and older, and found 0 children under 10 years positive in population screening (by invitation) compared to .8% of those over 10 years.

The Italian principality of Vo tested >85% of their population following their first death from COVID-19, and found no positive cases in children despite 2.6% of the population being positive. This finding was repeated when they tested again two weeks later – despite a number of children living in households with confirmed positive contacts.

Finally, a study in The Netherlands is undertaking community serology testing (looking for antibodies against SARS-CoV-2 as evidence of current or previous infection) and has released preliminary results. They have found 4.2% of adults are positive compared to 2% of those aged <20 years.

mistake, but the limited role children play in spreading the virus only became clear further along the infection curve. Dr. Woolhouse is quoted as saying: “One thing we have learned is that children are certainly, in the five to 15 brackets<sup>18</sup> from school to early years, are minimally involved in the epidemiology of this virus.”<sup>19</sup>

60. Such a policy of requiring facemasks fails even a rational basis test, and is clearly not in a child’s best interest when assessed through a factual, rather than fear based, lens. It is simply not rational to believe that an ill-fitting mask, designed for the face of an adult, will be properly worn by young children, 6-7 hours day, five days a week.

61. Even if one wishes to assume that masks likely blunt spread at school, children—even more than adults—find them uncomfortable to wear for hours and may lack the self-discipline to wear them without touching their faces or freeing their noses. Such discomfort overrides any potential public health benefit.

62. The Mitigation Plan is not supported by the evidence, the facts, the science, or the law. The evidence shows that minor children are less susceptible to catching COVID 19. The facts show that children do not pass the virus to a teacher. The science makes clear that adults wearing mask protect children, not the other way around. The law clearly shows that this policy fails a

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<sup>18</sup> A peer review study published in the journal Nature Medicine found that children and teenagers are only half as likely to get infected with the coronavirus as adults age 20 and older, and they usually don’t develop clinical symptoms of covid-19, the disease caused by the virus. The study, is based on a survey of six nations: Canada, China, Italy, Japan, Singapore and South Korea. The researchers developed mathematical models to interpret the demographic patterns of covid-19 cases in those countries. Age-dependent effects in the transmission and control of COVID-19 epidemics Nicholas G. Davies, Petra Klepac, Yang Liu, Kiesha Prem, Mark Jit, CMMID COVID-19 working group & Rosalind M. Eggo Nature Medicine (June 16, 2020).

<sup>19</sup> School closures ‘a mistake’ as no teachers infected in classroom: The Times of London, published 22 July 2020.

rational basis test, let alone a test based on strict scrutiny, with no compelling interest, and where the policy itself is not narrowly tailored. A narrowly tailored policy would compel all adults to wear masks. A narrowly tailored test would allow for students' temperatures to be monitored and do what is possible to maintain social distancing in the classroom. A narrowly tailored policy would involve having students wash their hands frequently. A Mitigation Plan that compels students to wear a mask that is not properly fitted which invites the very conduct we would hope to avoid (having hands touching the face) and is a recipe for failure.

63. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from implementing and enforcing the Mitigation Plan regarding mask mandates. Pursuant to Texas Civil Practice and Remedies Code § 37 et seq. and Tex. R. Civ. P. 680 et seq., Plaintiffs are entitled to declaratory relief and temporary, and permanent injunctive relief invalidating and restraining enforcement of Defendants' mask mandate.

## **2. The Facemask Order Creates a System of Education that is Both Separate and Unequal**

64. Under Defendants' Mitigation Plan, if Plaintiffs elect not to force their children to wear a mask over seven (7) hours a day, the child is sentenced to the Katy Virtual Academy. Specifically, the Defendants' Mitigation Plan states, "**Students who refuse to wear a face covering will be moved to Katy Virtual Academy for the duration of the grading period.**" (Exhibit "C")

65. In addition, those students who either refuse to comply or cannot comply with the Defendants' facemask order will be relegated to virtual learning off campus, i.e., Katy Virtual Academy.

66. Such virtual or e-learning is inadequate, and provides a separate and unequal education in violation of the Texas Constitution. In addition, to engage in virtual learning has a cost to the parents involved.

67. In traditional classrooms, teachers can give students immediate face-to-face feedback. Students who are experiencing problems in the curriculum can resolve them quickly and directly either during the lecture or during the dedicated office hours. Personalized feedback has a positive impact on students, as it makes learning processes easier, richer, and more significant, all the while raising the motivation levels of the students. Virtual learning, on the other hand, still tends to struggle with student feedback.

68. The virtual learning methods currently practiced in education tend to make Participating students undergo contemplation, remoteness and a lack of interaction. As a result, many of the students and teachers who inevitably spend much of their time online can start experiencing signs of social isolation, due to the lack of human communication in their lives. Social isolation coupled with a lack of communication often leads to several mental health issues such as heightened stress, anxiety, and negative thoughts.

69. Lack of self-motivation among students continues to be one of the primary reasons why students fail to complete online courses. In traditional classrooms, there are numerous factors which constantly push students towards their learning goals. Face-to-face communication with professors, peer-to-peer activities, and strict schedules all work in unison to keep the students from falling off track during their studies. In the setting of an online or virtual learning environment, however, there are fewer external factors which push the students to perform well. In many cases, the students are left to fend for themselves during their learning activities, without anyone constantly urging them on towards their learning goals.

70. All educational disciplines are not created equal, and not all study fields can be effectively used in virtual learning.

71. Aside from providing what is a separate and unequal education that is a poor substitute for those receiving education that is hands on and in school, one that is not free in any sense of the word, it is also unhealthy to sit a small child in front of a computer screen six (6) hours a day.

72. The American Academy of Pediatrics recommends parents place a reasonable limit on media. Elementary school-age children who watch TV or use a computer more than 2 hours per day are more likely to have emotional, social, and attention problems. Those problems include: educational problems, obesity, sleep problems and violence.<sup>20</sup>

73. The Defendants' policy concerning facemasks results in some parents having to decide between the adverse impacts associated with long term facemask use, and the deleterious effects of virtual learning. This is why the Defendants' policy fails to meet the standard required when interfering with a child's a fundamental right to a free education, the enactment of a policy that is narrowly tailored in order to obtain a compelling interest. Instead, the Defendants' facemask policy creates far more problems than it would ever hope to solve, at the short- and long-term expense to children.

74. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from implementing and enforcing their mask mandate. Pursuant to Texas Civil Practice and Remedies Code §37 et seq. and Tex. R. Civ. P. 680 et seq., Plaintiffs are entitled to declaratory relief and temporary, and

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<sup>20</sup> According to the American Academy of Child and Adolescent Psychiatry.

permanent injunctive relief invalidating and restraining enforcement of Defendants' mask mandate.

75. Plaintiffs found it necessary to engage the services of private counsel to vindicate their rights under the law and request the award of attorney fees to vindicate their rights.

### **3. Defendants' Facemask Order Violates Parental Authority to Determine Their Minor Child's Medical Treatment**

76. The Defendants' mask policy that requires minors to wear masks, as is being done here, meets the definition of a medical device.<sup>21</sup> Such wearing of a device interferes with the parents' right to choose the medical decision and treatments for their minor children in violation of the Texas Family Code and the Texas Constitution.

77. The CDC and other agencies make clear that facemasks worn by children are not a substitute for social distancing. Further, most government agencies make clear that minor children should not wear masks while outside. The Defendants' policy requires a mask be worn at all times, inside or outside, from the bus to the school house door.

78. The decision to wear a mask is that of the parents to make, not the Defendants. Texas law has traditionally recognized the right of parents to make health care decisions on their children's behalf, on the presumption that before reaching the age of majority, young people lack the experience and judgment to make fully informed decisions. The wearing of facemasks, under

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<sup>21</sup> According to the United States Food and Drug Agency, a face mask is a device, with or without a face shield, that covers the user's nose and mouth and may or may not meet fluid barrier or filtration efficiency levels. It includes cloth face coverings as a subset. It may be for single or multiple uses, and if for multiple uses it may be laundered or cleaned. There are many products marketed in the United States as "face masks" that offer a range of protection against potential health hazards. Face masks are regulated by FDA when they meet the definition of a "device" under section 201(h) of the Act. Generally, face masks fall within this definition when they are intended for a medical purpose. Face masks are regulated under 21 CFR 878.4040 as Class I 510(k)-exempt devices (non-surgical masks).

these facts, is not one of those rare exceptions that permits the Government to overcome parental consent in the child's best interest. COVID 19 does not represent that level of imminent and immediate threat to allow government to overcome the rights of the parents on this issue.

79. What is proposed here is the wearing of a medical device for extended periods. A parent may feel quite strongly that such a medical device is not in the child's best interest.

80. In order to overcome the parents right in determining a child's medical care, the policy must be one that is so compelling, that the life of child is in clear danger but for the treatment. Such policy must be narrowly tailored and executed in only the most unique factual settings (e.g. lifesaving chemotherapy treatment; necessary blood transfusion; or kidney dialysis, to name a few). In light of the science that shows that COVID 19 is seven time less likely to harm a child than the flu, none of the factors normally required to overcome parental consent exist.

81. Accordingly, Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from implementing and enforcing the Mitigation Plan. Pursuant to Texas Civil Practice and Remedies Code § 37 et seq. and Tex. R. Civ. P. 680 et seq., Plaintiffs are entitled to declaratory relief and temporary, and permanent injunctive relief invalidating and restraining enforcement of Defendants mask mandate.

82. Plaintiffs found it necessary to engage the services of private counsel to vindicate their rights under the law and request the award of attorney fees to vindicate their rights.

#### **4. Defendants' Mask Order Violate the Equal Protection Clause and Due Process Clauses found in Article I §3 and §19 of the Texas Constitution**

83. Article I of the Texas constitution contains important provisions regarding the basic rights of all Texas citizens to be treated equally before the law and to have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded

for industry, and to acquire, possess and protect property. Unfortunately, none of these fundamental requirements were met in the underlying mask mandates that subjects children to wear facemasks based on an irrational fear that these very same children catch and spread COVID-19.

### **Equal Protection Under Article 1 § 3**

84. Article I, § 3 of the Texas Constitution states, “All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.” Here, the Defendants’ mask order has the practical effect of treating different classes of students differently. The disparate and unequal treatment of these separate entities is not fully explained and has no rational basis.

85. Equal Protection refers to the idea that a governmental body may not deny people equal protection of its governing laws. The governing body state must treat an individual in the same manner as others in similar conditions and circumstances.

86. Generally, a legislature may make distinctions among people for any proper purpose, as long as the distinction is rational.<sup>22</sup> There must be a logical relationship between the purpose of a law and any classification of people that it makes. Without this "rational basis," a law will be struck down when challenged in court. However, in this case, we are dealing with a Constitutional right to receive a free public education. Therefore, the test is far higher. The proposed distinctions here must have a compelling interest, and be narrowly tailored, and pass strict scrutiny.<sup>23</sup>

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<sup>22</sup> To pass the rational basis test, the statute or ordinance must have a legitimate state interest, and there must be a rational connection between the statute’s/ordinance’s means and goals.

<sup>23</sup> In *Reed v. Reed*, 404 U.S. 71 (1971), the United States Supreme Court invalidated an Idaho statute that preferred males over females in the selection of a probate administrator. The Court



87. The Facemask Order at issue here, however, is utterly irrational in light of how COVID-19 operates. Either everyone needs to wear a mask to ensure safety, or not.

**Due Process Under Article I, Section 19 of the Texas Constitution**

88. Article I, section 19 of the Texas Constitution states, “No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land.”

89. Defendants’ mask policy states that students who do not comply with the Defendants’ mask mandate will be moved out of the public schools and into virtual learning. This is tantamount to an expulsion from the public school and has great implications to families who have work requirements and are unable to monitor their children during the day.

90. The Defendants’ policy translates into expulsion from public schools and placement into virtual learning for those failing to comply with the mask mandate, on the grounds that the failure to wear a mask is a disruption to the classroom. The secondary effect of this policy is to employ teachers as the mask police for children who lack the maturity level to comply with this policy on a long-term basis, hour after hour, day after day.

91. This violates the due process rights of the parents and the minor because the policy itself does not provide a clear process by which these decisions are to be made. Some children are going to simply be incapable of maintaining the discipline necessary to wear a mask for hours at a time. The standard being applied to students is far more strident than any similar policy that is applied to adults.

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explained that the equal protection issue was “whether a difference in the sex of the competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of [the statute].” The Court concluded that it did not since it was arbitrary to prefer men over women merely to avoid hearings on the merits.

92. Schools should be safe and students should not have to be afraid. But students must also be able to enjoy the freedoms that enable them to learn and thrive. However, the policy as stated by the Defendants allows for the failure to wear a mask by a student to be defined as disruptive conduct, subject to discipline. Such passive conduct has never once been defined by any school policy as requiring discipline.

93. This policy has the absurdity of taking teachers, who have absolutely no medical training whatsoever, to monitor the use of a medical device, on minor children, who lack the requisite maturity and discipline to wear a device for extended periods beyond what is expected of grown adults. Never before has a standard been employed to minors that is higher and stronger in nature than that applied to the adults. The school teachers and administrators will get a break throughout the day. During these breaks, one envisions that the teachers and administrators themselves will take a break from wearing a mask. However, the students get no such accommodations. Failure to comply has consequences.

94. It is also important to remember that the consequences of this policy are employed for violating a rule that has absolutely no rational basis whatsoever, and does absolutely nothing to protect the students or teachers involved.

#### **H. REQUEST FOR RELIEF**

95. Plaintiffs reallege and incorporate the foregoing paragraphs here as if fully set forth herein.

96. Plaintiffs seek a declaration that: (a) Defendants' Mitigation Plan as it relates to its mandatory mask use provisions, on its face, violates Article VII, § 1 of the Texas Constitution; (b) Defendants' Mitigation Plan as it relates to mandatory mask use provisions, on its face, violates Article I, § 3 of the Texas Constitution; and (c) Defendants' Mitigation Plan as it relates to its

mandatory mask use provisions, on its face, violates Article I, § 19 of the Texas Constitution.  
Article I, § 19 of the Texas Constitution.

97. Plaintiffs further request the following relief:
- a. A temporary injunction enjoining Defendants from enforcing Defendants' Mitigation Plan as it relates to the mandatory mask use provisions;
  - b. A permanent injunction enjoining Defendants' from enforcing and/or implementing Defendants' Mitigation Plan as it relates to the mandatory mask use provisions.
  - c. an award of costs and attorneys' fees; and
  - d. all other relief that the Court may deem just, proper, and equitable.

Respectfully submitted,

**WOODFILL LAW FIRM, PC**

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