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**OPINION*, U.S. COURT OF APPEALS
FOR THE THIRD CIRCUIT
(APRIL 6, 2023)**

NOT PRECEDENTIAL

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

CYNTHIA STEPIEN, ON BEHALF OF HERSELF AND
HER MINOR CHILD; STAMATIA DIMATOS SCHRECK
ON BEHALF OF HERSELF AND HER THREE MINOR
CHILDREN; RYAN CODY, ON BEHALF OF HIMSELF AND
HIS MINOR CHILD J.C.; KELLY FORD, ON BEHALF OF
HERSELF AND HER MINOR CHILD A.F.; SIMONA
CHINDEA, ON BEHALF OF HERSELF AND HER TWO
MINOR CHILDREN; GABE MCMAHON; M.F.; M.K.N.;
K.B.; B.W.; L.R.; J.V.P.; V.P.; D.M.; B.M.; A.M.;
DANIELLE ESCAYG; AND ALL OTHERS
SIMILARLY SITUATED,

Appellants,

v.

GOVERNOR OF NEW JERSEY; NEW JERSEY
COMMISSIONER OF EDUCATION; NEW JERSEY
COMMISSIONER OF HEALTH

No. 21-3290

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

On Appeal from the United States District Court for
the District of New Jersey

(District Court No. 2:21-cv-13271)

District Court Judge: Honorable Kevin McNulty

Submitted Pursuant to Third Circuit LAR 34.1(a)

September 16, 2022

(Filed: April 6, 2023)

Before: KRAUSE, BIBAS, and RENDELL,
Circuit Judges.

OPINION

RENDELL, Circuit Judge.

When the COVID-19 pandemic struck, New Jersey Governor Philip Murphy mandated masks in New Jersey schools. Believing that was unconstitutional, Plaintiffs filed suit against Governor Murphy, Education Commissioner Allen-McMillan, and Health Commissioner Persichilli (“Defendants”) to enjoin the mandate’s enforcement. The District Court denied Plaintiffs’ request for an injunction and dismissed the lawsuit. After that, and while this appeal was pending, the Governor withdrew the mandate. Defendants say that makes the case moot and deprives the federal courts of jurisdiction. We agree. Federal courts may only decide “cases” and “controversies,” and that requires a live dispute between adverse parties. Because this case is not justiciable, we will affirm the order of the District Court.

I.¹

In March 2020, Governor Murphy issued Executive Order (“EO”) 103, through which he declared a state of emergency under the Emergency Health Powers Act, N.J. Stat. Ann. § 26:13-1. He used his authority under the Act to close all New Jersey elementary and secondary schools. By August 2020, the public health situation improved enough to reopen them, yet the Governor issued EO 175, which imposed health and safety protocols that included “[m]andatory use of face coverings by staff, students, and visitors” at schools. N.J. Exec. Order No. 175 ¶ 2b (Aug. 13, 2020).

Plaintiffs are New Jersey public school students, their parents, and a special education teacher. While the mandate was in place, they sued Defendants in the District Court, alleging that the mandate violated their rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution. They sought to enjoin the Governor from enforcing the mandate and to compel Defendants to issue an order forbidding the individual school districts from creating their own mandates. They also sought a declaration that school mask mandates violate students’ constitutional rights and thus the executive orders imposing them were “void as illegal[.]” App. 64. The District Court denied Plaintiffs’ request for a preliminary injunction as unlikely to succeed on the merits. Plaintiffs timely filed this appeal.

¹ We write primarily for the parties and so we recite only the facts essential to our decision.

II.

The District Court had federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343. Ordinarily, our jurisdiction to review the denial of preliminary injunctive relief is proper under 28 U.S.C. § 1292(a)(1), but as we explain below, that jurisdiction does not exist here because the case is moot.

Article III of the Constitution limits a federal court’s jurisdiction to “cases” and “controversies,” which exist only where actions “present live disputes” such that “both sides have a personal stake.” *Hartnett v. Pa. State Educ. Ass’n*, 963 F.3d 301, 305 (3d Cir. 2020). Cases on appeal become moot “if events have taken place during the pendency of the appeal that make it impossible for the court to grant any effectual relief whatsoever.” *Cty. of Butler v. Governor of Pa.*, 8 F.4th 226, 230 (3d Cir. 2021) (internal quotation marks omitted). But we hesitate to declare a case moot “where the defendant claims the matter has become moot owing to his voluntary cessation of the challenged action.” *Clark v. Governor of N.J.*, 53 F. 4th 769, 775 (3d Cir. 2022) (citing *Hartnett*, 963 F.3d at 306-07). And we recognize an exception to the mootness doctrine where a defendant’s actions are “capable of repetition yet evading review.” *Hamilton v. Bromley*, 862 F.3d 329, 335 (3d Cir. 2017) (cleaned up). The latter “applies only in exceptional situations where (1) the challenged action is in its duration too short to be fully litigated” before it stops or expires, “and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” *Id.* (cleaned up).

III.

On March 4, 2022, after Plaintiffs filed this appeal, Governor Murphy issued EO 292, ending the mask mandate. Around the same time, the Department of Health issued “guidance” to districts about when and how to impose new mask mandates, but it explained that “individual school districts and school boards” could “make the determination as to whether universal masking is appropriate for their schools.” Appellant’s Supp. App. 80. Defendants have argued that the mandate’s end made this case moot, and no exception to mootness applied, while Plaintiffs have countered that the case is still live, or the “capable of repetition yet evading review” exception applies.

We recently faced a similar challenge to expired pandemic restrictions in *Clark v. Governor of New Jersey*, 53 F.4th at 771. There, two church congregations and their pastors mounted a First Amendment challenge to an executive order limiting in-person, indoor religious worship gatherings. *Id.* at 772. Six days after they sued, the Governor rescinded the challenged order, and he gradually ended all restrictions over the next several months. *Id.* at 772-73. We found the eliminated restrictions left “no ‘effectual relief whatsoever’” for us to grant, rendering the case “facially moot.” *Id.* at 776. And for three instructive reasons, we rejected the plaintiffs’ argument that the Governor’s voluntary cessation of the challenged conduct militated against mootness: (1) the public health situation had changed from the beginning of the pandemic; (2) the Governor did not reimpose restrictions during the waves of COVID variants that followed; (3) and it was not reasonably likely that future restrictions would resemble the original ones

enough to constitute the same legal controversy. *Id.* at 777-81. All of that made it “absolutely clear” that the State’s “allegedly wrongful behavior” would not recur, so we ruled that the case was moot. *Id.* at 775 (quotation omitted).

Here, given the similarity of the issues, we asked the parties to file supplemental briefs addressing whether this case is moot based on our ruling in *Clark*. The State urges that *Clark* requires us to find that it is and that neither voluntary cessation nor the capable of repetition yet evading review exception to mootness compel a different result.² But Plaintiffs urge that the case is still live, notwithstanding *Clark*. They point out that the complaint in *Clark* focused only on the terminated order, yet Plaintiffs here also seek an order requiring school districts to cease issuing any mandates on their own.

The challenged mandate here “was a product of the pandemic’s early stages” and Plaintiffs grounded their objections “in the mandate’s particulars.” *Resurrection Sch. v. Hertel*, 35 F.4th 524, 530 (6th Cir. 2022) (en banc). That requires us to measure the mandate and Plaintiffs’ objections to it against the backdrop of the grave public health conditions that made the mandate necessary. The upshot is Plaintiffs can succeed only if the resurfacing controversy has

² In the supplemental briefing, Defendants argue Plaintiffs waived any reliance on voluntary cessation. Under ordinary circumstances, we would agree, but we asked the parties to brief mootness generally, and that includes all scenarios that militate against mootness. But as we explain below, it makes no difference because the facts before us show that voluntary cessation of the challenged conduct does not rescue the case from mootness.

the same fit between the existing conditions and “the mandate’s particulars.” *Id.* But as we explained in *Clark*, that fit is no longer the same: vaccines, therapeutics, and other mitigation measures have changed the COVID landscape for the better. 53 F.4th at 778. And Governor Murphy’s decision not to dial up new mask mandates even as Omicron surged suggests those mandates will not recur unless COVID takes a dramatic turn for the worse. *Id.* at 779. Yet, even if he did, that would create an altogether different fit between any new mask mandate and the reality on the ground, birthing a different controversy between the parties.³

Plaintiffs seek refuge in the concept of voluntary cessation and the “capable of repetition yet evading review” exception to mootness. They also try to distinguish *Clark* based on their request for an order from Defendants. None of these arguments pass muster. We start with voluntary cessation. We have explained that “in voluntary-cessation cases, defendants’ burden of showing mootness is heavy.” *Hartnett*, 963 F.3d at 307 (internal citation omitted). To carry this burden, the defendant must show that it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Fields v.*

³ Moreover, Plaintiffs misplace their reliance on *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam). There, in an opinion issued on November 25, 2020, the Court split on the need for relief. The majority viewed the situation as involving a “constant threat” that gathering restrictions would be reimposed, *id.* at 68, while the Chief Justice and the dissenters believed it was unwise to issue “[a]n order telling the Governor not to do what he’s not doing,” *id.* at 75 (Roberts, C.J., dissenting). This case presents the latter situation.

Speaker of the Pa. House of Representatives, 936 F.3d 142, 161 (3d Cir. 2019) (quotation omitted). The same reasons that convinced us the case was moot in *Clark* lead us to reach that conclusion here. Public health conditions have changed dramatically since the dawn of the pandemic. Infection rates are down, vaccination rates are up, and officials have more arrows in their quiver to mitigate and treat COVID-19. Those increased options have borne fruit that undermines Plaintiffs' argument: despite a surge in infection rates during the Omicron wave, the Governor did not reimpose masking restrictions. The record shows that the Governor withdrew and refused to reimpose the mandate because of the changed health conditions, not this lawsuit. Beyond all that, we disagree that this case presents anything like *Roman Catholic Diocese* and the constantly shifting restrictions that troubled the Supreme Court there.⁴ Thus, we conclude that the termination of the mandate was not the kind that triggers our skepticism of a party's claim of mootness due to voluntary cessation of the allegedly wrongful behavior. See *Hartnett*, 963 F.3d at 306-07.

⁴ In *Roman Catholic Diocese*, the state imposed a complex regime of restrictions on gatherings that differed by region, and the state rapidly relaxed and tightened them in response to changing health conditions. 141 S. Ct. at 68. Those factors were enough to convince the Supreme Court that dropping the restrictions did not moot the case because history showed they could be reimposed at any time and in an unpredictable way. See *id.* at 68-69. But that was a different situation than the one in this case: the restrictions here were uniform, Defendants have not reimposed the school mask requirement once since rescinding it, and even a major uptick in cases during the Omicron wave did not persuade Defendants to act otherwise.

Plaintiffs fare no better under the exception to mootness for acts capable of repetition yet evading review. To invoke the exception, Plaintiffs must show “there is a reasonable expectation that the same complaining party will be subject to the same action again,” *Hamilton*, 862 F.3d at 335 (quotation omitted), and “[t]he action that must be repeatable is the precise controversy between the parties.” *Planned Parenthood of Wis., Inc. v. Azar*, 942 F.3d 512, 517 (D.C. Cir. 2019) (internal quotation marks omitted). Our reasoning in *Clark* does double duty here because, at bottom, this exception mirrors voluntary cessation by testing whether there is a reasonable expectation the challenged behavior will recur. *See, e.g., Brach v. Newsom*, 38 F.4th 6, 15 (9th Cir. 2022) (en banc) (“Our rationale for rejecting [the capable of repetition] exception mirrors much of our analysis regarding . . . voluntary cessation[.]”); *Resurrection Sch.*, 35 F.4th at 530 (finding that the capable of repetition exception “inapposite for largely the same reasons” that voluntary cessation did not counsel against a finding of mootness). And as we have explained, there is no such expectation here.

Finally, we conclude that Plaintiffs’ remaining request for an order compelling Defendants to order the districts not to issue their own mandates is also nonjusticiable. For one thing, Plaintiffs lack Article III standing. “To establish Article III standing, a plaintiff must demonstrate (1) an injury-in-fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision.” *Finkelman v. Nat’l Football League*, 810 F.3d 187, 193 (3d Cir. 2016) (internal quotation marks omitted).

But Plaintiffs are hard-pressed to show an injury stemming from district-specific mandates that districts haven't even drawn up, let alone put in place. Instead, they point to "conjectural or hypothetical" future mandates, not ones that are "actual or imminent." *Id.* (quoting *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 278 (3d Cir. 2014)). And as we have already explained, the drastic improvement in COVID mitigation measures since the pandemic's early days has led many New Jersey school districts to hold off on new mandates—even as Omicron and other variants surged. That makes any future mandates unlikely and leaves Plaintiffs to "rely on a chain of contingencies or mere speculation" that can't support standing. Plaintiffs don't show that future mandates are "imminent," so they fail to state a cognizable injury-in-fact sufficient for Article III standing. *Id.* (quotation omitted).

Yet even if Plaintiffs could show an injury-in-fact, they would still fail to satisfy the causation element of Article III standing because it is not clear they could trace that injury "to the challenged action of the [D]efendant[s]" rather than "the independent action of some third party [that is] not before the court." *Id.* (quoting *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 137–38 (3d Cir. 2009)). Plaintiffs named only the Governor, the Commissioner of Education, and the Commissioner of Health as Defendants. But under New Jersey law, school boards appear to have independent power to enact mask mandates given their broad authority over "the government and management" of in-district schools. N.J. Stat. Ann. § 18A:11-1(c). It follows that any injury to Plaintiffs from district-specific mandates would be fairly traceable

not to Defendants’ conduct, but to “unfettered choices made by independent actors not before the court,” namely the school districts. *R.K. v. Lee*, 53 F.4th 995, 999 (6th Cir. 2022) (internal citation omitted). And as we recognized in *Clark*, the Defendants’ mere “supervisory authority” would not make this case justiciable. *See Clark*, 53 F.4th at 780-81.

Relatedly, Plaintiffs’ request for injunctive and declaratory relief to remedy future district-imposed mandates is not ripe for our review. Ripeness examines whether an action is premature and requires courts to abstain from deciding a dispute until it becomes “sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine.” *Sherwin-Williams Co. v. Cnty. of Delaware, Pa.*, 968 F.3d 264, 272 (3d Cir. 2020) (internal quotation marks omitted). But “[a] dispute is not ripe for judicial determination if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Id.* (quoting *Wyatt, V.I., Inc. v. Gov’t of V.I.*, 385 F.3d 801, 806 (3d Cir. 2004)) (cleaned up). And even though parties “seeking declaratory relief need not wait until the harm has actually occurred to bring the action[,]” they still must show that the future event has a “real and substantial” probability of happening and that it is of “sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Id.* (quotation marks omitted).

Simply put, Plaintiffs’ claims focused on future district-imposed mandates are not ripe for largely the same reasons they fail to show an injury-in-fact: the claims require us to speculate about whether the districts will ever impose mask mandates and what those mandates would look like. *See id.* Yet individual

New Jersey school districts may never impose their own mask mandates in the future. And that seems probable considering that the vast majority of districts did not re-implement such mandates as COVID variants surged. The upshot is Plaintiffs offer nothing but uncertainty about whether any New Jersey school district will impose a mask mandate in the future. Until the threat of such a mandate becomes “sufficiently concrete,” Plaintiffs’ constitutional challenge is premature and thus “unfit for judicial resolution.” *Id.* (quotation marks omitted).

Because Plaintiffs cannot establish the existence of a case or controversy that arises from future district-imposed mask mandates, their related requests for injunctive and declaratory relief are nonjusticiable.

IV.

Plaintiffs seek “an insurance policy that” there will “never ever [be another school mask mandate], even in the face of yet another unexpected emergency or contingency.” *Brach*, 38 F.4th at 9. But the federal courts do not insure against such a possibility. Plaintiffs’ case is moot and there is no impending threat of harm or recurrence of harm. For those reasons, we will affirm the order of the District Court.

**JUDGMENT, U.S. COURT OF APPEALS
FOR THE THIRD CIRCUIT
(APRIL 6, 2023)**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CYNTHIA STEPIEN, ON BEHALF OF HERSELF AND
HER MINOR CHILD; STAMATIA DIMATOS SCHRECK
ON BEHALF OF HERSELF AND HER THREE MINOR
CHILDREN; RYAN CODY, ON BEHALF OF HIMSELF AND
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K.B.; B.W.; L.R.; J.V.P.; V.P.; D.M.; B.M.; A.M.;
DANIELLE ESCAYG; AND ALL OTHERS
SIMILARLY SITUATED,

Appellants,

v.

GOVERNOR OF NEW JERSEY; NEW JERSEY
COMMISSIONER OF EDUCATION; NEW JERSEY
COMMISSIONER OF HEALTH

No. 21-3290

On Appeal from the United States District Court
for the District of New Jersey
(District Court No. 2:21-cv-13271)
District Court Judge: Honorable Kevin McNulty

Before: KRAUSE, BIBAS, and RENDELL,
Circuit Judges.

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted on September 16, 2022.

On consideration whereof, it is now ORDERED and ADJUDGED that the Judgment entered by the District Court on December 8, 2021, is hereby AFFIRMED. Costs shall be taxed against Appellants.

All of the above in accordance with the Opinion of this Court.

ATTEST:

/s/ Patricia S. Dodszuweit
Clerk

DATE: April 6, 2023

**OPINION, U.S. DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY
(DECEMBER 7, 2021)**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CYNTHIA STEPIEN ON BEHALF OF HERSELF AND HER MINOR CHILD; STAMATIA DIMATOS SCHRECK, ON BEHALF OF HERSELF AND HER THREE MINOR CHILDREN; RYAN CODY, ON BEHALF OF HIMSELF AND HIS MINOR CHILD J.C.; ELLY FORD ON BEHALF OF HERSELF AND HER MINOR CHILD A.F.; GABE MCMAHON; M.F.; M.K.N.; K.B.; B.W.; L.R.; J.V.P.; V.P.; D.M.; B.M.; A.M.; and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

PHILIP D. MURPHY, GOVERNOR; ANGELICA ALLEN-MCMILLAN, COMMISSIONER OF EDUCATION;
JUDITH M. PERSICHILLI,
COMMISSIONER OF HEALTH

Defendants.

Civ. No. 21-CV-13271 (KM) (JSA)

Before: Kevin MCNULTY,
United States District Judge.

OPINION

KEVIN MCNULTY, U.S.D.J.:

This matter comes before this court on the plaintiffs' motion for an Order to Show Cause as to Vacating or Staying Executive Orders 251 and 253. (DE 12.)¹ Plaintiffs seek a preliminary injunction vacating the executive orders ("EOs") insofar as they require students, staff, and visitors to New Jersey schools to wear face masks while inside school buildings.

It is tempting to view the question before the court as "Should students and others be required to wear masks in school buildings?" That is a temptation a court must resist. In general, the wisdom of such public policies is not an issue for the courts, but for the people's elected representatives. The court's role is far more modest.

That said, the U.S. Constitution does impose limits on governmental action, which a court is bound to enforce. Plaintiffs assert that the in-school mask mandate exceeds those limits. They invoke the Equal Protection clause. But where a rule does not implicate

¹ Certain citations to the record are abbreviated as follows:

DE = docket entry in this case

Mot. = Plaintiffs' Brief in support of Application for Permanent injunctive relief (DE 12-2)

Opp. = Defendants' brief in opposition to Plaintiffs' motion for preliminary injunctive relief (DE 24)

Amicus Br. = Brief of Amici Curiae New Jersey Chapter of The American Academy of Pediatrics and American Academy of Pediatrics in Opposition to Plaintiffs' Motion For Preliminary Injunctive Relief (DE 41-1)

a suspect classification, for example, race or ethnicity, the Court's authority to second-guess policy decisions is very limited. Plaintiffs also invoke the First Amendment. But where a rule incidentally affects speech for reasons not related to its content, it may be allowed as a permissible "time, place, and manner" regulation. In short, constitutional provisions designed primarily to prohibit unequal treatment of minorities and suppression of unpopular messages have some application here, but that application is limited.

The United States Supreme Court instructs us that "schools must teach by example the shared values of a civilized social order." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986). One such value is that, when faced by a common catastrophe like a pandemic, we must all make some sacrifices to protect ourselves and our more vulnerable neighbors. Citizens on both sides of this issue surely have in common a concern for our children's welfare, although they may differ as to how that goal should be pursued. And all must admit that these EO^s impose some hardship upon those who are required to wear masks while in school buildings. Considered apart from their health benefits, the masks may also be seen to have educational disadvantages. Nevertheless, the decision to impose the in-school mask mandate is a rational one, and its burden on students and others is easily justified by the government's interest in controlling the spread of COVID-19 while maintaining in-person schooling.

I hold that the government acted within broad constitutional bounds when it enacted the in-school mask requirement that is challenged here. The motion for a preliminary injunction is denied.

I. Background

In late 2019, a novel coronavirus, SARS-CoV-2, which causes the disease known as COVID-19, began to circulate in China and quickly spread around the world. Beginning in March 2020, state and local governments in the United States began issuing emergency orders to reduce the spread of COVID-19. In New Jersey these orders led many non-essential businesses to shut down and schools to shift to remote learning, often *via* Zoom or other video applications. To date, well over a million New Jerseyans have contracted COVID-19 and more than 25,000 have died. NJ COVID-19 Dashboard, Cases and Trends, https://www.nj.gov/health/cd/topics/covid2019_dashboard.shtml. Nationally, there have been more than 48 million confirmed cases of COVID-19 and 780,000 deaths. New York Times, Coronavirus in the U.S., <https://www.nytimes.com/interactive/2021/us/covid-cases.html>. Just since defendants filed their brief on September 8, 2021, nearly 150,000 Americans have died from COVID-19. (Opp. at 1.) Even after highly effective vaccines became widely available in the Spring of 2021, COVID-19 continued to spread, because of the emergence of new, more virulent variants, including the Delta variant, and because a large proportion of the population remains unvaccinated. (DE 24-9, Exs. 30-38.)

Since the beginning of this school year, more than 25,000 K-12 students in New Jersey have tested positive for COVID-19. NJ COVID-19 Dashboard, School-Related Dashboards, https://www.nj.gov/health/cd/topics/covid2019_dashboard.shtml One study found that among children between the ages of 5 and 14, COVID-19 was the sixth leading cause of death

in August and September 2021. JARED ORTALIZA, KENDAL ORGERA, KRUTIKA AMIN, AND CYNTHIA COX, *COVID-19 continues to be a leading cause of death in the U.S. in September 2021*, Peterson-KFF Health System Tracker, <https://www.healthsystemtracker.org/brief/covid19-and-other-leading-causes-of-death-in-the-us>; see also JEFFERSON JONES, *Epidemiology of COVID-19 in Children Aged 5 – 11 years*, CDC ACIP Meeting, Nov 2, 2021, <https://www.cdc.gov/vaccines/acip/meetings/downloads/slides-2021-11-2-3/03-COVID-Jefferson-508.pdf>. Nearly one third of all child cases of COVID-19 nationally occurred in the three-month period between August 13 and November 11, 2021, driven by the resumption of in-person school and the more contagious Delta variant. (Amicus Br. at 4 (citing CHILDREN'S HOSP. ASS'N & AM. ACAD. OF PEDIATRICS, *Children and COVID-19: State Data Report* at Appx. Tab. 2A, Nov. 11, 2021), <https://downloads.aap.org/AAP/PDF/AAP%20and%20CHA%20-%20Children%20and%20COVID19%20State%20Data%20Report%2011.11%20FINAL.pdf>.)

Remote learning was unpleasant for many students and teachers, and extremely inconvenient for working parents. Studies have shown that it is an inferior method of instruction as compared to in-person education. (DE 24-12, Ex. 41.) Thus, as the 2021–22 school year approached, New Jersey Governor Phil Murphy sought to have students return to in-person schooling while also taking steps to inhibit or prevent the spread of the COVID virus and its variants. To achieve that goal, he issued EO 251 on August 6, 2021. EO 251 emphasized the importance of in-person learning, the lack of availability of vaccines

for children under 12 years of age,² and the danger posed by the Delta variant. With narrow exceptions, it mandated that everyone entering a school building, including but not limited to students, must wear a face mask. (EO 251, at 2-6; DE 24-1 ¶ 75).³ At the time that EO was issued, more than 4 million children across the country had been infected with COVID-19, more than 17,000 children had been hospitalized, and 371 children had died from the disease. (DE 24-8, Ex. 24.)

On July 2, 2021, plaintiffs filed a complaint in this court, requesting that I enjoin the executive orders.⁴ (DE 1.) A first amended complaint was filed a week later. (DE 2.) On August 6, 2021, Governor Murphy issued EO 251, renewing the mask mandate in the state's schools. (DE 11 ¶ 26.) On August 26, 2021, Murphy issued a supplementary EO, partially related to masks in schools, numbered EO 253. (Mot. at 36.) Plaintiffs filed a second amended complaint

² Very recently, in November 2021, vaccines were approved for children between the ages of 5 and 11. CDC, *CDC Recommends Pediatric COVID-19 Vaccine for Children 5 to 11 Years*, Nov. 2, 2021, <https://www.cdc.gov/media/releases/2021/s1102-PediatricCOVID-19Vaccine.html>. Whether widespread vaccination will lead to a change of policy regarding masking in schools remains unsettled.

³ Later in August 2021, Murphy issued EO 253, also challenged by plaintiffs. That EO dealt partially with masking but did not make any policy changes that are relevant to the analysis of this case, so I focus on EO 251.

⁴ Technically, injunctive relief on a Section 1983 claim would be directed against an official charged with enforcing the executive order in that person's official capacity. *See generally Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

on August 30, 2021. (DE 11.) That same day, plaintiffs also sought an Order to Show Cause as to Vacating or Staying the EO^s. (DE 12.) I ordered the parties to brief the issues and appear for oral argument *via* videoconference on September 9, 2021. (DE 16.) Based on the parties' briefs, factual submissions, and oral argument, I denied the plaintiffs' request insofar as it sought a temporary restraining order immediately suspending the operation of the EO^s. (DE 12, 24, 25.)

After the initial hearing, I ordered expedited discovery, and plaintiffs moved to compel the production of certain documents. (DE 28–30.) I denied the motion to compel, in part as unnecessary (because the defendants had complied) and in part because the material sought was protected by deliberative process privilege. (DE 36.)

After the close of supplemental discovery on October 22, 2021, I permitted additional briefing to be submitted by November 23, 2021. (DE 38.) The American Academy of Pediatrics (“AAP”) and its New Jersey chapter moved to file an amicus brief on November 19, 2021. (DE 41.) Plaintiffs filed a supplemental brief on November 23, 2021. (DE 45.) For responses to the AAP’s motion to file an amicus brief, I set a deadline of Friday, December 3, 2021. (DE 44.) As of today, December 7, 2021, no responses have been filed. Plaintiffs’ motion, insofar as it sought a preliminary injunction, is therefore fully briefed and ripe for decision.

II. Preliminary Issues

a. Motion to file an Amicus Brief (AAP)

Federal Rule of Civil Procedure 29 allows a private *amicus curiae* to file a brief with leave of the court. Fed. R. Civ. P. 29(a)(2). On November 19, 2021, the AAP and its New Jersey chapter moved to file an amicus brief in this case. (DE 41.) The AAP is a national organization of pediatricians that has over 67,000 members and over the last year has advised governments and private organizations on best practices related to children and the COVID-19 pandemic. (DE 41-1 at 2.) The proposed amicus brief contains a great deal of information related to the use of masks in schools that is helpful to the Court as background. The AAP's motion to file its amicus brief (DE 41) and the related motions to appear *pro hac vice* (DE 42, 43) are therefore granted.

b. Motion to intervene

Federal Rule of Civil Procedure 24 governs intervention by nonparties. A party may intervene of right if it "(1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. (a). A private party may be given permission by the court to intervene if it "(A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that

shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24 (b).

Reginald Burgess, a resident of California, has moved to intervene in this case. (DE 6.) Burgess asks this court to “order masking nationwide at the command of the CDC as well as vaccines be taken by those capable.” (DE 6 at 6.) Burgess cites *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). He identifies no federal rule or statute that provides a basis for him to intervene. He does not appear to have any particularized interest, but only a belief concerning the best means of preventing the spread of COVID-19. (DE 6 at 5.) His arguments and citations add nothing to what the parties and the Court could marshal on their own. Although a generalized interest in these issues is shared by many citizens, it does not provide a basis for intervention. Mr. Burgess’s motion to intervene (DE 6) is therefore denied.

III. Legal Standard

“Preliminary injunctive relief is an ‘extraordinary remedy, which should be granted only in limited circumstances.’” *Ferring Pharm., Inc. v. Watson Pharm., Inc.*, 765 F.3d 205, 210 (3d Cir. 2014) (quoting *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 586 (3d Cir. 2002)). In order to obtain a preliminary injunction, the moving party must show the following:

- (1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured . . . if relief is not granted. . . . [In addition,] the district court, in considering whether to grant a preliminary injunction, should take into account, when

they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.

Reilly v. City of Harrisburg, 858 F.3d 173, 176 (3d Cir. 2017) (alteration in original) (quoting *Del. River Port Auth. v. Transamerican Trailer Transport, Inc.*, 501 F.2d 917, 919-20 (3d Cir. 1974)). The movant bears the burden of establishing “the threshold for the first two ‘most critical’ factors. . . . If these gateway factors are met, a court then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief.” *Id.* at 179. “While each factor need not be established beyond doubt, they must combine to show the immediate necessity of injunctive relief.” *Cmty. Servs. v. Heidelberg Twp.*, 439 F. Supp. 2d 380, 395 (M.D. Pa. 2006).

The decision to grant or deny a preliminary injunction is within the Court’s discretion. *See Am. Express Travel Related Servs., Inc. v. Sidamon Eristoff*, 669 F.3d 359, 366 (3d Cir. 2012). Moreover, the primary purpose of preliminary injunctive relief is “maintenance of the status quo until a decision on the merits of a case is rendered.” *Acierno v. New Castle Cty.*, 40 F.3d 645, 647 (3d Cir. 1994). Particular scrutiny is required where, as here, the plaintiff is asking the Court to order an affirmative act that changes the status quo. *See Bennington Foods LLC v. St. Croix Renaissance, Group LLP*, 528 F.3d 176, 179 (3d Cir. 2008) (“[W]here the relief ordered by the preliminary injunction is mandatory and will alter the status quo, the party seeking the injunction must meet a higher standard of showing irreparable harm

in the absence of an injunction.”); *Acierno*, 40 F.3d at 653 (“A party seeking a mandatory preliminary injunction that will alter the status quo bears a particularly heavy burden in demonstrating its necessity.”).

IV. Discussion

I first examine plaintiffs’ Equal Protection claims and then examine their First Amendment claims. I hold that plaintiffs have not demonstrated that they are likely to succeed on the merits of either, and therefore deny their request for a preliminary injunction.⁵

a. Equal Protection

Written in the aftermath of the Civil War to guarantee a meaningful measure of freedom to formerly enslaved people, the Fourteenth Amendment declares that no state can “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Over the past century and a half, the Supreme Court has defined the Equal Protection Clause as “a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). To quote *Ramos v. Town of Vernon*, upon

⁵ Plaintiffs also bring claims asserting violations of New Jersey administrative law. (Mot. at 31-34.) These claims do not invoke federal law, and in any event would likely be barred by the Eleventh Amendment. *King v. Christie*, 981 F. Supp. 2d 296, 310 n.12 (D.N.J. 2013). It appears that plaintiffs are pursuing those claims in state court. Insofar as plaintiffs seek a preliminary injunction based on state administrative law, their request is denied.

which plaintiffs rely heavily, the Equal Protection Clause requires the state to “treat similarly situated individuals similarly, in the absence of an adequate reason to distinguish between them.” 353 F.3d 171, 174 (2d Cir. 2003). From this basic rule, the inverse proposition follows: the state may treat differently situated individuals differently. *See Vacco v. Quill*, 521 U.S. 793, 799 (1997). How different or similar those situations must be is largely dictated by the level of scrutiny that the law requires.

The first step, then, is to determine what level of scrutiny is appropriate for these EOs. A court’s level of scrutiny differs based on the nature of the classification. Strict scrutiny is appropriate if the challenged regulation targets a suspect class or burdens the exercise of a fundamental right.⁶ *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *Artway v. Att’y Gen. of State of N.J.*, 81 F.3d 1235, 1267 (3d Cir. 1996). In other cases, rational-basis scrutiny is appropriate; the challenged regulation “need only be rationally related to a legitimate government goal.” *Artway*, 81 F.3d at 1267.

School children do not constitute a suspect class. *See West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1365 (10th Cir.), cert. denied, 531 U.S. 825 (2000); *Simmermon v. Gabbianelli*, 932 F. Supp.

⁶ In equal protection analysis, it is the classification itself that must impinge on the fundamental right. *See Connelly v. Steel Valley Sch. Dist.*, 706 F.3d 209, 213-14 (3d Cir. 2013), as amended (May 10, 2013). Plaintiffs also argue that the EOs directly infringe students’ First Amendment rights to free speech and association. That claim I analyze separately at Section III.b, *infra*.

2d 626, 631 (D.N.J. 2013).⁷ Similarly, the classification at the heart of the EO斯—that masks are required within school buildings but are not required in many other locations does not burden a fundamental right. The EO斯 do not, for example, distinguish between persons in public schools and persons in religious schools, a classification which could potentially burden the First Amendment right to free exercise of religion. Nor do the EO斯 differentiate between, *e.g.*, regions of the state, a classification which might carry a disparate racial impact. Rather, the EO斯 establish a blanket rule: With select exemptions, everyone who enters a school building in New Jersey must wear a mask while inside the building.

Because the mask mandate does not target a suspect class or burden a fundamental right, it receives not strict scrutiny but rational-basis review. *See W.S. by Sonderman v. Ragsdale*, 2021 WL 2024687, at *2 (N.D. Ga. May 12, 2021) (“Rational basis is the proper standard of review for the mask mandate. The mandate neither discriminates against a protected class nor infringes a fundamental right.”). Rational-basis review in equal protection analysis “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993) (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). Government actions analyzed under the rational basis standard are accorded a “strong presumption of validity” and should be upheld so long as there is a

⁷ Although plaintiffs sometimes refer to the EO斯 imprecisely (Mot. at 31), the EO斯 do not apply solely to schoolchildren but rather to anyone entering a school building.

“rational relationship between the disparity of treatment and some legitimate governmental purpose.” *Heller*, 509 U.S. at 319-20. Indeed, “a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Beach Communications*, 508 U.S. at 313; *see also* *Donatelli v. Mitchell*, 2 F.3d 508, 513 (3d Cir. 1993).

Here, plaintiffs do not identify a group of students that is treated differently despite being similarly situated. The EO^s do not, for example, require masks at some schools but not others. Rather, plaintiffs object that those entering schools are required by law to wear masks, while many others, in non-school settings, are not.⁸ (Mot. at 36-37; DE 45 at ix-xi.) Essentially, plaintiffs argue that such a school/non-school distinction is irrational in relation to the goal of fighting the spread of COVID. Defendants, for

⁸ To be clear, the in-school mask mandate is not the only one. Plaintiffs concede that masks are also required by state law in, e.g., day care and health care facilities. (See Mot at 1-3; EO 264 (September 20, 2021), <https://nj.gov/infobank/eo/056murphy/pdf/EO-264.pdf>.) State restrictions were previously far broader, at one point amounting to a lockdown, but were incrementally relaxed in many settings. See EO 241 (May 17, 2021), <https://www.nj.gov/infobank/eo/056murphy/pdf/EO-241.pdf>.

Less directly relevant here are federal mask mandates, such as those that apply on New Jersey Transit trains, *see* FTA, Federal Mask Requirement for Transit, <https://www.transit.dot.gov/TransitMaskUp>, and within federal courthouses, *see* United States District Court for the District of New Jersey, COVID-19: Orders, Procedures and Changes, <https://www.njd.uscourts.gov/covid-19-orders-procedures-and-changes>.

their part, put forward a number of arguments explaining why the requirement that masks be worn in schools is rationally related to the goal of slowing the spread of COVID. (Opp. at 11-15, 36-37.)

Defendants' arguments easily clear the relatively low bar of rational basis scrutiny. To put it another way, defendants are not required to win the policy debate in order to prevail here. There are numerous bases on which a policy maker could conclude that requiring students, teachers, staff, and visitors at New Jersey schools to wear masks is rationally related to the legitimate government purpose of inhibiting the spread of COVID-19. Any one of those explanations would be sufficient to uphold the EOs against an equal protection challenge, but I will discuss a few.

First, it is undisputed that masks help to reduce the spread of COVID-19 by blocking many of the virus-containing droplets expelled from the mouth and nose when breathing and speaking. (Opp. at 13-15; DE 24-1 ¶ 47; DE 24-14, Exs. 53-59.) COVID-19 spreads more easily when people are in close proximity for extended periods of time, especially indoors, when there is little airflow. (DE 24-1 ¶ 45.) The Delta variant (and now the Omicron variant) spread more readily than earlier iterations of the SARS-CoV-2 virus. The Governor—accurately, as it turns out—anticipated that cases would increase in the months after he issued the EOs. (DE 24-9, Exs. 30-37; EO 251 at 2-3.)⁹ In-person schooling—conceded to be a

⁹ I do not suggest that this Court should be supervising state executive orders on an ongoing basis, following trends in the data. I cite figures only to confirm that the State's concerns have a basis in fact.

desirable goal—necessarily entails that students and teachers will be indoors, in close proximity, for extended periods of time. (DE 24-1 ¶ 51; DE 24-2 ¶ 50-51.) In addition, at the time the EO was issued, vaccines were not approved at all for children younger than twelve years of age. Thus, the single most effective means of reducing the spread of COVID-19 was unavailable, at least in the context of elementary school. (DE 24-1 ¶ 52).¹⁰ Consequently, both the CDC

Currently, new cases statewide are trending sharply upward, and the rate of transmission (R_t) is at 1.26. New Jersey, COVID-19 Information Hub, <https://covid19.nj.gov/> Both figures are well above the most recent, July 2021 lows.

Cases in K-12 schools are on a similar trend, both as to students and staff. The report dated November 28, 2021, showed 3,024 new student cases and 858 new staff cases for the preceding week. From September 1–November 25, 2021, weekly cases have approximately doubled to a rate of 2.66 cases/1000 students and 4.41 cases/1000 staff. <https://www.nj.gov/health/cd/topics/covid2019/dashboard.shtml> (“NJ COVID-19 School-related Dashboards”) (last visited Dec. 7, 2021). For comparison, institutions of higher education had rates of .46 cases/1000 students and .78 cases/1000 staff. *Id.* (“Higher Education” tab).

10 Vaccinations for children from 5–11 years of age were only recently approved. Thus far, only a small percentage of those younger children have been fully vaccinated. (Amicus Br. at 15 (citing AAP, Children and COVID-19 Vaccinations Trends, at 6, Nov. 3, 2021); *see also* <https://downloads.aap.org/AAP/PDF/Child%20Vaccinations%20Report%20US%20and%20by%20State%20Nov%203%20final.pdf>.) Nationally, full vaccination rates for children 5-11 are currently at 5.1%. CDC, Demographic Characteristics of People Receiving COVID-19 Vaccinations in the United States, <https://covid.cdc.gov/covid-data-tracker/#vaccination-demographic>. In New Jersey, as of December 1, 2021, 17% of children 5-11 and 73% of children 12-17 had received at least one dose. AAP, Children and COVID-19 Vaccinations Trends as of December 1 2021, <https://downloads.aap.org/AAP/PDF/Child%20Vaccinations%20Report%20US%20and%20by%20State%20Nov%203%20final.pdf>

and the American Academy of Pediatrics (“AAP”) recommend universal masking in schools to reduce viral transmission during the school day. (DE 24-1 ¶ 71; Amicus Br. at 10 (citing AAP, *COVID-19 Guidance for Safe Schools*, [arguendo that it is possible to disagree with that recommendation. Nevertheless, a reasonable public official or legislator could rationally opt to follow such authoritative guidance.¹¹](https://www.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/)

Of course, another effective way to reduce COVID transmission in schools would be to close schools and

20Dec%20revised.pdf.

By comparison, people 18 and over have been fully vaccinated at a rate of 71.5% nationally, CDC, Covid Data Tracker, https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total, and at a rate of 80.8% in New Jersey, CDC, COVID-19 Vaccinations in the United States, <https://data.cdc.gov/Vaccinations/COVID-19-Vaccinations-in-the-United-States-Jurisdi/unsk-b7fc/data>.

¹¹ Governor Murphy has suggested that the school mask mandate may be permitted to expire in January 2022 if a sufficient number of students have been vaccinated. LILO H. STAINTON, *Murphy: Mask mandate goes if parents vaccinate kids*, WHYY, Nov. 9, 2021, <https://whyy.org/articles/murphy-mask-mandate-goes-if-parents-vaccinate-kids/>. Such a potential policy change, however, is not yet concrete and does not moot plaintiffs’ claims in this case.

return to remote learning, as was done earlier in the pandemic. Following the opinion of medical and child development experts, however, the governor determined that the educational superiority of in-person learning justified the incremental risk of COVID transmission—provided that proper precautions, such as masking, were taken to inhibit the spread of the disease. (Opp. at 11; EO 251 at 2; DE 24-2 ¶ 45-55; DE 24-12, Ex 41.) Thus, it was rational and permissible for the governor to determine that in-person schooling with masks was preferable to another year of remote schooling.¹²

Plaintiffs argue that the mask mandate is under-inclusive and therefore irrational.¹³ (DE 45 at x-xi.)

¹² Although the issue is not raised in the briefing, it appears that remote schooling also had a major effect on parents' (and perhaps especially mothers') workforce participation. *See USHA RANJI, BRITTNI FREDERIKSEN, ALINA SALGANICOFF, AND MICHELLE LONG, Women, Work, and Family During COVID-19: Findings from the KFF Women's Health Survey*, Kaiser Family Foundation, <https://www.kff.org/womens-health-policy/issue-brief/women-work-and-family-during-covid-19-findings-from-the-kff-womens-health-survey/>. Helping parents return to work and thus aiding economic recovery is also a rational basis to require in-person schooling with masks.

¹³ In making this argument plaintiffs cite *BST Holdings, L.L.C. v. OSHA*, 2021 U.S. App. LEXIS 33698, *20 (5th Cir., November 12, 2021), a recent decision staying the OSHA emergency temporary standard requiring COVID vaccinations at large employers. That decision, which has no binding authority on this court, is based primarily on federal constitutional law, administrative law, and the OSHA enabling statute. To that extent, it does not address the issues of the executive power of the governor of the state of New Jersey. Generally, that a regulation is underinclusive is extremely weak evidence that the problem it addresses does not exist, or is not an emergency.

In short, they contend that it makes no sense for students, who are at relatively low risk of the most serious health impacts from COVID, to be required to wear masks while adults are free to congregate elsewhere, unmasked. (Mot. at 36-37; DE 45 at vi.) Preliminarily, it is important to note that the contrast is perhaps overdrawn. COVID, although more dangerous to older citizens, is nevertheless dangerous to children. One study has estimated that COVID-19 was, in recent months, the sixth leading cause of death for children between 5 and 14 years of age. ORTALIZA, et al., *COVID-19 continues to be a leading cause of death in the U.S. in September 2021*. Other studies conclude that a significant proportion of infected students suffer lasting health impacts, short of hospitalization and death. (DE 24-9, Ex. 29; Amicus Br. 5-6 (citing DANILO BUONSENSO, et al., *Preliminary evidence on long COVID in children*, Acta Paediatrica (2021), <https://onlinelibrary.wiley.com/doi/10.1111/apa.15870> and HELEN THOMSON, *Children with long covid*, 249 New Scientist 10 (2021), <https://www.sciencedirect.com/science/article/pii/S0262407921003031?via%3Dihub>.) The EOs, however, are not meant only to protect children. Schools employ many teachers and staff members who are at higher risk of hospitalization and death from COVID and can contract it from children. What is more, many students live with older or immunocompromised family members who are also at higher risk of

Almost every regulation with a bright line rule is both underinclusive and overinclusive. Although such bright line rules are sometimes arbitrary, they are necessary for effective administration of regulations. So long as the bright line is rationally related to a legitimate government goal, the regulation will be upheld under rational-basis review.

serious illness from COVID. (DE 24-14, Ex. 50.) So even if COVID-19 posed no danger at all to children, it could be rational to require masks in school to reduce secondary infections and protect more vulnerable people from illness.

On the underinclusiveness point, there are other factors that distinguish schools from other settings. Most importantly, education is compulsory. The government requires the vast majority of children under the age of 18 to spend hours each day at school, in close proximity to each other as well as to teachers and staff. As a result, the government takes on a particular responsibility for those children's safety, surpassing its general responsibility with respect to the citizenry at large. *See generally Frugis v. Bracigliano*, 177 N.J. 250, 268 (2003) ("The law imposes a duty on children to attend school. . . . While their children are educated during the day, parents transfer to school officials the power to act as the guardians of those young wards. No greater obligation is placed on school officials than to protect the children in their charge from foreseeable dangers. . . . Although the overarching mission of a board of education is to educate, its first imperative must be to do no harm to the children in its care.") In addition, relatively few children, especially those under twelve years of age, have been vaccinated against COVID-19, as compared to adult vaccination rates. *See* n.10, *supra*. It is thus rational for the state government to make separate and more stringent provision for those entering school buildings.

It is true, of course, that COVID is a serious problem outside of school, as well as inside. But where there is no reason to think that any distinction

drawn between the two is based on a suspect classification or hostility to the exercise of a fundamental right, we are in the rational-basis realm. In that realm, the government is free to address problems one at a time, or to concentrate its efforts where the need seems most critical. *See Beach Communications, Inc.*, 508 U.S. at 316; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Mabey Bridge & Shore, Inc. v. Schoch*, 666 F.3d 862, 876 (3d Cir. 2012).

I again emphasize that the court's task is to identify a rational basis for the EO_s, not to second-guess or usurp elected officials' policy decisions regarding acceptable levels of risk or the tradeoffs between health concerns and other priorities. Because there are multiple rational bases for the in-school mask mandate, the plaintiffs are not likely to succeed on the merits of their equal protection claim. I decline to issue a preliminary injunction on equal protection grounds.

b. First Amendment

Plaintiffs next argue that the in-school mask mandate infringes schoolchildren's First Amendment right to freedom of speech. As discussed below, because the mask mandate potentially implicates the First Amendment, I apply intermediate scrutiny to the EO_s and analyze them as a time, place, and manner restriction. I hold that the burden placed on First Amendment rights by the mandate is justified by the compelling and content-neutral government interest in stemming the spread of COVID-19; that the mandates are narrowly tailored to serve that

interest; and that they leave open adequate alternative channels of communication.

i. Students and the First Amendment

Before reaching the heart of the time, place, and manner analysis, I generally survey the place of students' rights in our First Amendment jurisprudence.

In 1969, ruling in favor of students who were suspended for wearing black armbands to protest the ongoing war in Vietnam, the Supreme Court stated that schoolchildren are "persons under our Constitution" and "possessed of fundamental rights which the State must respect." *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (internal quotation marks omitted). Declaring that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the Court in *Tinker* set the basic standard for in-school student speech that has remained largely intact for a half century. *Id.* at 506; *see also Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 794 (2011) ("Minors are entitled to a significant measure of First Amendment protection.") (cleaned up). In the intervening years, the Court has clarified that some categories of student speech are not protected by the First Amendment and may be regulated even on the basis of content.¹⁴ Generally, however, peaceful student

¹⁴ In a recent decision, the Court outlined those permissible content-based restrictions on student speech as follows:

This Court has previously outlined three specific categories of student speech that schools may regulate in certain circumstances: (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds; (2) speech, uttered during a class

speech that does not “materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others” is protected. *Tinker*, 393 U.S. at 513.

The Supreme Court has made it clear, then, that students enjoy First Amendment protections. The Court has emphasized, however, that students’ First Amendment rights, particularly on campus, are narrower than those of adults. Recently the Court reiterated that “courts must apply the First Amendment ‘in light of the special characteristics of the school environment,’” *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2044 (2021) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)). One of those special characteristics is that schools stand *in loco parentis*. *Id.* at 2045 (citing *Bethel Sch. Dist. v. Fraser*, 478 U.S. at 684).

In its most recent case to address student speech, *Mahanoy Area School District*, the Court emphasized that the special characteristics of schools “call for special leeway when schools regulate speech that occurs under its supervision.” *Id.* In that case, a student profanely expressed negative feelings about the school’s cheerleading program in a private Snapchat posted from a location outside of school. The Supreme Court affirmed the Third Circuit’s decision that the school had violated the First Amendment by punishing the student, but held that

trip, that promotes “illegal drug use”; and (3) speech that others may reasonably perceive as “bear[ing] the imprimatur of the school,” such as that appearing in a school-sponsored newspaper.

Mahanoy Area Sch. Dist. v. B. L. by & through Levy, 141 S. Ct. 2038, 2045 (2021) (citations omitted).

Tinker's reduced standard of First Amendment protection may apply off of school grounds as well as on. *Id.* at 2045-46.¹⁵ While the boundaries are not entirely clear, the Court's decision does yield one definite principle: a clear rejection of Third Circuit case law that had held students' First Amendment rights were "coextensive" with those of adults. *Id.*; *B.L. by & through Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d 170, 178 (3d Cir. 2020) (quoting *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932 (3d Cir. 2011)), *aff'd with different reasoning*, 141 S. Ct. 2038 (2021); JENNY DIAMOND CHENG, *Deciding Not to Decide: Mahanoy Area School District v. B.L. and the Supreme Court's Ambivalence Towards Student Speech Rights* 74 VAND. L. REV. EN BANC 511, 518 (2021).

By allowing schools to punish a student for speech that would undeniably be protected by the First Amendment if uttered by an adult, the Court reaffirmed longstanding law that the First Amendment provides lesser protection for students than for adults. The suggestion by plaintiffs that courts must give

¹⁵ The Court did not equate on-campus and off-campus speech, however. It mentioned "three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech." *Id.* at 2046. These features included the fact that schools rarely act *in loco parentis* in relation to off campus speech and the Court stated that schools will have "have a heavy burden to justify intervention" regarding out-of-school political or religious speech and noted that schools should protect students who expressed unpopular ideas. *Id.* The knotty definitional issues posed by communication "on" or "off" campus, especially in the internet age, are not germane here, but are relevant as background.

greater protection to the free speech rights of students is diametrically opposed to precedent and therefore must be rejected. (Mot. at 14.)

In short, although schools are allowed to impose rules and punishments that would violate the First Amendment if applied to adults, students retain free speech rights, and can prevail against state actions that restrict those rights.

ii. Masks and Speech

Plaintiffs argue that the EO's violate students' First Amendment right to freedom of speech because masks interfere—to some degree—with the physical ability to speak, muffling the voice, “muzzl[ing]” schoolchildren, and obscuring facial expressions in a way that impairs their participation in the educative process. (Mot. at 16.) The government responds that the mandate does not implicate the First Amendment at all, and should be considered only as a regulation of non-expressive conduct.¹⁶ (Opp. at 21-25.)

Defendants cite a number of cases in which courts across the country have upheld mask mandates against constitutional challenges. (*Id.* at 21.) Those cases are suggestive, but not entirely on point; almost none of those other plaintiffs argued, as plaintiffs do here, that a mask mandate physically restricts speech. *See, e.g., Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214, 237 (D. Md. 2020) (considering and rejecting an argument that a state mask mandate *compelled* speech because the wearing of a mask had

¹⁶ In the alternative, defendants argue that the EO's survive intermediate scrutiny. (Opp. at 25-28.)

expressive content).¹⁷ Relatedly, defendants cite several Supreme Court precedents that construe the First Amendment in relation to expressive conduct rather than pure speech. (Opp. at 21-22.) The EO_s, they argue, do “not burden any First Amendment conduct whatsoever” because the First Amendment only protects “conduct that is inherently expressive,” which mask wearing is not. (*Id.* at 21 (quoting *Rumsfeld v. FAIR*, 547 U.S. 47, 66 (2006))). Those cases, however, do not directly address the particular claims made here; these plaintiffs do not claim that mask wearing is expressive conduct.¹⁸ Rather, the plaintiffs argue primarily that a mask physically interferes with actual speech—talking in the usual sense—as well as communicative facial expressions. Many, this Court included, have experienced the need to repeat themselves or to speak more loudly and clearly to be understood through a mask. The ability to speak and have one’s voice heard is protected by the First Amendment. I assume *arguendo*, then, that laws which burden this ability, whether purposely or

¹⁷ Still farther afield are cited cases in which religious schools argued that the wearing of masks inherently violated their freedom of worship or the tenets of their faith. No such claim is made in relation to the EO_s here, and I do not discuss it.

¹⁸ To determine if conduct is expressive, courts must consider whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.” (*Id.* at 21–22 (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989))). See *Rumsfeld v. FAIR*, *supra* (law schools threatened with a denial of federal funding for prohibiting military recruiters); *Texas v. Johnson*, *supra* (flag burning).

incidentally, trigger some level of scrutiny under our First Amendment jurisprudence.¹⁹

¹⁹ I make that concession *arguendo* in plaintiffs' favor, but the matter is not free from doubt.

For example, in one case that defendants cite for the proposition that the mask mandate does not implicate the First Amendment, the court in fact applied intermediate scrutiny to the governor's order closing movie theaters, although it upheld the order. *Nat'l Ass'n of Theatre Owners v. Murphy*, 2020 WL 5627145, at *10-*11 (D.N.J. Aug. 18, 2020).

On the other hand, in *L.T. v. Zucker*, 2021 WL 4775215 (N.D.N.Y. Oct. 13, 2021), the court considered a First Amendment challenge to an in-school mask mandate like the one here. Those plaintiffs, like these, argued that masks had a muffling effect, that they hid facial expressions, and so on. The *L.T.* court agreed with the position taken by defendants here that the First Amendment is not implicated:

However, even if the mask mandate does prevent facial expressions from being seen and forces Plaintiffs to alter their vocal modulations, the mandate still would not likely be found to constitute an incidental burden on speech. The speech that is allegedly infringed is not sufficiently intertwined with the regulated conduct, and even if the two were sufficiently connected, the speech is not sufficiently particularized to fall under the First Amendment's protective umbrella.

Id. at *5. As for the obstruction of facial expressions, *L.T.* noted that clear masks are available. I have used them in my own courtroom to facilitate confrontation of witnesses. *See also* n.22, *infra*.

L.T. also rejected an equal protection challenge, similar to the one here, on the basis of the alleged arbitrariness of the imposition of a mask mandate on schools but not certain other, allegedly comparable facilities.

Plaintiffs then overreach, however, in their interpretation of the scope of First Amendment rights. At its broadest, plaintiffs' argument embraces the idea that there is a First Amendment right to untrammeled social communication during school.²⁰ To make this argument, plaintiffs rely heavily on a single phrase from *Tinker*: "personal intercommunication among the students." (Mot. at 14-16.) By removing this phrase from its context, plaintiffs greatly exaggerate the constitutional protection given to student interactions at school.

That omitted context is as follows. The Court in *Tinker* defined "personal intercommunication" as distinguished from communication in the classroom, but did not suggest that personal intercommunication was the same as purely social communication. In full, the relevant paragraph reads as follows:

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during

²⁰ Plaintiffs use the same set of arguments to assert that the mask mandate also violates students' First Amendment right of association. Plaintiffs, however, do not plausibly allege that the right to association in school, assuming such a right exists, is violated by mask requirements. See *Gruenke v. Seip*, 225 F.3d 290, 308 (3d Cir. 2000); *Denis v. Ige*, 2021 WL 1911884, at *11 (D. Haw. May 12, 2021) (citing *Oakes v. Collier Cty.*, 515 F. Supp. 3d 1202, 1215 (M.D. Fla. 2021)). Because I find that the freedom of speech argument is far more directly applicable than the freedom of association argument, and because the analyses substantially overlap, I focus my attention on the freedom of speech argument.

prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Tinker, 393 U.S. at 512-13 (cleaned up; emphasis added). In short, “personal intercommunication” refers to the type of First Amendment activities that students can engage in during lunchtime, between classes, and before or after school. The classroom is not the lunchroom, of course, and the permissible level of communication may differ as between the two. Likewise, the school’s authority to require that students be respectful, or refrain from noisy chatter, does not imply that the school is free to suppress political or

social points of view. Overall, however, *Tinker* dictates that students' rights are subject to regulation "in light of the special characteristics of the school environment." *Mahanoy*, 141 S. Ct. at 2044.²¹ There is no support in the case law for the proposition that students have a First Amendment right to speak with one another purely socially, with no "muffling" or other restrictions, while at school. And within the classroom, of course, speech at inappropriate times or about inappropriate topics can be suppressed. *Mahanoy*, 141 S. Ct. at 2050 (Alito, J., concurring) (citing *Kuhlmeier*, 484 U.S. at 279.) Even outside the classroom, schools are permitted to give students detention, thus preventing them from communicating with their friends; to mandate a "quiet lunch"; to assign students to classes that separate them from their friends; and even punish students for using sexual innuendo in a speech. *Fraser*, 478 U.S. 675.

Because schools can restrict speech and activities that might be protected by the First Amendment for

²¹ None of the "personal intercommunication" cases cited by plaintiffs involve purely social communication. Rather, all such cases involve students who wished to engage in political or religious speech, for example, by handing out flyers or tracts. See, e.g., *Slotterback By & Through Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 293 (E.D. Pa. 1991) (handing out religious tracts); *Morgan v. Swanson*, 659 F.3d 359, 369 (5th Cir. 2011) (handing out pencils to classmates that read "Jesus loves me this I know for the Bible tells me so"); *Gillman ex rel. Gillman v. Sch. Bd. for Holmes Cty., Fla.*, 567 F. Supp. 2d 1359, 1362 (N.D. Fla. 2008) (wearing clothes with pro-homosexuality-acceptance messages). Plaintiffs characterize *Morgan v. Swanson* as a case about a half-birthday party (Mot. at 21), but the issue in that case was whether the student could pass out the "Jesus loves me" pencils at the half-birthday party, not whether she could hold a purely social half-birthday celebration.

adults or in a public setting, plaintiffs' citations to cases regarding loitering laws and curfew ordinances are not persuasive. *See Ramos*, 353 F.3d 171 (holding that curfew ordinance violated the equal protection rights of juveniles); *Sawyer v. Sandstrom*, 615 F.2d 311 (5th Cir. 1980) (holding that an anti-loitering ordinance unconstitutionally overbroad); *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048 (7th Cir. 2004) (holding that curfew law violated juveniles' free expression rights). The Fifth Circuit's opinion in *Sawyer* provides a good illustration of the reasons that those cases are inapposite. There, the Fifth Circuit stated that “[t]he rights of locomotion, freedom of movement, to go where one pleases, and to use the public streets in a way that does not interfere with the personal liberty of others are implicit in the first and fourteenth amendments.” *Sawyer*, 615 F.2d at 316 (quoting *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1254 (M.D. Pa. 1975), *aff'd without opinion*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976)). Yet that formulation is self-evidently inapplicable to schools. Schools are allowed to restrict students' freedom of movement; they may require students to arrive at school on time and remain on campus during the school day. No “right to locomotion” on the public streets is thereby infringed. All in all, plaintiffs have not established that the EO's directly violate any recognized First Amendment right to purely social “personal intercommunication” within the school environment.

The EO's, while they may impinge upon the physical act of speaking, make no distinctions based on the message being expressed. There is no indication, and plaintiffs do not argue, that the EO's are based

on hostility to expression of any particular message or point of view. The EO^s are therefore content-neutral, and I apply (at most, *see* n.19, *supra*) intermediate scrutiny to them. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Cnty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Because I find that the EO^s burden First Amendment rights only incidentally, they are best analyzed as a regulation of the time, place, and manner of New Jerseyans' speech while inside school buildings. To stand, regulations analyzed under that intermediate scrutiny standard must (1) serve a substantial government interest unrelated to the content of speech; (2) be "narrowly tailored to serve" that interest; and (3) "leave open ample alternative channels for communication of the information." *McCullen v. Coakley*, 573 U.S. 464, 477 (2014). That three-part standard is easily met.

First, there are two substantial and related underlying government interests. As the U.S. Supreme Court has held, "[s]temming the spread of COVID-19 is unquestionably a compelling interest." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam). In addition, New Jersey has a substantial interest in the state's students receiving in-person education, which studies have shown to be superior to remote education. (Opp. at 26.) At the intersection of those two substantial government interests sits the requirement of in-person schooling with masks. Masks have been shown to help prevent the spread of COVID within schools and thus within the broader community, and also to help protect teachers and staff members who are more likely than children to experience serious illness. (DE 24-1 ¶ 55-

58; DE 24-14, Ex. 50.) They help make safe, in-person schooling possible.

Second, the mask mandate is narrowly tailored to serve those two related government interests. “[T]he requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Rock Against Racism*, 491 U.S. at 799. A broader way to prevent COVID transmission would be to close schools and require remote learning, cutting off in-person interaction altogether. Instead, the governor chose to open the schools but have those entering school buildings wear masks. As noted above, masks are a low-cost, effective way to prevent the spread of COVID. That is not to say, of course, that the negative educational and social experiences of students, attested to in plaintiffs’ affidavits, do not exist. And there is, of course, real discomfort associated with wearing masks all day. Legitimate government actions, however, are not required to be costless to be narrowly tailored. There is no evidence that requiring masks causes significant short-or long-term harm—or at least no evidence sufficient to permit this Court to displace State officials’ policy judgments. (Amicus Br. at 16-19 (citing AAP, *Do Masks Delay Speech and Language Development?*, <https://healthychildren.org/English/health-issues/conditions/COVID-19/Pages/Do-face-masks-interfere-with-language-development.aspx> and ASHLEY L. RUBA & SETH D. POLLAK, *Children’s emotion inferences from masked faces: Implications for social interactions during COVID-19*, PLoS One (2020), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0243708>.) I find that

the EO's mask mandate is narrowly tailored to achieve the twin goals of preventing the spread of COVID and maintaining in-person education.²²

Third, the EO's leave open sufficient alternative channels of communication. To begin with, the EO's impose no restrictions at all on students' speech or activities while outside of school, as plaintiffs acknowledge. (DE 45 at v-vi.) Plaintiffs claim that "schools are the forum in which children seek (and obtain) conversation, friendship, dating, exchanges of ideas and association with others." (Mot. at 20, emphasis in original.) Many young people, however, find joy, conversation, romance, and friendship outside of school. Nothing in the EO's affects their ability to do so. Plaintiffs seek to analogize the schools to the quintessential public forum: "[T]o the child, school is similar to the public streets for an adult." (Mot. at 21.) For the reasons stated above, the analogy is flawed; schools do not correspond to the wide-open forum of a public street. (And of course, the public streets are available to students themselves at other times of day.)

Common experience suggests that students, when masked, nevertheless remain free to talk, gesticulate,

²² The EO's exceptions also evidence its narrow tailoring. EO 251 exempts from the mask mandate disabled students whose individualized educational programs precludes the use of a mask and allows any student to remove the mask when wearing it would be dangerous to health (e.g., in extreme heat) or when performing a task that cannot be performed safely with a mask. EO 251 at 4-5. In addition, clear masks are available, and may be particularly advisable for speech therapists and those teaching students who are hearing-impaired. (Opp. at 15; DE 24-15, Ex. 63.)

and otherwise make themselves understood; to be “muffled” is not to be gagged. What is more, students are able to communicate in many ways other than unmasked, face-to-face conversation. They are free to text, tweet, Snapchat, and so on (hopefully not during class). The EOs, then, do not deprive them of their ability to communicate, generally; they only make it marginally more difficult to communicate face-to-face while in school.

State and local governments have long exercised extraordinary powers to stop the spread of deadly disease. *See* WILLIAM J. NOVAK, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* 191-234 (1996). While some restrictions related to the COVID-19 pandemic have been found, for example, to infringe the right to free exercise of religion under the First Amendment, *see, e.g.*, *Roman Catholic Diocese*, 141 S. Ct. 63, the EOs at issue here are well within the acceptable scope of state power to address a lethal pandemic. They do not violate the constitutional rights of New Jersey’s residents.

I find the plaintiffs are unlikely to succeed on the merits of their First Amendment claim, and therefore will deny the motion for a preliminary injunction on those grounds.

V. Conclusion

For the reasons set forth above, plaintiffs' motion for a preliminary injunction (DE 12) is DENIED. A separate order will issue.

/s/ Kevin McNulty
United States District Judge

DATE: December 7, 2021

**ORDER, U.S. DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY
(DECEMBER 7, 2021)**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CYNTHIA STEPIEN ON BEHALF OF HERSELF AND HER MINOR CHILD; STAMATIA DIMATOS SCHRECK, ON BEHALF OF HERSELF AND HER THREE MINOR CHILDREN; RYAN CODY, ON BEHALF OF HIMSELF AND HIS MINOR CHILD J.C.; ELLY FORD ON BEHALF OF HERSELF AND HER MINOR CHILD A.F.; GABE MCMAHON; M.F.; M.K.N.; K.B.; B.W.; L.R.; J.V.P.; V.P.; D.M.; B.M.; A.M.; and ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

PHILIP D. MURPHY, GOVERNOR; ANGELICA ALLEN-MCMILLAN, COMMISSIONER OF EDUCATION; JUDITH M. PERSICHILLI, COMMISSIONER OF HEALTH

Defendants.

Civ. No. 21-CV-13271 (KM) (JSA)

Before: Kevin MCNULTY,
United States District Judge.

THIS MATTER having come before the Court on plaintiffs' application by order to show cause (DE 12) for a preliminary injunction pursuant to Fed. R. Civ. P. 65; and the Court having considered the submissions and supplemental submissions of the parties (DE 12-2, 24, 45); and the Court having held oral argument on the order to show cause on September 9, 2021 (DE 25); and the Court having considered the amicus submission of the New Jersey Chapter of The American Academy of Pediatrics and the American Academy of Pediatrics (DE 41); and the Court having considered the motion to intervene of Reginald Burgess (DE 6); for the reasons stated in the accompanying Opinion, and for good cause shown;

IT IS this 7th day of December 2021,

ORDERED that leave to file an amicus brief by the New Jersey Chapter of The American Academy of Pediatrics and the American Academy of Pediatrics (DE 41), as well as the accompanying motions to for leave to appear pro hac vice of Jessica Anne Morton (DE 42) and Jeffrey B. Dubner (DE 43) are GRANTED; and it is further

ORDERED that the motion to intervene of Reginald Burgess (DE 6) is DENIED; and it is further

ORDERED that plaintiffs' motion for a preliminary injunction (DE 12) is DENIED.

/s/ Kevin McNulty

United States District Judge

**EXECUTIVE ORDER NO. 251
(AUGUST 6, 2021)**

WHEREAS, on March 9, 2020, I issued Executive Order No. 103, declaring the existence of a Public Health Emergency, pursuant to the Emergency Health Powers Act (“EHPA”), N.J.S.A. 26:13-1 et seq., and a State of Emergency, pursuant to the New Jersey Civilian Defense and Disaster Control Act (“Disaster Control Act”) N.J.S.A. App A:9-33 et seq., in the State of New Jersey for Coronavirus disease 2019 (“COVID-19”); and

WHEREAS, through Executive Order Nos. 119, 138, 151, 162, 171, 180, 186, 191, 200, 210, 215, 222, 231, 235, and 240, issued on April 7, 2020, May 6, 2020, June 4, 2020, July 2, 2020, August 1, 2020, August 27, 2020, September 25, 2020, October 24, 2020, November 22, 2020, December 21, 2020, January 19, 2021, February 17, 2021, March 17, 2021, April 15, 2021, and May 14, 2021, respectively, the facts and circumstances of which are adopted by reference herein, I declared that the COVID-19 Public Health Emergency continued to exist and declared that all Executive Orders and Administrative Orders adopted in whole or in part in response to the COVID-19 Public Health Emergency remained in full force and effect; and

WHEREAS, in accordance with N.J.S.A. App. A:9-34 and -51, I reserve the right to utilize and employ all available resources of State government to protect against the emergency created by COVID-19; and

WHEREAS, as COVID-19 continued to spread across New Jersey, I have issued a series of Execu-

tive Orders pursuant to my authority under the Disaster Control Act and the EHPA, to protect the public health, safety, and welfare against the emergency created by COVID-19, including Executive Order Nos. 104-133, Nos. 135-138, Nos. 140-166, Nos. 168-173, No. 175, Nos. 177-181, No. 183, Nos. 186-187, Nos. 189-198, No. 200, Nos. 203-204, No. 207, and Nos. 210-211 (2020) and Nos. 214-216, Nos. 219-220, Nos. 222-223, No. 225, Nos. 228-235, Nos. 237-244, No. 246, and No. 249 (2021), the facts and circumstances of which are all adopted by reference herein; and

WHEREAS, on June 4, 2021, I signed Assembly Bill No. 5820 into law as P.L.2021, c.103 and issued Executive Order No. 244, which terminated the Public Health Emergency declared in Executive Order No. 103 (2020) but maintained the State of Emergency declared in that same Order; and

WHEREAS, P.L.2021, c.103 provided that following the termination of the Public Health Emergency declared in Executive Order No. 103 (2020), the Governor may continue to issue orders related to implementation of recommendations of the Centers for Disease Control and Prevention (“CDC”) to prevent or limit the transmission of COVID-19, including in specific settings; and

WHEREAS, the American Academy of Pediatrics (“AAP”) has emphasized that in-person learning is critical for educational and social development of children, as evidence demonstrates that remote learning has been detrimental to the educational attainment of students of all ages and has exacerbated the mental health crisis among children and adolescents; and

WHEREAS, the CDC has also cited evidence that suggests virtual learning can lead to learning loss for children and worsening mental health problems for the younger population; and

WHEREAS, the CDC has reported that new variants of COVID-19 have been identified in the United States, and that certain variants, particularly the B.1.617.2 (“Delta”) variant, are more transmissible; and WHEREAS, given new evidence regarding transmission of the Delta variant, the CDC now recommends universal indoor masking for all teachers, staff, students, and visitors in K-12 schools, regardless of vaccination status; and WHEREAS, the CDC continues to emphasize that children should return to full-time in-person learning in the fall with layered prevention strategies in place, such as masking in indoor settings; and

WHEREAS, AAP similarly recommends universal masking in schools because a significant portion of the student population, specifically individuals under the age of 12, is not yet eligible to receive a vaccine; and

WHEREAS, there is no concrete timeline for authorization for use of currently available COVID-19 vaccinations for children under the age of 12, so it would be impossible for that group to be fully vaccinated before the start of the 2021 – 2022 school year; and

WHEREAS, only the Pfizer vaccination is currently available to youth in the 12–17 age group; and

WHEREAS, according to data estimates, only 40 percent of 12-15 year-olds and 57 percent of 16-17

year-olds in New Jersey have received at least one dose of a COVID-19 vaccine; and

WHEREAS, both the CDC and AAP recognize that masking is a critical tool to reduce transmission of the virus and protect unvaccinated individuals; and

WHEREAS, the State has experienced significant upticks in critical COVID-19 metrics over the past few weeks, including COVID-19 positive cases, the rate of transmission, spot positivity, and new hospitalizations, that warrant additional precautions in certain settings with a substantial number of unvaccinated individuals; and

WHEREAS, after consultation with the New Jersey Department of Health, I have determined that it is necessary to enforce a uniform masking policy in schools for students, staff, and visitors while vaccination is not available to a significant portion of the student population; and

WHEREAS, this Order is consistent with the terms of P.L.2021, c.103;

NOW, THEREFORE, I, PHILIP D. MURPHY, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby ORDER and DIRECT:

1. All public, private, and parochial preschool programs and elementary and secondary schools, including charter and renaissance schools (collectively “school districts”), must maintain a policy regarding mandatory use of face masks by staff, students, and

visitors in the indoor portion of the school district premises, except in the following circumstances:

- a. When doing so would inhibit the individual's health, such as when the individual is exposed to extreme heat indoors;
- b. When the individual has trouble breathing, is unconscious, incapacitated, or otherwise unable to remove a face mask without assistance;
- c. When a student's documented medical condition or disability, as reflected in an Individualized Education Program (IEP) or Educational Plan pursuant to Section 504 of the Rehabilitation Act of 1973, precludes use of a face mask; When the individual is under two (2) years of age;
- d. When the individual is engaged in activity that cannot physically be performed while wearing a mask, such as eating or drinking, or playing a musical instrument that would be obstructed by a face mask;
- e. When the individual is engaged in high-intensity aerobic or anaerobic activity;
- f. When a student is participating in high-intensity physical activities during a physical education class in a well-ventilated location and able to maintain a physical distance of six feet from all other individuals; or
- g. When wearing a face mask creates an unsafe condition in which to operate equipment or execute a task.

2. This Order shall not impact the obligation of any school district to comply with requirements issued by the CDC on masking on public transportation conveyances, including school district transportation.

3. The State Director of Emergency Management, who is the Superintendent of State Police, shall have the discretion to make additions, amendments, clarifications, exceptions, and exclusions to the terms of this Order.

4. It shall be the duty of every person or entity in this State or doing business in this State and of the members of the governing body and every official, employee, or agent of every political subdivision in this State and of each member of all other governmental bodies, agencies, and authorities in this State of any nature whatsoever, to cooperate fully in all matters concerning this Order, and to cooperate fully with any Administrative Orders issued pursuant to this Order.

5. No municipality, county, or any other agency or political subdivision of this State shall enact or enforce any order, rule, regulation, ordinance, or resolution which will or might in any way conflict with any of the provisions of this Order, or which will or might in any way interfere with or impede its achievement.

6. Penalties for violations of this Order may be imposed under, among other statutes, N.J.S.A. App. A:9-49 and-50.

7. This Order shall take effect on Monday, August 9, 2021 and shall remain in effect until revoked or modified by the Governor.

GIVEN, under my hand and seal this 6th day of August, Two Thousand and Twenty-one, and of the Independence of the United States, the Two Hundred and Forty-Sixth.

[seal]

/s/ Philip D. Murphy
Governor

Attest:

/s/ Parimal Garg
Chief Counsel to the Governor

**EXECUTIVE ORDER NO. 253
(AUGUST 23, 2021)**

WHEREAS, on March 9, 2020, I issued Executive Order No. 103, declaring the existence of a Public Health Emergency, pursuant to the Emergency Health Powers Act (“EHPA”), N.J.S.A. 26:13-1 et seq., and a State of Emergency, pursuant to the New Jersey Civilian Defense and Disaster Control Act (“Disaster Control Act”), N.J.S.A. App A:9-33 et seq., in the State of New Jersey for Coronavirus disease 2019 (“COVID-19”); and

WHEREAS, through Executive Order Nos. 119, 138, 151, 162, 171, 180, 186, 191, 200, 210, 215, 222, 231, 235, and 240, issued on April 7, 2020, May 6, 2020, June 4, 2020, July 2, 2020, August 1, 2020, August 27, 2020, September 25, 2020, October 24, 2020, November 22, 2020, December 21, 2020, January 19, 2021, February 17, 2021, March 17, 2021, April 15, 2021, and May 14, 2021, respectively, the facts and circumstances of which are adopted by reference herein, I declared that the COVID-19 Public Health Emergency continued to exist and declared that all Executive Orders and Administrative Orders adopted in whole or in part in response to the COVID-19 Public Health Emergency remained in full force and effect; and

WHEREAS, in accordance with N.J.S.A. App. A:9-34 and-51, I reserve the right to utilize and employ all available resources of State government to protect against the emergency created by COVID-19; and

WHEREAS, as COVID-19 continued to spread across New Jersey, I have issued a series of Executive Orders pursuant to my authority under the Disaster Control Act and the EHPA, to protect the public health, safety, and welfare against the emergency created by COVID-19, including Executive Order Nos. 104-133, Nos. 135-138, Nos. 140-166, Nos. 168-173, No. 175, Nos. 177-181, No. 183, Nos. 186-187, Nos. 189-198, No. 200, Nos. 203-204, No. 207, and Nos. 210-211 (2020) and Nos. 214-216, Nos. 219-220, Nos. 222-223, No. 225, Nos. 228-235, Nos. 237-244, No. 246, No. 249, and Nos. 251-252 (2021), the facts and circumstances of which are all adopted by reference herein; and

WHEREAS, on June 4, 2021, I signed Assembly Bill No. 5820 into law as P.L.2021, c.103 and issued Executive Order No. 244, which terminated the Public Health Emergency declared in Executive Order No. 103 (2020) but maintained the State of Emergency declared in that same Order; and

WHEREAS, P.L.2021, c.103 provided that following the termination of the Public Health Emergency declared in Executive Order No. 103 (2020), the Governor, Commissioner of the Department of Health (“DOH”), and the head of any other State agency may continue to issue Orders related to implementation of recommendations of the Centers for Disease Control and Prevention (“CDC”) to prevent or limit the transmission of COVID-19 and related to vaccine distribution, administration, and management, COVID-19 testing, and data collection; and

WHEREAS, the American Academy of Pediatrics (“AAP”) has emphasized that in-person learning is critical for educational and social development of children, as evidence demonstrates that remote learn-

ing has been detrimental to the educational attainment of students of all ages and has exacerbated the mental health crisis among children and adolescents; and

WHEREAS, the CDC has reported that new variants of COVID-19 have been identified in the United States, and that certain variants, particularly the B.1.617.2 (Delta) variant, are more transmissible than previous strains; and

WHEREAS, the State has experienced significant upticks in critical COVID-19 metrics over the past few months, including COVID-19 positive cases, the rate of transmission, spot positivity, and new hospitalizations, that warrant additional precautions in certain settings, especially those with a substantial number of unvaccinated individuals; and

WHEREAS, the CDC has emphasized that vaccination is a critical means to prevent spread of COVID-19 and to avoid infection of those individuals that cannot be vaccinated because their age precludes them from receiving one, and has strongly recommended vaccination of all eligible teachers and educational staff; and

WHEREAS, while over 5.4 million people in the State have been fully vaccinated against COVID-19, additional steps are necessary to ensure continued vaccinations of individuals in certain settings of concern to protect against spread of COVID-19 and to sustain the provision of full in-person instruction for New Jersey students; and

WHEREAS, on July 6, 2021, the U.S. Department of Justice's Office of Legal Counsel issued an opinion concluding that Section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 360bbb-3 does

not prohibit public or private entities from imposing vaccination requirements while vaccinations are only available pursuant to Emergency Use Authorization (“EUA”); and

WHEREAS, requiring workers in public, private, and parochial preschool programs, and elementary and secondary schools, including charter and renaissance schools (collectively “school districts”) to receive a COVID-19 vaccine or undergo regular testing can help prevent outbreaks and reduce transmission to children, including those who are not yet eligible for vaccination; and

WHEREAS, the CDC has emphasized that COVID-19 vaccines are effective, in that they can prevent individuals from getting and spreading the virus, and can prevent severe illness in individuals who do contract COVID-19; and

WHEREAS, preventing transmission of COVID-19 is critical to keeping schools open for in-person instruction; and

WHEREAS, school districts have access to multiple sources of funding to address costs associated with worker vaccination efforts and testing, including three rounds of federal Elementary and Secondary School Emergency Relief funds and Emergency Assistance for Nonpublic Schools within the Governor’s Emergency Education Relief funds; and

WHEREAS, the State will continue to work closely with school districts to successfully implement the requirements of this Order; and

WHEREAS, Executive Order No. 251 (2021) requires all school districts to maintain a policy

regarding mandatory use of face masks by staff, students, and visitors in the indoor portion of school district premises; and

WHEREAS, that Order allows for exemptions from mask-wearing when “doing so would inhibit the individual’s health,” “when the individual has trouble breathing,” and when a student’s documented medical condition or disability precludes use of a face mask; and

WHEREAS, the AAP and CDC continue to emphasize the importance of universal indoor masking for teachers, staff, and students, particularly as the majority of the student population remains ineligible for vaccination at this time; and

WHEREAS, exemptions to mask wearing should be as limited as possible to maximize protections; and

WHEREAS, it is necessary and appropriate that school districts’ policies regarding a medical exemption from mask wearing require individuals to submit medical documentation; and

WHEREAS, this Order is related to vaccination management, COVID-19 testing, data collection, and the implementation of CDC recommendations, and is thus authorized under P.L.2021, c.103;

NOW, THEREFORE, I, PHILIP D. MURPHY, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby ORDER and DIRECT:

1. All public, private, and parochial preschool programs, and elementary and secondary schools,

including charter and renaissance schools (“covered settings”), must maintain a policy that requires all covered workers to either provide adequate proof to the covered setting that they have been fully vaccinated or submit to COVID-19 testing at minimum one to two times weekly. This requirement shall take effect on October 18, 2021, at which time any covered workers that have not provided adequate proof that they are fully vaccinated must submit to a minimum of weekly or twice weekly testing on an ongoing basis until fully vaccinated.

2. Covered workers may demonstrate proof of full vaccination status by presenting the following documents if they list COVID-19 vaccines currently authorized for EUA in the United States and/or the World Health Organization (“WHO”), along with an administration date for each dose:
 - a. The CDC COVID-19 Vaccination Card issued to the vaccine recipient by the vaccination site, or an electronic or physical copy of the same;
 - b. Official record from the New Jersey Immunization Information System (NJIIS) or other State immunization registry;
 - c. A record from a health care provider’s portal /medical record system on official letterhead signed by a licensed physician, nurse practitioner, physician’s assistant, registered nurse or pharmacist;
 - d. A military immunization or health record from the United States Armed Forces; or

- e. Docket mobile phone application record or any state specific application that produces a digital health record.

Covered settings collecting vaccination information from covered workers must comport with all federal and State laws, including but not limited to the Americans with Disabilities Act, that regulate the collection and storage of that information.

3. To satisfy the testing requirement, a covered worker must undergo screening testing at minimum one to two times each week. Where a covered setting requires an unvaccinated covered worker to submit proof of a COVID-19 test, the worker may choose either antigen or molecular tests that have EUA by the U.S. Food and Drug Administration (“FDA”) or are operating per the Laboratory Developed Test requirements by the U.S. Centers for Medicare and Medicaid Services. Where a covered setting provides the unvaccinated covered worker with on-site access to COVID-19 tests, the covered setting may similarly elect to administer or provide access to either an antigen or molecular test. If the covered policy need not require the worker to submit to testing for that week. This requirement shall not supplant any requirement imposed by the covered setting regarding diagnostic testing of symptomatic workers or screening testing of vaccinated workers.

4. Covered settings must have a policy for tracking test results from testing required by this Order and must report results to local public health departments.

5. For purposes of this Order, “covered workers” shall include all individuals employed by the covered setting, both full-and part-time, including, but not

limited to, administrators, teachers, educational support professionals, individuals providing food, custodial, and administrative support services, substitute teachers, whether employed directly by a covered setting or otherwise contracted, contractors, providers, and any other individuals performing work in covered settings whose job duties require them to make regular visits to such covered settings, including volunteers. Covered workers do not include individuals who visit the covered setting only to provide one-time or limited-duration repairs, services, or construction.

6. For purposes of this Order, a covered worker shall be considered “fully vaccinated” for COVID-19 two weeks or more after they have received the second dose in a two-dose series or two weeks or more after they have received a single-dose vaccine. Individuals will only be considered fully vaccinated where they have received a COVID-19 vaccine that is currently authorized for emergency use by the FDA or the WHO, or that are approved for use by the same. Workers who are not fully vaccinated, or for whom vaccination status is unknown or who have not provided sufficient.

7. Nothing in this Order shall prevent a covered setting from instituting a vaccination or testing policy that includes additional or stricter requirements, so long as such policy comports with the minimum requirements of this Order. A covered setting may also maintain a policy that requires more frequent testing of covered workers.

8. The Commissioner of the DOH is hereby authorized to issue a directive supplementing the requirements outlined in this Order, which may include, but not be limited to, any requirements for

reporting vaccination and testing data to the DOH. Actions taken by the Commissioner of the DOH pursuant to this Order shall not be subject to the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

9. It is hereby clarified that the policy of public, private, and parochial preschool programs, and elementary and secondary schools, including charter and renaissance schools, regarding mandatory mask wearing in the indoor portion of school district premises, as outlined in Executive Order No. 251 (2021), must require individuals seeking a medical exemption from mask wearing under Paragraphs 1 (a)–(c) of that Order to produce written documentation from a medical professional to support the exemption. Self-attestations and parental attestations are not sufficient for this purpose.

10. The State Director of Emergency Management, who is the Superintendent of State Police, shall have the discretion to make additions, amendments, clarifications, exceptions, and exclusions to the terms of this Order.

11. It shall be the duty of every person or entity in this political subdivision in this State and of each member of all other governmental bodies, agencies, and authorities in this State of any nature whatsoever, to cooperate fully in all matters concerning this Order, and to cooperate fully with any Administrative Orders issued pursuant to this Order.

12. No municipality, county, or any other agency or political subdivision of this State shall enact or enforce any order, rule, regulation, ordinance, or resolution which will or might in any way conflict with

any of the provisions of this Order, or which will or might in any way interfere with or impede its achievement.

13. Penalties for violations of this Order may be imposed under, among other statutes, N.J.S.A. App. A:9-49 and-50.

14. This Order shall take effect immediately and shall remain in effect until revoked or modified by the Governor.

GIVEN, under my hand and seal this 23rd day of August, Two Thousand and Twenty-one, and of the Independence of the United States, the Two Hundred and Forty-Sixth.

[seal]

/s/ Philip D. Murphy
Governor

Attest:

/s/ Parimal Garg
Chief Counsel to the Governor

**EXECUTIVE ORDER NO. 281
(JANUARY 11, 2022)**

WHEREAS, on March 9, 2020, I issued Executive Order No. 103, declaring the existence of a Public Health Emergency, pursuant to the Emergency Health Powers Act (“EHPA”), N.J.S.A. 26:13-1 et seq., and a State of Emergency, pursuant to the New Jersey Civilian Defense and Disaster Control Act (“Disaster Control Act”), N.J.S.A. App A:9-33 et seq., in the State of New Jersey for Coronavirus disease 2019 (“COVID-19”), the facts and circumstances of which are adopted by reference herein; and

WHEREAS, through Executive Order Nos. 119, 138, 151, 162, 171, 180, 186, 191, 200, 210, 215, 222, 231, 235, and 240, which were issued each month between April 7, 2020 and May 14, 2021, and the facts and circumstances of which are adopted by reference herein, I declared that the COVID-19 Public Health Emergency in effect at the time continued to exist; and

WHEREAS, Executive Order No. 111, issued March 28, 2020, requires that health care facilities report their capacity and supplies, including bed capacity ventilators, and Personal Protective Equipment (“PPE”) on a daily basis; and

WHEREAS, Executive Order No. 112, issued April 1, 2020, granted the Department of Law and Public Safety, Division of Consumer Affairs, the authority to temporarily reactivate certain inactive health care licenses and allow the licensure of physicians licensed, and in good standing, in another country; suspended and waived certain licensure requirements for ad-

anced practice nurses and physician assistants; relaxed registration requirements for the Prescription Monitoring Program; waived signature requirements for funeral agreements and authorizations; and provided certain healthcare professionals with civil or criminal immunity; and

WHEREAS, Executive Order No. 207, issued December 4, 2020, required all individuals, regardless of age, to be automatically enrolled in the New Jersey Immunization Information System (“NJIIS”), the statewide electronic immunization registry, upon receipt of a COVID-19 vaccination; and

WHEREAS, New Jersey made significant progress in responding to COVID-19 and mitigating its devastating effects, in particular in light of the advent of three effective vaccines that, among other things, had significantly reduced the likelihood of both contracting and transmitting the variants of COVID-19 that were present in the United States at the time; and

WHEREAS, on June 4, 2021, in light of these developments, I signed Assembly Bill No. 5820 into law as P.L.2021, c.103, and issued Executive Order No. 244, which terminated the Public Health Emergency declared in Executive Order No. 103 (2020); and

WHEREAS, P.L.2021, c.103 sought to enable the State to bring an end to its prior Public Health Emergency while still allowing for an orderly continuation of the Administration’s ability to order certain public health measures relating to COVID-19, including but not limited to vaccine distribution, administration, and management, COVID-19 testing, health

resource and personnel allocation, data collection, and implementation of recommendations of the Centers for Disease Control and Prevention (“CDC”) to prevent or limit the transmission of COVID-19, including in specific settings; and

WHEREAS, P.L.2021, c.103 explicitly maintained the State of Emergency declared in Executive Order No. 103 (2020), and stated it would in no way diminish, limit, or impair the powers of the Governor to respond to any of the threats presented by COVID-19 pursuant to the Disaster Control Act; and

WHEREAS, in addition to leaving the prior State of Emergency in effect, nothing in P.L.2021, c.103 prevented the Governor from declaring any new public health emergency under the EHPA, N.J.S.A. 26:13-1 et seq., should the evolving circumstances on the ground require such a declaration; and

WHEREAS, Executive Order No. 251, issued August 6, 2021, requires all public, private, and parochial preschool programs and elementary and secondary schools, including charter and renaissance schools (collectively “school districts”), to maintain a policy regarding mandatory use of face masks by staff, students, and visitors in the indoor portion of the school district premises, except in certain specified circumstances; and

WHEREAS, Executive Order No. 252, issued August 6, 2021, requires all covered health care and high-risk congregate settings to maintain a policy that requires all covered workers to either provide adequate proof to the health care and high-risk congregate settings that they have been fully vaccinated

or submit to COVID-19 testing at minimum one to two times weekly beginning September 7, 2021; and

WHEREAS, Executive Order No. 253, issued August 23, 2021, requires school districts to maintain a policy that requires all covered workers to either provide adequate proof to the school district that they have been fully vaccinated or submit to COVID-19 testing at minimum one to two times weekly beginning October 18, 2021; and

WHEREAS, Executive Order No. 264, issued September 20, 2021, requires all child care centers and other child care facilities (collectively “child care settings”) to maintain a policy regarding mandatory use of face masks by staff, child enrollees, and visitors in the indoor portion of the child care setting premises, except in certain specified circumstances; and

WHEREAS, Executive Order No. 264 (2021) further required all child care settings to maintain a policy that required all covered workers to either provide adequate proof to the child care setting that they have been fully vaccinated or submit to COVID-19 testing at minimum one to two times weekly beginning November 1, 2021; and

WHEREAS, Executive Order No. 271, issued October 20, 2021, requires that each executive department and agency, including an independent authority, ensure that certain new contracts, new solicitation for a contract, extension or renewal of existing contracts, and exercise of an option on existing contracts, include a clause that the contractor or any subcontractors, at any tier, that is party to the contract, must maintain a policy that requires all covered

workers to either provide adequate proof to the covered contractor that they have been fully vaccinated or submit to COVID-19 testing at minimum one to two times weekly; and

WHEREAS, as the CDC has recognized, viruses can change through mutation and mutations can result in a new variant of the virus, and these variants can have meaningfully distinct impacts from the original virus; and

WHEREAS, as the CDC has recognized, some variants spread more easily and quickly than other variants of the same virus, which may lead to more cases of COVID-19, increased strain on healthcare resources, more hospitalizations, and more deaths; and

WHEREAS, new variants are classified based on how easily the variant spreads, how severe its symptoms are, how it responds to treatments, and how well vaccines protect against the variant; and

WHEREAS, since Executive Order No. 244 (2021) took effect, the CDC has reported that new variants of concern of COVID-19 have been identified in the United States, particularly the B.1.617.2 (“Delta”) variant and most recently the B1.1.529 (“Omicron”) variant; and

WHEREAS, although New Jersey was able to end the prior Public Health Emergency on account of the effectiveness of vaccines in reducing transmissibility of COVID-19, the Omicron variant appears to spread more easily than other variants, including Delta; early evidence suggests people who have received a primary series of a COVID-19 vaccine but have not yet received the recommended booster shot

are more likely to become infected with this variant than prior variants and to be able to spread the virus to others; and some monoclonal antibody treatments may not be as effective against infection with the Omicron variant; and

WHEREAS, on January 11, 2022, I issued Executive Order No. 280, declaring the existence of a new Public Health Emergency, pursuant to the EHPA, N.J.S.A. 26:13-1 et seq., in the State of New Jersey due to the surge of cases and hospitalizations tied to the new variants of COVID-19; and

WHEREAS, because vaccines are effective at preventing severe illness, hospitalizations, and death, including from the Omicron variant, the CDC has noted that the recent emergence of this variant emphasizes the importance of vaccination and boosters; and

WHEREAS, according to the CDC, studies show after getting the primary series of a COVID-19 vaccine, protection against the virus and the ability to prevent infection may decrease over time, in particular due to changes in variants; and

WHEREAS, although the COVID-19 vaccines remain effective in preventing severe disease, recent data suggests their effectiveness at preventing infection or severe illness wanes over time; and

WHEREAS, the CDC has reported that vaccinated people who receive a COVID-19 booster are likely to have stronger protection against contracting and transmitting COVID-19, particularly the Omicron variant, and stronger protection against serious illness, including hospitalizations and death; and

WHEREAS, after the first confirmed case of the Omicron variant was identified in New Jersey on December 3, 2021, COVID-19 cases started to significantly and rapidly increase again; and

WHEREAS, for the first time since April 2020, the COVID-19 Activity Level reached the “Very High” score throughout the entire State the week of January 1, 2022; and

WHEREAS, as of January 10, 2022, due to the increased prevalence of the Omicron variant, there were 6,075 adult and 86 pediatric hospitalizations related to COVID-19, and within the last week there were over 229,000 new cases, by far the highest number of new cases ever and the highest number of hospitalizations since the start of the pandemic, with 419 new confirmed deaths reported within the last week; and

WHEREAS, as these numbers demonstrate, the spread of the Omicron variant has led to the highest number of cases in New Jersey ever, and has also led to a drastic increase in hospitalizations, increased risk to health and safety of health care workers, and staffing shortages; and

WHEREAS, the increased potential for such a large number of hospitalizations raises serious concerns about the public health and about the capacity of the State’s hospitals and health care systems to meet the health needs of residents, even in the face of the State’s preparedness and response efforts since March 2020; and

WHEREAS, health care workers must have the staffing and resources that are essential to maintaining the operations of the State’s essential health

care services to protect public health during the Omicron variant surge, which include but are not limited to critical and emergency health care, vaccination administration, COVID-19 testing, and contact tracing; and

WHEREAS, it remains crucial that the State understand the health care system's existing capacity and its gaps through continued reporting, which will allow additional resources to be deployed where they are most needed as the State responds to the surge in cases and increased hospitalizations related to the Omicron variant; and

WHEREAS, the spread of COVID-19 has greatly strained the resources and capabilities of county and municipal governments, including public health agencies, that provide essential services for containing and mitigating the spread of contagious diseases, such as resources for vaccination administration, COVID-19 testing, and contract tracing, and the situation is too large in scope to be handled entirely by the normal county and municipal operating services; and

WHEREAS, the CDC has advised that expedient and additional public health action is necessary to prevent severe impacts on the health of individuals and the health care system due to the rapid spread of the Omicron variant; and

WHEREAS, the CDC has confirmed that the rapid increase of infections is due to the increased transmissibility of the Omicron variant and its increased ability to evade immunity conferred by past infection or vaccination; and

WHEREAS, continued automatic enrollment in the NJIIS for individuals receiving a COVID-19 vaccine will facilitate and track progress relative to New Jersey's vaccination targets; and

WHEREAS, the State has thus far administered approximately 13.1 million doses of COVID-19 vaccines, with over 7.4 million New Jerseyans having received at least one dose of a vaccine and over 6.4 million having received the primary series of a vaccine; and

WHEREAS, there is no concrete timeline for authorization for use of currently available COVID-19 vaccinations for children under the age of 5; and

WHEREAS, according to data estimates, only 29.5 percent of 5– 11 year-olds, 63.1 percent of 12-15 year-olds, and 75.1 percent of 16–17 year-olds in New Jersey have received their primary series of a COVID-19 vaccine; and

WHEREAS, as of January 10, 2022, only 46.3 percent of eligible individuals statewide have received their booster shot, with only 7.5 percent of persons 12-17 years old and eligible to be boosted having received their booster shot; and

WHEREAS, while over 74 percent of people in the State have received the primary series of a COVID-19 vaccine, the booster rates remain significantly lower and additional steps are necessary to ensure continued vaccinations, especially boosters, of individuals to protect against spread of COVID-19; and

WHEREAS, in addition to vaccination, testing for COVID-19 remains one of the strongest tools to

prevent the further spread of COVID-19, particularly the Omicron variant; and

WHEREAS, the CDC recommends that all individuals should seek testing when they are ill and isolate if they experience COVID-19 symptoms or receive a positive result; and

WHEREAS, there are currently over 1,000 testing sites available to residents of the state and since mid-December 2021, the Department of Health (“DOH”) has supported approximately 100 additional testing sites while also supporting local and county governments in expanding free testing for residents; and

WHEREAS, hospitals across the State report having experienced an increase of individuals seeking testing through their emergency departments and they continue to ask members of the public to only seek urgent medical treatment from hospitals to help preserve critical staff and resources, especially as hospitals are approaching maximum capacity; and

WHEREAS, despite the increased testing capacity, the demand for testing in light of the increase in cases caused by the Omicron variant spread continues to exceed the supply of COVID-19 tests and there are delays in processing times for test results at clinical laboratories due to the increase in volume of tests and staffing shortages; and

WHEREAS, the State must have the resources necessary to protect the public health through vaccination efforts, masking, testing, treatment, and isolation and quarantine, monitoring hospital admissions and ICU capacity, tracking activity of the virus in the community, and acquiring and maintaining stockpiles

of PPE, ventilators, and other critical supplies to remain prepared for the ongoing surge; and

WHEREAS, while our vaccination and testing efforts continue to progress, an effective mass vaccination and booster program and an adequate response to the continued public health threats imposed by COVID-19, and particularly the Omicron variant, require that my Administration retain all of the flexibility and resources that a public health emergency provides; and

WHEREAS, the American Academy of Pediatrics (“AAP”) has emphasized that in-person learning is critical for educational and social development of children, as evidence demonstrates that remote learning has been detrimental to the educational attainment of students of all ages and has exacerbated the mental health crisis among children and adolescents; and

WHEREAS, the CDC has also cited evidence that suggests virtual learning can lead to learning loss for children and worsening mental health problems for the younger population; and

WHEREAS, child care centers provide critical support to tens of thousands of families across the State who rely on safe, in-person environments for their children during the work day; and

WHEREAS, given the evidence regarding high transmission of the Omicron variant, the CDC continues to recommend universal indoor masking for all teachers, staff, students, child enrollees, and visitors in K-12 schools and child care settings over the age of 2 regardless of vaccination status; and

WHEREAS, the CDC continues to emphasize that children should continue full-time, in-person learning with layered prevention strategies in place, including masking in indoor settings; and

WHEREAS, the AAP similarly recommends universal masking in schools and child care settings because a significant portion of the student population has not yet received the vaccine, including individuals under the age of 5 who are not yet eligible to even receive a vaccine; and

WHEREAS, both the CDC and AAP recognize that masking is a critical tool to reduce transmission of the virus and protect unvaccinated individuals; and

WHEREAS, after consultation with the DOH, I have determined that it is necessary to continue to enforce a uniform masking policy in schools and child care settings for teachers, staff, students, child enrollees, and visitors over the age of 2 while vaccination rates are low among a significant portion of the student population and not yet available to a significant portion of the child enrollee population; and

WHEREAS, on July 6, 2021, the U.S. Department of Justice's Office of Legal Counsel issued an opinion concluding that Section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 360bbb-3 does not prohibit public or private entities from imposing vaccination requirements while vaccinations are only available pursuant to Emergency Use Authorization; and

WHEREAS, requiring workers in schools and child care settings to receive a COVID-19 vaccine or undergo regular testing can help prevent outbreaks

and reduce transmission to children, including those who have not received, or are not yet eligible to receive, a vaccination; and

WHEREAS, preventing transmission of COVID-19 is critical to keeping schools and child care settings open for in-person instruction; and

WHEREAS, school districts have access to multiple sources of funding to address costs associated with worker vaccination efforts and testing, including three rounds of federal Elementary and Secondary School Emergency Relief funds and Emergency Assistance for Nonpublic Schools within the Governor's Emergency Education Relief funds; and

WHEREAS, the CDC has repeatedly emphasized the importance of heightened mitigation protocols in certain congregate and health care settings because of the significant risk of spread and vulnerability of the populations served; and

WHEREAS, requiring workers in those congregate and health care settings to receive a COVID-19 vaccine or undergo regular testing can help prevent outbreaks and reduce transmission to vulnerable individuals who may be at higher risk of severe disease; and

WHEREAS, parties that contract with the State government provide essential services to the public and interact with the public on a regular basis, and because of the nature of their work, a significant portion of their workers are not able to work remotely; and

WHEREAS, ensuring the safety of the government workforce during this overall escalation in COVID-19 cases, hospitalizations, and deaths resulting from the Omicron variant is essential for continued operation and service to the public, and it is fitting and proper to require additional protections to the State workforce and public by continuing to require contractors to provide their vaccination or testing status as a condition of entry onto State property and into State facilities, including property and facilities leased by a contractor; and

WHEREAS, this ensures that contractors are held to the same requirements as the State workforce, which the Executive Branch in its capacity as an employer has required to receive a COVID-19 vaccine or undergo regular testing; and

WHEREAS, the State will continue to work closely with school districts and child care settings to successfully implement the requirements of this Order; and

WHEREAS, as we evaluate the appropriate response and resources needed to combat the surge in cases and increase in hospitalizations due to the Omicron variant, I have consulted with the Executive Branch departments and agencies as to what administrative orders, directives, and waivers are necessary to continue; and

WHEREAS, the Constitution and statutes of the State of New Jersey, particularly the provisions of N.J.S.A. 26:13-1 et seq., N.J.S.A. App. A: 9-33 et seq., N.J.S.A. 38A:3-6.1, and N.J.S.A. 38A:24 and all amendments and supplements thereto, confer upon

the Governor of the State of New Jersey certain emergency powers, which I have invoked;

NOW, THEREFORE, I, PHILIP D. MURPHY, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby ORDER and DIRECT:

1. Executive Order Nos. 111, 112, and 207 (2020) shall be reinstated and remain in full force and effect, except that any civil or criminal immunity related to the COVID-19 response bestowed by Executive Order No. 112 (2020) shall not be reinstated.
2. Executive Order Nos. 251, 252, 253, 264, and 271 (2021) shall remain in full force and effect.
3. The administrative orders, directives, and waivers issued by any Executive Branch departments and agencies in whole or in part based on the authority under the EHPA to respond to the previously declared Public Health Emergency presented by the COVID-19 outbreak that are provided in the Appendix to this Order shall remain in full force and effect unless otherwise modified or revoked by the Executive Branch department or agency.
4. For purposes of this Order, “Executive Branch departments and agencies” shall mean any of the principal departments in the Executive Branch of State government and any agency, authority, board, bureau, commission, division, institution, office, or other instrumentality within or created by any such department, and any independent State authority, commission, instrumentality, or agency over which the Governor exercises executive authority, as determined by the Attorney General.

5. It shall be the duty of every person or entity in this State or doing business in this State and of the members of the governing body and every official, employee, or agent of every political subdivision in this State and of each member of all other governmental bodies, agencies, and authorities in this State of any nature whatsoever, to cooperate fully in all matters concerning this Order, and to cooperate fully with any Administrative Orders issued pursuant to this Order.

6. No municipality, county, or any other agency or political subdivision of this State shall enact or enforce any order, rule, regulation, ordinance, or resolution which will or might in any way conflict with any of the provisions of this Order, or which will or might in any way interfere with or impede its achievement.

7. Penalties for violations of this Order may be imposed under, among other statutes, N.J.S.A. App. A:9-49 and-50.

8. This Order shall take effect immediately and shall remain in effect until revoked or modified by the Governor.

GIVEN, under my hand and seal this 11th day of January,

Two Thousand and Twenty-two, and of the Independence of the United States, the Two Hundred and Forty-Sixth.

[seal]

/s/ Philip D. Murphy
Governor

Attest:

/s/ Parimal Garg
Chief Counsel to the Governor

**EXECUTIVE ORDER NO. 288
(FEBRUARY 10, 2022)**

WHEREAS, on March 9, 2020, I issued Executive Order No. 103, declaring the existence of a Public Health Emergency, pursuant to the Emergency Health Powers Act (“EHPA”), N.J.S.A. 26:13-1 et seq., and a State of Emergency, pursuant to the New Jersey Civilian Defense and Disaster Control Act (“Disaster Control Act”), N.J.S.A. App A:9-33 et seq., in the State of New Jersey for Coronavirus disease 2019 (“COVID-19”), the facts and circumstances of which are adopted by reference herein; and

WHEREAS, through Executive Order Nos. 119, 138, 151, 162, 171, 180, 186, 191, 200, 210, 215, 222, 231, 235, and 240, which were issued each month between April 7, 2020 and May 14, 2021, and the facts and circumstances of which are adopted by reference herein, I declared that the COVID-19 Public Health Emergency in effect at the time continued to exist; and

WHEREAS, New Jersey made significant progress in responding to COVID-19 and mitigating its devastating effects, in particular in light of the advent of three effective vaccines that, among other things, had significantly reduced the likelihood of both contracting and transmitting the variants of COVID-19 that were present in the United States at the time; and

WHEREAS, on June 4, 2021, in light of these developments, I signed Assembly Bill No. 5820 into law as P.L.2021, c.103, and issued Executive Order No.

244, which terminated the Public Health Emergency declared in Executive Order No. 103 (2020); and

WHEREAS, P.L.2021, c.103 sought to enable the State to bring an end to its prior Public Health Emergency while still allowing for an orderly continuation of the Administration's ability to order certain public health measures relating to COVID-19, including but not limited to vaccine distribution, administration, and management, COVID-19 testing, health resource and personnel allocation, data collection, and implementation of recommendations of the Centers for Disease

Control and Prevention ("CDC") to prevent or limit the transmission of COVID-19, including in specific settings; and

WHEREAS, P.L.2021, c.103 explicitly maintained the State of Emergency declared in Executive Order No. 103 (2020), and stated it would in no way diminish, limit, or impair the powers of the Governor to respond to any of the threats presented by COVID-19 pursuant to the Disaster Control Act; and

WHEREAS, in addition to leaving the prior State of Emergency in effect, nothing in P.L.2021, c.103 prevented the Governor from declaring any new public health emergency under the EHPA, N.J.S.A. 26:13-1 et seq., should the evolving circumstances on the ground require such a declaration; and

WHEREAS, as the CDC has recognized, viruses can change through mutation and mutations can result in a new variant of the virus, and these variants can have meaningfully distinct impacts from the original virus; and

WHEREAS, as the CDC has recognized, some variants spread more easily and quickly than other variants of the same virus, which may lead to more cases of COVID-19, increased strain on healthcare resources, more hospitalizations, and more deaths; and

WHEREAS, new variants are classified based on how easily the variant spreads, how severe its symptoms are, how it responds to treatments, and how well vaccines protect against the variant; and

WHEREAS, since Executive Order No. 244 (2021) took effect, the CDC has reported that new variants of concern of COVID-19 have been identified in the United States, particularly the B.1.617.2 (“Delta”) variant and most recently the B1.1.529 (“Omicron”) variant; and

WHEREAS, although New Jersey was able to end the prior Public Health Emergency on account of the effectiveness of vaccines in reducing transmissibility of COVID-19, the Omicron variant appears to spread more easily than other variants, including Delta; early evidence suggests people who have received a primary series of a

COVID-19 vaccine but have not yet received the recommended booster shot are more likely to become infected with this variant than prior variants and to be able to spread the virus to others; and some monoclonal antibody treatments may not be as effective against infection with the Omicron variant; and

WHEREAS, on January 11, 2022, I issued Executive Order No. 280, declaring the existence of a new Public Health Emergency, pursuant to the EHPA,

N.J.S.A. 26:13-1 et seq., in the State of New Jersey due to the surge of cases and hospitalizations tied to the new variants of COVID-19; and

WHEREAS, on January 11, 2022, I issued Executive Order No. 281, extending various orders, including Executive Order No. 252 (2021), to ensure the State continues to have the necessary resources in place to respond to the new variants of COVID-19; and

WHEREAS, on January 19, 2022, I issued Executive Order No. 283, requiring all covered health care and high-risk congregate settings to maintain a policy that requires all covered workers to provide adequate proof to the health care and high-risk congregate settings that they have are up to date with their COVID-19 vaccinations, including any booster shots for which they are eligible; and

WHEREAS, N.J.S.A. 26:13-3(b) establishes that a Public Health Emergency declared by the Governor shall automatically terminate after 30 days, unless renewed for an additional 30 days through a declaration of the Governor; and

WHEREAS, after the first confirmed case of the Omicron variant was identified in New Jersey on December 3, 2021, COVID-19 cases started to significantly and rapidly increase again; and

WHEREAS, for the first time since April 2020, the COVID-19 Activity Level reached the “Very High” score throughout the entire State the week of January 1, 2022; and

WHEREAS, as of January 10, 2022, due to the increased prevalence of the Omicron variant, there

were 6,075 adult and 86 pediatric hospitalizations related to COVID-19, and within that week there were over 229,000 new cases, by far the highest number of new cases ever and the highest number of hospitalizations since the start of the pandemic, with 419 new confirmed deaths reported within that week; and

WHEREAS, as these numbers demonstrate, the spread of the Omicron variant has led to the highest number of cases in New Jersey ever, and has also led to a drastic increase in hospitalizations, increased risk to health and safety of health care workers, and staffing shortages; and

WHEREAS, as the State has taken significant emergency measures in the last month in response to the Omicron variant, there has been a decrease in the rate of reported new cases of COVID-19 in New Jersey, in the total number of individuals being admitted to hospitals for COVID-19, and in the rate of reproduction for COVID-19 infections in New Jersey; and

WHEREAS, the fact that the spread of COVID-19 has slowed over the last 30 days does not in any way suggest that the ongoing Public Health Emergency has dissipated, because absent mitigation measures, particularly increased rates of vaccinations and COVID-19 testing, public health experts anticipate that the spread of COVID-19 may again significantly increase; and

WHEREAS, since the Public Health Emergency was declared on January 11, 2022, at which time there were over 1,638,522 total cases of COVID-19 in New Jersey, the COVID-19 outbreak related to the

Omicron and other new variants has continued to present a public health hazard in New Jersey, in the region, and across the United States; and

WHEREAS, as of February 9, 2022, according to the World Health Organization, there were over 399,600,607 confirmed cases of COVID-19 worldwide, with over 5,757,562 of those cases having resulted in death; and

WHEREAS, as of February 9, 2022, according to the CDC, there were over 76,976,575 confirmed cases of COVID-19 in the United States, with over 906,603 of those cases having resulted in death; and

WHEREAS, as of February 10, 2022, there were over 2,139,579 positive cases of COVID-19 in New Jersey, with at least 29,323 of those cases having resulted in death; and

WHEREAS, while the rate of reported new cases across all counties has decreased over the past weeks, New Jersey continues to see cases and hospitalizations in every county and a significant number of deaths, demonstrating the need for many of the State's current measures to remain in place, both to reduce additional new infections and to save lives; and

WHEREAS, while the number of hospitalized patients, patients in intensive care, and ventilators in use, and the spot positivity of COVID-19 tests have decreased considerably over the past few weeks, COVID-19 continues to spread throughout the State; and

WHEREAS, because vaccines are effective at preventing severe illness, hospitalizations, and death, including from the Omicron variant, the CDC has

noted that the recent emergence of this variant emphasizes the importance of vaccination and boosters; and

WHEREAS, according to the CDC, studies show after getting the primary series of a COVID-19 vaccine, protection against the virus and the ability to prevent infection may decrease over time, in particularly due to changes in variants; and

WHEREAS, although the COVID-19 vaccines remain effective in preventing severe disease, recent data suggests their effectiveness at preventing infection or severe illness wanes over time; and

WHEREAS, the CDC has reported that vaccinated people who receive a COVID-19 booster are likely to have a stronger protection against contracting and transmitting COVID-19, particularly the Omicron variant, and stronger protection against serious illness, including hospitalizations and death; and

WHEREAS, the CDC has advised that expedient and additional public health action is necessary to prevent severe impacts on the health of individuals and the health care system due to the rapid spread of the Omicron variant; and

WHEREAS, New Jersey has administered over 13.5 million doses of the COVID-19 vaccine in the State to date; and

WHEREAS, even with these improvements and the State's continued rollout of its vaccination program, it is still necessary to maintain mitigation protocols to ensure spread is limited while dissemination of the vaccine continues; and

WHEREAS, the renewal of the declaration of the ongoing Public Health Emergency is necessary to ensure that the State can swiftly respond to Omicron and new variants and take all appropriate actions should the rate of reported new cases of COVID-19 in New Jersey, number of individuals being admitted to hospitals for COVID-19, or rate of reproduction for COVID-19 infections in New Jersey again increase, as we have seen in numerous states across the country; and

WHEREAS, the spread of COVID-19 has greatly strained the resources and capabilities of county and municipal governments, including public health agencies, that provide essential services for containing and mitigating the spread of contagious diseases, and the situation is too large in scope to be handled entirely by the normal county and municipal operating services; and

WHEREAS, the facts as set forth above and in consultation with the Commissioner of the Department of Health (“DOH”) confirm that the spread of COVID-19 in New Jersey constitutes an ongoing public health hazard that threatens and presently endangers the health, safety, and welfare of the residents of one or more municipalities or counties of the State, and it is necessary and appropriate to take action against this public health hazard to protect and maintain the health, safety, and welfare of New Jersey residents and visitors; and

WHEREAS, the facts as set forth above and in consultation with the Commissioner of DOH confirm that there exists a Public Health Emergency in the State; and

WHEREAS, the Constitution and statutes of the State of New Jersey, particularly the provisions of N.J.S.A. 26:13-1 et seq., N.J.S.A. App. A: 9-33 et seq., N.J.S.A. 38A:3-6.1, and N.J.S.A. 38A:24 and all amendments and supplements thereto, confer upon the Governor of the State of New Jersey certain emergency powers, which I have invoked;

NOW, THEREFORE, I, PHILIP D. MURPHY, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby DECLARE and PROCLAIM that the Public Health Emergency declared in Executive Order No. 280 (2022) pursuant to the EHPA, N.J.S.A. 26:13-1, et seq., continues to exist throughout the State of New Jersey, and I hereby ORDER AND DIRECT:

1. All Executive Orders adopted in whole or in part based on the authority under the EHPA to respond to the Public Health Emergency presented by the COVID-19 outbreak, including those extended pursuant to Executive Order No. 281 (2022), as well as Executive Order No. 283 (2022), remain in full force and effect.

2. All actions taken by any Executive Branch departments and agencies in whole or in part based on the authority under the EHPA to respond to the Public Health Emergency presented by the COVID-19 outbreak and extended pursuant to Executive Order No. 281 (2022) and attached in the Appendix thereto, including but not limited to any Administrative Orders, remain in full force and effect.

3. For purposes of this Order, “Executive Branch departments and agencies” shall mean any of the

principal departments in the Executive Branch of State government and any agency, authority, board, bureau, commission, division, institution, office, or other instrumentality within or created by any such department, and any independent State authority, commission, instrumentality, or agency over which the Governor exercises executive authority, as determined by the Attorney General.

4. This Order shall take effect immediately.

GIVEN, under my hand and seal this 10th day of February,

Two Thousand and Twenty-two, and of the Independence of the United States, the Two Hundred and Forty-Sixth.

[seal]

/s/ Philip D. Murphy
Governor

Attest:

/s/ Parimal Garg
Chief Counsel to the Governor

**SECOND AMENDED COMPLAINT
(AUGUST 27, 2021)**

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

CYNTHIA STEPIEN, ON BEHALF OF HERSELF AND
HER MINOR CHILD; STAMATIA DIMATOS SCHRECK
ON BEHALF OF HERSELF AND HER THREE MINOR
CHILDREN; RYAN CODY, ON BEHALF OF HIMSELF AND
HIS MINOR CHILD J.C.; KELLY FORD, ON BEHALF OF
HERSELF AND HER MINOR CHILD A.F.; SIMONA
CHINDEA, ON BEHALF OF HERSELF AND HER TWO
MINOR CHILDREN; GABE MCMAHON; M.F.; M.K.N.;
K.B.; B.W.; L.R.; J.V.P.; V.P.; D.M.; B.M.; A.M.;
DANIELLE ESCAYG; AND ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs,

v.

PHILIP D. MURPHY, GOVERNOR;
ANGELICA ALLEN-MCMILLAN, COMMISSIONER
OF EDUCATION; JUDITH M. PERSICHILLI,
COMMISSIONER OF HEALTH,

Defendants.

Docket No: 21-cv-13271

1. Plaintiffs are students in New Jersey public schools, and will be students in September 2021, appearing in this action in their own names and, where necessary, with the consent of their parents.
2. Other plaintiffs are parents of minor children who will be attending public schools in New Jersey, appearing for themselves and on behalf of their minor children.
3. Plaintiff DANIELLE ESCAYG, a resident of Belmar, is a special education teacher at Red Bank Regional school.
4. All plaintiffs appear on behalf of themselves and others similarly situated.
5. All plaintiffs seek declaratory relief that New Jersey's mandatory mask mandates for schoolchildren, and other policies or orders isolating and segregating schoolchildren from each other and from teachers and staff purportedly to prevent Covid transmission, or future such orders, are unconstitutional and violate the First, Fifth and 14th Amendments to the United States Constitution.
6. Plaintiffs seek injunctive relief: 1) barring defendants from compelling the wearing of face masks by schoolchildren during the school day and certain other requirements purporting to prevent Covid transmission, as described herein; 2) directing that defendants vacate and rescind all such orders; and 3) that defendants issue affirmative orders barring school districts from promulgating or implementing mask mandates and other Covid-related preventative, isolation and segregation policies.

7. Plaintiffs Ryan Cody and Kelly Ford seek additional declaratory relief (Count IV) that the state and/or its school districts or officials may not impose mandatory Covid testing of schoolchildren without express, written parental consent, along with appropriate injunctive relief barring such practice.

PLAINTIFFS

8. Plaintiff CYNTHIA STEPIEN is a parent of a minor school child entering the third grade at Woodside Elementary School in the River Vale School District.

9. Plaintiff STAMTIA DIMATOS SCHRECK is a parent of three minor children attending the Ramapo Bridge Middle School and the George Washington Elementary School in the Mahwah School District.

10. Plaintiff RYAN CODY is a parent of J.C., a student at Peter Muschal Elementary School in the Bordentown School District, Bordentown, New Jersey.

11. Plaintiff KELLY FORD is a parent of her minor daughter A.F., who will be a sophomore at Barnegat High School; Plaintiff Kelly Ford has consented to her son M.F., who will be a senior at Barnegat High School, appearing in this action on his own behalf.

12. Plaintiff SIMONA CHINDEA is a parent of two minor children attending school in the West Orange school district in Essex County.

13. Plaintiff GABE MCMAHON, age 18, is a student at Middletown South High School in Middletown, New Jersey.

14. Plaintiff M.F. is a student at Barnegat High School in Ocean County, New Jersey.

15. Plaintiff M.K.N. is a student at Jackson High School in Jackson, New Jersey.

16. Plaintiff K.B. is a student at Southampton High School in Burlington County, New Jersey.

17. Plaintiff B.W. will be a junior at a public high school in Monmouth County, New Jersey.

18. Plaintiff L.R. is a student at Jackson High School in Jackson, New Jersey.

19. Plaintiff J.V.P. is a student at Old Bridge High School in Old Bridge, New Jersey.

20. Plaintiff V.P. is a student at Old Bridge High School in Old Bridge, New Jersey.

21. Plaintiff D.M. is a student at John P. Stevens High School in Edison, New Jersey.

22. Plaintiff B.M. is a sophomore at Middletown South High School in Middletown, New Jersey.

23. Plaintiff A.M. is a public high school student in Sparta, New Jersey.

24. All student plaintiffs with the exception of GABE McMAHON, who is over the age of 18, are minors participating as plaintiffs in this action with the consent and approval of their parent or guardian.

DEFENDANTS

25. Defendant PHILIP D. MURPHY is the Governor of New Jersey, defendant ANGELICA ALLEN-MCMILLAN, Ed.D, is the Commissioner of Education of New Jersey and defendant JUDITH M. PERSICHILLI, R.N., B.S.N., M.A. is the Commissioner of Health of New Jersey.

26. Defendants have the actual power and authority, or have asserted that they have such power or authority, to impose mandatory wearing of masks by children in New Jersey public schools and other Covid preventative measures imposed on schoolchildren, as described herein; in particular, defendant Murphy in his capacity as Governor of New Jersey issued Executive Order 251 mandating that all public and private schoolchildren, teachers and staff must wear masks in school and directing that all schools and district implement policies to mandate masking. See Executive Order 251, August 6, 2021, annexed hereto.

27. Defendants have supervisory power and authority over New Jersey public schools and school districts sufficient to block the implementation of such mandatory measures.

28. Defendants have the legal power to implement and carry out an order of this Court that New Jersey public schools and school districts cease requirements of mandatory mask wearing by schoolchildren and other preventative Covid-related measures imposed on children, or any Covid testing without parental consent as asserted separately by Plaintiffs Kelly Ford and Ryan Cody (Count IV). Defendants have the legal power to implement and carry out any order of this court enjoining or prohibiting said practices and their presence in this action will enable an effective remedy.

JURISDICTION

29. Jurisdiction is in the United States District Court pursuant to 28 U.S.C. § 1331 in that this matter presents a federal question under 42 U.S.C. § 1983, et seq., and the United States Constitution,

based upon Defendants' assertion of powers under color of state law mandating the wearing of masks by schoolchildren and/or other Covid preventative measures, and requiring that school district issue such policies, thereby violating Plaintiffs' rights under the First, Fifth and Fourteenth Amendments to the Constitution.

VENUE

30. Venue is properly in the Newark Vicinage of the District Court of New Jersey based upon the residence of Plaintiff Cynthia Stepien in River Dale in the County of Bergen; the residence of Plaintiff Simona Chindea in the County of Essex; the residence of Plaintiff A.M. in Sparta, New Jersey in the Country of Sussex; the residence of plaintiffs J.V.P. and V.P. in Old Bridge Northern Middlesex County; the residence of plaintiff D.M. in Edison in Northern Middlesex County.

COUNT I

(Declaratory and Injunctive Relief as to Policies Mandating the Wearing of Masks by New Jersey Schoolchildren and Other Covid Preventative Measures While Attending New Jersey Public Schools)

31. Plaintiff repeats and reasserts each and every allegation set forth above as if more fully set forth herein.

BACKGROUND TO THE EXECUTIVE ORDERS

32. Following prior executive orders, New Jersey school districts where the student plaintiffs or the

children of the parent plaintiffs attend school required through July 4, 2021 that all students attending public schools must wear face masks and be subject to other Covid-preventative measures while on the school grounds during the school day.

33. Such requirements were based upon Executive Order No.175, §§ 2a-b, that required mandatory mask wearing, six foot social distancing and/or physical barriers between all New Jersey students, and Executive Order No. 242, § 2 that exempted schools from the rescinding of mask mandates and other Covid-preventative measures in all other public and private places (except for health care and mass transit facilities).

34. Executive Order No. 242 eliminated all masks, barriers and social distancing for children and adults at theaters, malls, retail establishments, restaurants, catering halls, athletic events and stadiums, political gatherings and public protests, public lectures, parks and beaches, houses of worship, weddings, bar and bat mitzvahs, communions, and other similar places of congregation, but children in New Jersey's public schools have continued to be made subject to mandates that they must wear face masks and engage in social distancing and other isolating measures, including physical transparent barriers surrounding their desks, while in physical attendance at public schools.

35. Under these policies and practices, school-children who refuse to wear face masks have not been permitted on the premises of their schools or to participate in organized school activities and were required to remain at home for remote learning, losing the opportunity to associate with other students, teachers and staff.

36. Exceptions to the school mask mandate and other requirements been given only on an ad hoc basis, and with no regulatory standard, for health or safety reasons particular to certain schoolchildren but are not available to the general student population including most plaintiffs; where such waivers may apply in certain instance they create a stigmatizing effect since those schoolchildren with the waiver would be permitted to attend school without masking while all other children would be required to be masked; waivers also disclose to the general student and staff population that the given child has a medical condition and renders the waived child subject to fears that they may be communicating Covid or other conditions. Such waivers do not protect rights but enhance injury from masking and other Covid preventative measures.

37. Governor Murphy and Commissioner of Education Angelica Allen-McMillan announced June 28, 2021 that Executive Order 175 will be allowed to expire on July 4, 2021 but that school districts were authorized to continue mask mandates and other Covid restrictions in their discretion.¹ In their announcement, Defendants Murphy and Allen-McMillan specifically stated that school districts were empowered and authorized to continue social distancing and physical separation between students; the Governor expressly reserved for himself the power to reimpose mask mandates and other restrictions via executive order. Such statements also appear in the state's document entitled "The Road Forward" published June

¹ See e.g. <https://www.nj.com/?e=dbf55eea75c4e425 a5e5f74c2f68 7d0e&utm source=Sailthru&utm medium=email&utm campaign=Newsletter coronavirus&utm term=Newsletter coronavirus>

29, 2021 at <https://www.nj.gov/education/roadforward/docs/HealthAndSafetyGuidanceSY2122.pdf>.

38. Subsequently, on August 6, 2021 the Governor announced and issued Executive Order 251 that provided that all New Jersey school districts maintain mandatory masking policies for all schoolchildren, teachers and other staff subject to certain narrow exceptions. *See Executive Order 251.* Specifically, the Executive Order states as the basis for the mandatory masking policy that

“the State has experienced significant upticks in critical COVID-19 metrics over the past few weeks, including COVID-19 positive cases, the rate of transmission, spot positivity, and new hospitalizations, that warrant additional precautions in certain settings with a substantial number of unvaccinated individuals;”

See Executive Order 251 at 3-4.

39. The Governor has asserted that all schools, public and private, must adhere to the provisions of Executive Order 251.

40. Executive Order 253 reaffirmed Executive Order 251 and also stated that any exemptions to student mask wearing should be limited as much as possible to “maximize” mask wearing.

41. Accordingly, a justiciable controversy exists under the Declaratory Judgment Act, 28 U.S.C. § 2201 as to whether defendants are acting, under color of state law, or have assumed the power, to authorize and facilitate mask mandates and other preventative and restrictive measures imposed on schoolchildren, burdening, restricting and limiting rights of speech,

communication, association and privacy protected by the First, Fifth and Fourteenth Amendments to the United States Constitution, giving rise to a right of declaratory and injunctive relief pursuant to 28 U.S.C. § 1983, et seq.

**MASK-WEARING MANDATES AND OTHER
COVID-PREVENTION MANDATES BURDEN
AND IMPAIR THE PROTECTED SPEECH,
ASSOCIATIONAL AND PRIVACY
RIGHTS OF CHILDREN**

**Associational Impairment and the
Chilling Effect of Masking**

42. Mandatory wearing of masks by schoolchildren burdens and impairs protected speech rights, inhibiting and preventing communication between students, and between students, teachers and aides.
43. Mandatory mask wearing prevents or impairs the perception and exchange of non-verbal forms of communication vital and material to the exchange of ideas, thoughts and emotions.
44. Mandatory wearing of masks burdens and impairs protected associational rights of schoolchildren, inhibiting and preventing the formation and maintenance of relationships and friendships between schoolchildren, and between schoolchildren and teachers and staff.
45. Masking prevents non-verbal exchanges of information and signaling through facial cues and gestures of emotion, humor, approval and disapproval, joy, anger or despair, encouragement or discouragement

of friendship and other non-verbal forms of communication.

46. Such non-verbal communication is:
 - a) necessary and material to normal human associational rights and interests;
 - b) a critical and non-severable part of human speech and association; and
 - c) necessary and material to normal exchanges of ideas and thoughts.

47. Schoolchildren, like all human beings, require access to facial expressions and non-verbal cues as a normal and assumed part of human association; the deprivation of such by mandatory mask wearing impairs their liberty and privacy interests.

48. Mandatory mask usage chills, prevents and inhibits basic communication. Words are frequently muffled and rendered inaudible by the use of masks; students are chilled in their willingness to communicate or express themselves by the barrier presented by face coverings; students are chilled in exercising their speech rights, in part, because masking prevents the feedback of acceptance, disagreement and other non-verbal cues that complete human thought and communication; plaintiffs have had difficulty understanding teachers or each other due to mask usage and have refrained from speech in class due to such constraints.

Non-Masking Elements of the Executive Orders

49. In prior executive orders, the Governor has imposed other restrictive measures including the use of plexiglass barriers surrounding school desks, social

distancing and isolation measures that burden and prevent ordinary communication and association; such measures prevent, impair and burden speech, privacy and associational rights of schoolchildren.

50. As an example of such practices, Plaintiff Ryan Cody observed his son's kindergarten desk surrounded by plexiglass barriers on May 20, 2021 when he toured his son J.C.'s classroom; Mr. Cody has been told that such conditions will continue to be imposed in September 2021 when his son's school resumes.

51. By way of further example, the eight-year old daughter of Plaintiff Stamatia Dimatos Schreck, residing in Mahwah and attending the Mahweh School District was forced in the 2021 spring term to sit in her classroom surrounded by plexiglass barriers and was subjected to imposed social distancing measures, along with mask wearing.

52. Beginning May 5, 2021, Plaintiff Cynthia Stepien's eight-year old daughter I.B., age 7, a second grader at Woodside Elementary School in River Vale, New Jersey, was forced to sit at her classroom desk surround by plexiglass barriers and became subject to imposed six foot social distance barriers between all students and teachers and staff; her class was told by her teacher at Woodside to imagine a tight circle around her desk as the only space where students could stand.

53. Upon information and belief, such policies were universal in New Jersey schools through at least July 4, 2021 and were mandated in the Department of Education's "The Road Back" that states:

“In a classroom setting where social distancing can take place (e.g., desks are 6 feet apart) or physical barriers are in place, face coverings can be removed when students are seated at desks but should be worn when moving about the classroom.”

<https://www.nj.gov/education/reopening/NJDOETheRoadBack.pdf> at 19. “The Road Back” also provides that “face coverings are always required for visitors and staff . . . ”. *Id.*

54. The Road Back mandates six foot separation between all students at all times:

“[S]tudent desks and seating in classrooms, cafeterias, multi-purpose rooms, and other spaces should be separated by at least six feet to the maximum extent practicable. Where such physical distancing is not feasible or difficult to maintain, protective measures such as physical barriers between students and arranging seating such that all individuals face the same direction can help reduce transmission.”

<https://www.nj.gov/education/reopening/NJDOETheRoadBack.pdf> at 18.

55. Other mandates of the Department of Education included forced separation of children during meals and recess periods, prohibiting children’s desks from facing each other, requiring children to sit on only one side of a table spaced six feet apart. *Id.* at 18-19.

56. The requirements intentionally bar mixing of classes or cohorts, further burdening associational and privacy rights of children. *Id.* at 31.

57. Summaries of the experience of certain named plaintiffs in the wearing of masks and Covid separation mandates appear below at ¶¶ 57-71, *infra*.

Plaintiff K.B.'s Experience Under Covid Masking and Separation Mandates

58. Plaintiff K.B. has experienced a direct intrusion into her associational rights. For example, at lunchtime her associational opportunities were limited by the Covid regulations to two students at opposite ends of a lunch table (with three students in the case of a larger oval table); previously she could choose to associate at will with a group of 10 students or more at a single lunch table with the students forming their own group but such choices and opportunity to associate and communicate with other students were prohibited under the Covid regulations; such communal gathering at lunchtime was a vital part of K.B.'s school experience and formed a traditional and important forum for student communication and association.

59. Under the mask mandate K.B. lost the ability to relate emotionally to other students; she is prevented by mask usage from helping other students with their emotions and feelings as she has done in the past because she cannot see their expressions based on facial movement and signaling. Wearing a mask, she can no longer tell if her colleagues in a classroom group are seeking help, if they are confused with a project, if they are mad, if they wish to be left alone, all materials elements of her ordinary communication

and associational acts that are lost to her under the Covid regulations.

60. Due to the loss of non-verbal cues and signaling, K.B. no longer knows if friends or other students are glad to see her and wish to communicate with her or if they are angry, irritated and not willing to communicate or, conversely, if they welcome her presence. She has lost the emotional component of communication and association.

61. K.B. also experiences a severe intrusion into her emotional well-being as she finds herself criticized and chastised if she slips her mask below her nose. She finds that she is now in an anxious state throughout the school day due to the fear of such criticism and of teacher discipline; she did not experience this fear in school prior to the mask mandate.

62. K.B. is no longer comfortable in her relations with teachers due to the fear of constant mask discipline. She further believes that friends will seek to avoid her if she wears her mask below her nose as she often does due to her asthmatic condition.

63. K.B. experiences discomfort and claustrophobia wearing the mask due to her asthma and difficulty breathing. K.B. now experiences regular and repeated panic attacks caused by the day long sensation of smothering while wearing a mask and has changed her behaviors at home due to such anxiety: for example, she no longer sleeps with a blanket over her head at night due to her day-time perception of smothering; her allergies have worsened and she has significant self-esteem issues due to her feeling of isolation in her opposition to the use of the mask in school.

Plaintiff B.W.'s Experience Under Covid Masking and Other Separation Mandates

64. Plaintiff B.W. is a junior at a high school in Monmouth County. She experienced nearly a full year of mask mandates and other separation regimens as she was attending a special course that required in-person presence.

65. By means of the mask mandates and separation regimen, she lost her social center as her friendships and associations arise as a result of her attendance at school; during the period when students returned to schools in large numbers and were masked and separated in May and June, B.W. was unable to develop new friendships or personal associations due to the inability to see faces and the requirement of maintaining a strict six foot separation.

66. Continuing discipline by teachers for violation of these standards also interfered with the development of and maintenance of her friendships and associations.

67. B.W. had difficulty in making friendships due to the inability to get to know others due to the mask and separation mandates; in her experience, friends frequently and repeatedly said they did not recognize each other, adversely impairing social interactions. B.W. has forgotten many students and frequently will not begin conversations as she cannot see the face of other persons. Lacking access to facial expressions B.W. is confused about the emotional reactions and responses of others.

68. For B.W., like most people and other plaintiffs, facial expression is fundamental to communication and association especially because B.W.'s first fourteen (14) years were lived free of such impairment and burden; prior to the mask mandate she was able to access non-verbal social cues that are absent under the mask regimen. The absence of facial expressions and other social cues due to mask usage now forces B.W. to learn over again methods of understanding of others' emotional states; her prior 14 years experience with nonverbal means of understanding and communication is now beyond her reach under mask mandates.

69. Mask mandates have caused B.W. to suffer harm and interference in her functioning as an individual. B.W. has repeatedly had contact lenses rip due to the air that flows into her eyes from under the mask that dries out the lenses and causes them to tear, a condition she never experienced in her school years prior to mask mandates; under the mask mandate B.W. has suffered an impairment of her self-esteem and no longer cares for her appearance in preparing to go to school each day and she does not look forward to school now that its social aspect has been impaired. B.W.'s enjoyment of life has been injured materially due to the continued discipline imposed by teachers as to mask usage.

70. B.W. experienced extreme limitations in lunchtime association with other students due to the mask and separation mandates: at lunch, students were isolated in the gymnasium on separate desks kept apart from each other or, on some occasions, forced to sit no more than two people at a single table six feet apart and, if a larger table, three persons;

this was a material and adverse change from the usual and traditional lunchtime cafeteria practices typically experienced by B.W. in which unlimited numbers of students could choose to associate together at lunch tables, generally at least 10 students with open and unrestrained communication.

71. B.W. ceased to speak to or associate with other students during lunch periods due to the impairment described herein. For B.W. and other students at New Jersey public schools, particularly middle and high school students, the lunch period is vital to their speech and associational interests: lunch is traditionally a period when students are not in class and do not have direct obligations to adhere to a structured order of activity. At lunchtime students are free, by long tradition and practice, to engage in open communication and association with other students. Such traditional association and communication during lunch is impossible under the mask and separation mandates as there is no direct proximity between students for ordinary conversation, they are kept isolated at separate desks or tables and all discussion must take place over a distance between desks or tables; such “communication” necessarily loses any element of privacy or confidentiality as it must be sufficiently audible to traverse the distance between desks or tables and be heard by others; the intimacy of direct, private communication with other students is lost under the mask and separation mandates, comprising a substantial impairment of speech, associational and privacy rights. B.W. along with other plaintiffs and students throughout the state has experienced a material interference and

impairment of her associational and privacy rights during the traditional lunch period.

Plaintiff M.K.N.'s Experience Under Covid Masking and Other Separation Mandates

72. Plaintiff M.K.N. will be a junior at Jackson High School in Jackson, New Jersey. For M.K.N. school was a central place of social contact and interaction where she would see all of her friends in one place, engage in group projects, interact with her teachers, and spend her day with peers who were the same age. Upon her return to school, following the onset of the mask and separation mandate, M.K.N. developed a feeling of hate towards attending school; she was impaired in her ordinary and usual association with fellow students since all had to be distanced and masked making it difficult to make personal connection. M.K.N. was not able to communicate with teachers or other students in the usual and ordinary manner because they were muffled behind their masks. Once extremely motivated as a student, following the onset of mask and separation mandates M.K.N. found it hard to want to do her work most of which was now independent because masks made it hard for teachers to be able to lecture for long periods of time. Masks contributed to M.K.N.'s insecurities and lowered self esteem, in part, because she developed an increased facial acne following the stress of the mask and separation mandates.

73. M.K.N. also felt forced to abandon her vocation as a track athlete because practicing and working out with a mask made her physically uncomfortable; she did not feel it was safe to undergo practice in a mask and to wear a mask during a large

portion of meets, demands that impaired her ability to practice and compete. In the prior winter season, athletes were required to remain masked when outside at all times when not actually competing. Track was a large and important social aspect of M.K.N.'s school life and she felt compelled to give it up because of the mask requirement. The loss of such a major social aspect of M.K.N.'s school life affected her ability to learn and to interact with peers, impacting her mental health and sense of well-being; she is dreading the return to school in the fall.

Plaintiff M.F.'s Experience Under Covid Masking and Other Separation Mandates

74. Plaintiff M.F. will be a senior in September at Barnegat High School in Ocean County, New Jersey. He has not set foot in school since the mask mandate began. As a person with Asperger's Syndrome, M.F. bases his communication heavily on people's expressions and emotions. M.F. needs to see what people feel before he speaks; when he can't see their expressions, he struggles to communicate. When M.F. cannot see a frown or a smile he does not understand how the speaker is speaking or understands fully the message because he needs access to their expressions to infer meaning.

75. Ordinarily, M.F. has no trouble socializing but cannot when others are wearing masks because he can't communicate with them as they are emotionless as far as he can see. Masking impairs M.F.'s ability to develop friendships and relationships. He has other friends who have stayed out junior year. The masking rule, by compelling students to

remain out of school, has the effect of impairing and impugning their associational rights and interests.

76. M.F. also has epilepsy and finds a mask makes breathing difficult; his seizures are brought about primarily by high temperatures and heat; masks cause him quick fatigue, difficulty in breathing and heat builds up that leads to his seizures; he reasonably fears based on his own experience that seizures will arise if he is forced to attend school wearing a mask.

77. Even if a medical waiver is available for M.F. to attend school without a mask, he will be a lone exception among the vast majority of students, As such, a waiver is not a remedy for M.F. as it will have the effect of stigmatizing him, communicating to students and staff that he has an illness that others lack, violating his health privacy, and conveying the appearance that he is a threat of communicating a disease since he would be without a mask.

Plaintiff A.F.'s Experience Under Covid Masking and Other Separation Mandates

78. Plaintiff A.F. will be a sophomore at Barnegat High School. She began her career at Barnegat High in September 2020 as a freshman under a Covid mask and separation regimen. A.F. frequently left class to go to the bathroom to remove her mask so she could breathe freely and easily, thereby forced by the mask requirement to leave class and its learning opportunities. She was anxious and feeling trapped at school as a result of mandatory mask usage. A.F. found it hard to recognize people who were wearing masks and sitting surrounded by plexiglass around their desks. To avoid these impairments A.F. was forced after two weeks to accept virtual or remote

learning but even then she could still not see the teacher's face (or other students) who were all masked and surrounded by plexiglass.

79. In person or virtually, A.F. could not see or identify individual students who were masked and could not adequately understand teachers or fellow students because masks and plexiglass barriers impaired communication. While they were masked A.F. experienced that fellow students were unwilling to ask questions of teachers as they normally would during a lesson. A.F. experienced for herself, and observed for others, fear and anxiety that removing the mask during school would be seen as harming someone; she also felt that she would be seen by others as lacking compassion if she removed her mask or adjusted it off her nose, factors that contributed to her anxiety. She began counseling as a result of these issues.

Plaintiff Schreck Child's Experience Under Covid Masking and Other Separation Mandates

80. Stamatia Dimatos Schreck's eight year old child attends school in the Mahwah school district and is highly dependent on her emotional connection with peers and teachers. She has told plaintiff Schreck that she cannot communicate with her teacher or her friends because of the mandatory mask. Teachers and other students could not hear her voice because of her mask; plexiglass surrounding her desk interfered with hearing or talking with her teacher or other students.

81. Plaintiff Schreck's child complains that she cannot breathe throughout the entire school day and is afraid to ask her teachers if she can pull her mask

below her nose periodically, to take a breath for a moment. Snack time is the only time this eight year old can pull down her mask, a period that is limited to a few minutes; she has shortness of breath and dizziness while wearing the mask.

Plaintiff A.M.'s Experience Under Covid Masking and Other Separation Mandates

82. After spring break in late April to late June, A.M. began going to school full time and wore masks all of the time, from 7:20 A.M. to 2:20 P.M. each day. She had no breaks with the mask except for lunch and would typically go 3-4 hours wearing the mask with no break. For A.M. school was a lot less personal wearing masks in school; she reports that it feels like we are doing something wrong by showing our faces by pulling our masks down to get a drink or to breathe. While wearing a mask A.M. could not breathe freely throughout the day; for her, masks are extremely uncomfortable.

83. Plexiglass was folded on each desk in A.M.'s high school classrooms; students had to unfold the plexiglass and plane it around the outside of the desk, three sides, each time they came into a room.

84. In hallways in A.M.'s school, a rule was instituted that students could only walk on one side of the hallway. A.M. reports feeling controlled. She reports that walking down the hallway and seeing everyone in masks made school feel like a hospital; she reports thinking to herself, "this is school and shouldn't feel this way". A.M. reports minimal conversation in the halls while students are masked and that in the pre-pandemic period the hallways used to be loud with people always laughing but that after

the masks were mandated she never really saw that conduct any longer.

85. Indoors A.M.s school required that students eat with hundreds of plexiglass shields on tables. Not more than three people were at each table, each surrounded by plexiglass. A.M. reports that students could still talk to each other at the table but it was an abnormal setting in that students were used to talking freely to one another and now were unable to.

86. A.M. reports that forced masking and the plexiglass made students feel that each was sick and contagious and had some deadly disease to be protected against. She could not understand the logistics behind the virus measures that made her feel guilty, as if she had done something wrong; she reports that the masks and plexiglass felt like punishment that is ruining her teenage years and her high school experience. She reports that high school under these regimes seems like imprisonment because her freedoms are being taken away.

87. For A.M. the masking regime and plexiglass made her school experience lose its personal aspects. She found that she could not speak to her friend or neighbor without plastic between them; she reports that the environment was no longer a welcoming school setting. She also reports that physically speech was impaired as it is much more difficult to hear others because the masks cover faces, creating a situation that is not normal; she is used to being around fellow students with no boundaries. She believes that she converses less than usual because of the masks and plexiglass. For A.M., she no longer looks forward to school nor does she enjoy the school setting due to

these restraints and the imposition on access to and conversation with friends and school colleagues.

88. A.M. also reports that continued mask discipline and disciplinary threats by teachers in which students are chastised multiple times each day to wear or pull up their mask or to keep their plexiglass in place has impaired her relations with her teachers who she formally regarded as friends but now considers to be alienated from her. She reports that teachers had encouraged her and others to regard them as students' friends and that their offices and classrooms were "safe spaces". A.M. says that she no longer regards teachers in this way due to the discipline and chastisement in the masking regimen.

Non-Plaintiff Robert Wilbur's Experience Under Covid Masking and Other Separation Mandates

89. Robert Wilbur, a senior who graduated in spring 2021 from Howell High School, Farmingdale, and is not a plaintiff as he is no longer in the school system.

90. He experienced a loss of personal and human connection while wearing a mask in that the face is not visible except for the eyes; the mask prevented him from experiencing a humanized relationship and real interaction with other people at school; he experienced a loss when students and staff could no longer present themselves in a friendly manner causing an interference in his human connection with them; Wilbur experienced what he describes as a "scary" scenario when students with masks could not be

differentiated by teachers taking away their distinctness of being an individual human being.

91. Robert Wilbur experienced a material loss of association with the school community at joint school events, such as films or other activities, in that masked audiences and crowds prevent viewing or identification of friends since one simply sees people wearing masks without the ability to see and judge reactions and feelings; he experienced a robotic sense with others when masked, not normal human interactions.

92. The quality and nature of his interactions at school under the mask mandate were impaired materially when, for example, he received a track award and shook hands with his coaches and school officials but could see no facial expressions of pleasure, smiles, warmth or any other reaction, depriving him of any sense of worth in the award due to the lack of validation, a primary reason for engaging in school activities. At the end of his student career, Robert Wilbur sought such validation and was deprived of it along with a sense of belonging. During the mask mandate, he could not increase his circle of friends and associates, particularly because the use of masks and separation orders made interaction with others difficult if not impossible, a material intrusion into his liberty and privacy interests.

93. High school was vital to Robert Wilbur's associational interests. He ranks high school as highest among the places where he would meet with people, develop friendships and communicate with people, particularly, the lunch period that he ranks highest among all locations where he would pursue associational and speech interests. The lunch period was the

time when students were free to walk around, when one would see everyone, even people one did not have classes with. Before Covid the lunch period was the “epicenter” of students’ associational interests and was a time when everyone was sort of let loose. In Robert Wilbur’s high school experience, everyone was eating lunch at the same time; the cafeteria could not accommodate everyone so students could also go to the main gym, secondary gym and two wings of classrooms were available. He describes the pre-Covid lunch period as typically very open and free and central to his and other students’ associational interests.

**Masking Mandates Intrude Upon A Child’s
Associational Interests and Other First
Amendment Rights and Interests**

94. Masking and other Covid preventative practices as described in this Second Amended Complaint are common throughout New Jersey’s public schools based upon the experiences of the plaintiffs and based upon the directive and mandate of the Governor and the New Jersey Department of Education that claims it imposed such requirements statewide pursuant to N.J.S.A. 18A:40-6 and N.J.A.C. 6A:16-2.1. *See The Road Back, <https://www.nj.gov/education/reopening/NJDOETheRoadBack.pdf>* at 16.

95. The school is a fundamental center of a child’s associational rights and interests, and is their primary forum for meeting people, communicating, speaking on matters of common interest, ordinary social and human intercourse and developing social contacts and friendships.

96. Such rights are constrained and impaired when children are masked and kept isolated and segregated from one another.

97. Such targeted intrusion into personal rights and liberties of children is particularly egregious when the state has removed all such restraints on all other members of the population and in all other places of public assembly.

98. Within the school itself, the traditional freedoms of the lunch period, a place of relaxed discipline and structure where students engage in free and open conversation and pursuit of personal associative relationships, has been restricted and restrained in material ways under the state's masking and/or other Covid regulations.

99. In other ways, the state has imposed restrictions on the ordinary and usual socialization and associational relationships between schoolchildren.

100. For example, schoolchildren are regularly chastised by teachers, often multiple times per day, if their masks slip below their nose or if masks are not adjusted properly or if the child removes the mask; children are regularly and routinely threatened with disciplinary write-ups if they do not adjust their masks to a "correct" usage.

101. Anxiety in schoolchildren caused by such continuing chastisement violates the privacy rights of children and burdens and inhibits the exercise of children's speech and associational rights.

102. Discipline over the use of masks is a new element in the state's educational program that has changed the relationship between students, and

between students and teachers, injects anxiety in the student-teacher relationship, violating the right of privacy and association of the plaintiffs and their children.

103. Mandatory use of plexiglass dividers surrounding each individual student's desk confines and imprisons children, separates them from their friends and teachers and introduces an unnatural form of control and segregation upon children in the classroom, further violating the liberty and privacy interests of plaintiffs and their children.

104. The practice of masking, as well as other practices described above, are elements introduced into the public schools that have not been examined or studied as to their potential harmful impacts among children; that interfere in their ability to communicate; that impose an unnatural lifestyle upon children; and interfere with their association with friends, other students and teachers; such practices cause alienation and anxiety among students.

105. The process of mandatory mask wearing causes anxiety to plaintiffs and others as a direct by-product of school attendance.

106. Masks are worn all day, giving rise to a continuing regimen of mask discipline; masks become wet with saliva, causing discomfort and interfering with a school child's ordinary comfort and function

107. Students regularly have difficulty breathing causing many to move the mask below the nose only to be disciplined by school staff until they correct the mask placement. These conditions are regularly experienced by students under the mask mandates.

108. Mandatory wearing of masks on a continuing full time basis is contrary to the normal and natural functioning of the human body and a violation of the right of the citizen to control their body and their natural functions.

109. The unnatural forced covering of a part of the children's body, their face, that is normally exposed in ordinary social intercourse and that represents the primary means of personal identification and reflects the basic individuality of the child violates children's rights of privacy

110. Parent plaintiffs have not consented to the imposition of these unnatural conditions upon their children, violating their associational and privacy interests.

111. The Covid masking regimen imposed in New Jersey schools permits no ordinary conversation and chills discussion or communication between students; the mask and separation mandates impair ordinary human discourse, conversation, non-verbal communication and signaling through facial expressions.

112. Such mandates chill and impair expression and communication due to the unnatural constraints imposed on the children's social intercourse.

113. Throughout New Jersey, schoolchildren are given two mask breaks per day for a short duration but must otherwise wear masks at all times with the exception of outside gym class or, in some instances, when they are permitted to remove masks while seated inside their plexiglass dividers surrounding their desks.

114. All such measures impair and burden speech, association and privacy rights of children in the public schools.

WHEREFORE, plaintiffs seek judgment as follows:

- 1) Declaratory relief that the policy and/or practice of mandating the wearing of masks by schoolchildren in New Jersey public schools violates children's protected speech, privacy and associational rights and interests;
- 2) Declaratory relief that other purportedly preventative and disciplinary measures as described herein violate students' speech, associational and privacy rights;
- 3) Injunctive relief directing that defendants cease such practices and affirmatively order the withdrawal by school districts of all such orders, guidelines and policies and directing that school districts and officials shall not issue or implement such orders;
- 4) Declaratory relief that Executive Order 251 and No. 253, inasmuch as it ratifies or affirms Order No. 251, are void as illegal and violate the First Amendment rights of New Jersey schoolchildren;
- 5) Injunctive relief barring the State from enforcing Executive Order 251 and 253 and vacating such order;
- 6) Reasonable attorney's fees and cost of suit and such other relief as to the Court should seem just and proper.

COUNT II
(Due Process — Substantive and Procedural)

115. Plaintiffs repeats and reasserts each and every allegation set forth above as if more fully set forth herein.

**No Public Process or Hearings
as to the Executive Orders**

116. No public process pursuant to the New Jersey Administrative Procedure Act, N.J.S.A. § 52:14B-2, et seq. (hereafter the “APA”), or otherwise, has taken place prior to the imposition of mask mandates or other Covid preventative measures as to New Jersey schoolchildren.

117. Defendants, in their capacity as officers of New Jersey, have held no public hearing, either with or without notice, prior to the imposition of mask mandates or other Covid preventative measures governing New Jersey schoolchildren.

No Study as to Effects of Masking of Children

118. Defendants have not studied or examined the impact of the state’s Covid regimen on schoolchildren or released or identified such studies.

119. Defendants have held no hearings to evaluate such measures on the development or psychology of children.

120. No public comment or testimony has been solicited or permitted from lay witnesses or experts as to such impacts; no evaluation has taken place or been released as to the effect of such measures on children; no adequate or substantiated findings of fact have been issued by defendants through any

agency identifying the basis for the mask mandate or other Covid separation regimens as to New Jersey schoolchildren.

No Record Has Been Released as to the Basis of The Executive Orders and No Adequate Findings Have Been Made to Substantiate the Orders' Mandatory Masking Schoolchildren

121. No record has been released by the Governor or other defendants that can be examined by a court, the legislature or the public as to the basis for the issuance of Executive Orders 251 and 253.

122. To the extent any executive order purports to set out findings of fact, such findings did not come about through any public process on notice with the right of public participation in a public hearing, as required under the APA.

123. To the extent the defendants contend that Executive Orders 251 and 253 contain findings of fact, no substantiated findings have been presented to support the issuance of the Executive Orders as to masking schoolchildren.

124. To the extent defendants contend they have the power to unilaterally impose such measures upon New Jersey Schoolchildren or to authorize school districts to impose such measures, any such assertion of power violates the substantive and procedural due process rights of parents and children, thereby depriving plaintiffs of due process under the Fifth Amendment to the United States Constitution.

125. Defendants have not identified any persons they have consulted or relied upon in the issuance or determination of mask mandates or other Covid

preventive measures as to New Jersey schoolchildren; defendant's circle of consultants and other contributing public officials to the issuance of such orders is kept private and non-transparent, a further violation of plaintiffs' and the public's due process rights.

126. As set forth in connection with Count I above, the masking and other Covid preventative measures violate the protected liberty interests of New Jersey schoolchildren and their parents.

Executive Order 251 Is Arbitrary, Capricious, Unreasonable or Illegal

127. Executive Order 251 is indefinite and of continuing duration without stipulated end and provides for arbitrarily adding more restraints of a completely unknown nature by the unilateral order by the Superintendent of the State Police, as section "3" of the Executive Order states:

The State Director of Emergency Management, who is the Superintendent of State Police, *shall have the discretion to make additions, amendments, clarifications, exceptions, and exclusions to the terms of this Order.*

Executive Order 251 at § 3 [emphasis added]. Thus, Executive Order 251 allows an unknown and unaccountable official, the head of the state police, to make additions and changes at will and in his own discretion.

128. In addition, no objective criteria have been established by the State or by the defendants for the imposition of masking or other Covid mandates on children or for the termination of such orders.

129. The Executive Order's reference to "significant upticks" in Covid "metrics" is an arbitrary basis on which to impose restraints on residents of the State.

130. Due to the foregoing concerns, the executive orders and any other orders or directives by any official of the state or any school district imposing mask mandates or other Covid preventative measures imposed upon New Jersey schoolchildren violate plaintiffs' rights to due process, both substantive and procedural.

WHEREFORE, plaintiff respectfully seeks judgment pursuant to 28 U.S.C. § 1983 and/or directly under the Fifth and 14th Amendments, as follows:

- 1) declaratory relief that the mask mandate and other Covid-preventative measures that have been imposed on New Jersey Schoolchildren, and as are to be re-imposed, and Executive Orders 251 and 253, violate plaintiffs' rights to substantive and procedural due process pursuant to the Fifth and 14th Amendments to the United States Constitution and relief, in particular, vacating Executive Order 251;
- 2) injunctive relief barring the re-imposition of mask mandates and other Covid-preventative measures as to New Jersey schoolchildren by any state agency or by any school district or public school in the absence of hearings on notice pursuant to the APA and other forms of appropriate due process;
- 3) injunctive relief affirmatively directing defendants to issue orders vacating and rescinding all such mandates and orders by

any agency or instrumentality of the State of New Jersey including but not limited to any public school, school district or board or any school agency, and directing that school districts and officials shall not issue or implement such orders;

- 4) reasonable attorney's fees, interest, costs and such other relief as to the Court seems just and proper.

COUNT III (Equal Protection)

131. Plaintiff repeats and reasserts each and every allegation set forth above as if more fully set forth herein.

132. The executive orders mandating mask wearing in all public places by persons living in or situated in New Jersey and other isolating measures have been rescinded either by operation of law or by the Governor's action pursuant to Executive Order No. 242.

133. Other than children in school, people situated in New Jersey are no longer required by any law, regulation or executive order to wear masks in public places, to practice social distancing or to be kept within barriers while inside indoor structures such as businesses, theaters, restaurants, bars, places of worship, stadiums, or any other similar place of public congregation (except for health care and mass transit facilities).

134. Regardless of vaccination status, adults and children may sit in close packed rows at an indoor stadium; at a movie theater; in restaurants and bars;

in houses of worships; may dance in large groups at weddings or other gatherings; may mass at political meetings or protests; may sit close together at public entity meetings such as planning and local governing bodies or at lectures or at indoor theaters or playhouses; may mix and sit freely in libraries and a host of other locations in any degree of proximity or for any length of time without mask or separation requirements.

135. New Jersey schoolchildren and teachers and staff, however, are still subject to mandatory masking and other restrictive measures by virtue of Executive Orders 251 and 253.

136. By virtue of the foregoing, Executive Orders 251 and 253 mandating mask wearing by schoolchildren impose a burden on children (and teachers and staff) that is distinct and separate from any burden imposed on other persons or classes of persons in similar places of public or private congregation thereby violating the equal protection clause of the 14th Amendment to the United States Constitution.

137) In addition, the mask mandate and other Covid preventative measures as to New Jersey schoolchildren, including but not limited to Executive Orders 251 and 253, also violate the equal protection clause of the New Jersey Constitution (1947), thereby depriving plaintiffs of their right to due process under the Fifth Amendment to the United States Constitution.

WHEREFORE, plaintiffs respectfully seeks judgment pursuant to 28 U.S.C. § 1983 and/or directly under the Fifth and 14th Amendments, as follows:

- 1) declaratory relief that the mask mandate and/or other Covid-preventative measures,

including but not limited to Executive Orders 251 and 253, violate plaintiffs' rights to equal protection under the 14th Amendment;

- 2) declaratory relief that the mask mandate and other Covid-preventative measures described herein, including but not limited to Executive Orders 251 and 253, violate plaintiffs' rights to due process pursuant to the Fifth Amendment based upon the violation of the New Jersey Constitution's equal protection provisions;
- 3) injunctive relief barring the mask mandate and its implementation and other Covid-preventative measures as to schoolchildren by any state agency or by any school district or public school, including but not limited to Executive Orders 251 and 253;
- 4) injunctive relief affirmatively directing defendants to issue orders vacating and rescinding all such mandates and orders by any agency or instrumentality of the State of New Jersey including but not limited to any public school, school district or board or any school agency, and directing that school districts and officials shall not issue or implement such orders;
- 5) reasonable attorney's fees, interest, costs and such other relief as to the Court seems just and proper.

COUNT IV
(Covid Testing of Schoolchildren-Plaintiffs
Ryan Cody and Kelly Ford)

138. Plaintiffs Ryan Cody and Kelly Ford repeat and reassert each and every allegation set forth above as if more fully set forth herein.

139. Based upon the guidance set forth in “The Road Forward” and other public statements by the Governor and the Commissioner of Education, school districts and officials have been authorized to impose any Covid prevention measure in their judgment including testing of schoolchildren in school.

140. Such mandatory testing of schoolchildren is typically by nasal swab that is invasive and in many cases causes injury, pain and anxiety depending on the individual child’s physiology and sensitivity and on the manner of administration of the test by the provider.

141. Schools are not empowered by law to administer medical treatment, testing or therapy of students without parental consent.

142. Because the Governor and Commissioner’s guidance does not limit the scope of authority to test students to instances where the school obtains parental consent, a justiciable question arises as to whether school districts and officials have been authorized to administer Covid tests to children without parental consent.

143. Accordingly, plaintiffs Ryan Cody and Kelly Ford, on behalf of themselves and others similarly situated, seek relief as follows:

- 1) declaratory relief pursuant to 42 U.S.C. § 1983, that Covid testing of children by school districts and their officials without parental consent violates the plaintiffs' due process rights to govern the health care of their children and their privacy rights to act as parents to supervise and determine the medical treatment, testing or therapy to be provided for their children;
- 2) injunctive relief barring Covid testing of schoolchildren by any school district or school official without express, written parental consent;
- 3) injunctive relief affirmatively directing defendants to issue orders to New Jersey school districts directing that they shall not conduct Covid testing of any schoolchildren in the absence of express, written consent by their parent or guardian;
- 4) reasonable attorney's fees, interest, costs and such other relief as to the Court seems just and proper.

Dated: August 27, 2021.

Respectfully submitted

/s/ Bruce I. Afran

Counsel for Plaintiffs

**DECLARATION OF JOHN ZAMMIT
(AUGUST 15, 2021)**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CYNTHIA STEPIEN, ON BEHALF OF HERSELF AND
HER MINOR CHILD; STAMATIA DIMATOS SCHRECK
ON BEHALF OF HERSELF AND HER THREE MINOR
CHILDREN; RYAN CODY, ON BEHALF OF HIMSELF AND
HIS MINOR CHILD J.C.; KELLY FORD, ON BEHALF OF
HERSELF AND HER MINOR CHILD A.F.; SIMONA
CHINDEA, ON BEHALF OF HERSELF AND HER TWO
MINOR CHILDREN; GABE MCMAHON; M.F.; M.K.N.;
K.B.; B.W.; L.R.; J.V.P.; V.P.; D.M.; B.M.; A.M.;
DANIELLE ESCAYG; AND ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs,

v.

PHILIP D. MURPHY, GOVERNOR;
ANGELICA ALLEN-MCMILLAN, COMMISSIONER
OF EDUCATION; JUDITH M. PERSICHILLI,
COMMISSIONER OF HEALTH,

Defendants.

Docket No: 21-cv-13271

CERTIFICATION OF JOHN ZAMMIT

JOHN ZAMMIT declares as follows:

1. I am a licensed New Jersey teacher with nine years teaching experience in Woodbridge Township at Fords Middle School that has students in grades six, seven and eight. I teach seventh grade American Civics and I coach basketball privately.
2. I make this declaration in support of the plaintiffs' motion for an injunction as to the mask mandate set forth in Executive Order 251.
3. I hold a B.A. degree with my major fields in history and political science and secondary education from Monmouth University, received in 2012.
4. I also hold a Masters degree in Educational Leadership and Administration from Montclair State University, received in 2015.
5. In my school, masking and other Covid separation measures were in place for the entirety of the 2020-2021 school year and adversely impacted my students and my ability to teach and engage in normal human behaviors, fundamental to supporting child development.
6. I teach seventh graders whose social and emotional developmental needs are very diverse because of the various levels of maturity of the typical 12-year old.
7. At this age, students are first starting to learn about their personal bodies, relationships and decision making. The middle school years are transformational in developing their beliefs, personalities and identities as young adults. Many experiences in

schools are driven by social and emotional needs while interacting with teachers and peers.

8. As a teacher, I observed the tremendous amount of isolation caused by masking and Covid separation including reduced outlets for children to assemble, express themselves and interact with others— sports and clubs cancelled — and the many hours each day that students had to keep distanced and masked up; their school culture was completely dismantled and no longer conducive for fostering healthy interpersonal connections.

9. Much of the educational process is also what is *not* being said and masking immediately impedes the ability to communicate effectively with students from the loss of non-verbal communication to understanding their needs if they were struggling and if so, in what ways? From what I observed, due to the loss of non-verbal communication in combination with social distancing, teachers faced unprecedented obstacles for making traditional levels of progress with students who were struggling and underperforming.

10. In our modern educational system, the classroom and the majority of activities are built around group learning and collaboration but due to the masking orders group activities were limited, engagement was minimal and there was a seemingly lack of motivation or desire for additional discussions or social interactions among the students to talk to each other, due to the masks. I can wholeheartedly say it was alarming to think how in previous years the most common phrases I used were “okay, now let’s settle down” or “I’m glad we’re having fun working with each other . . . but it’s time to focus class

will be ending soon!” This past school year I spent many days pleading with students to collaborate and work with each other or upon finishing an activity early to “just be kids, maybe turn and talk to each other a bit” but I was told by students it’s “awkward” “uncomfortable” and “difficult” with the masks. Hallways had limited interactions and often there were students being reprimanded for the mask requirements or for being too close together. I also experienced less conversations between teachers and students before and after class.

11. I saw many instances where a child was being reprimanded because they would not put the mask on or for it falling below their nose. Children complaining they can’t breathe or their face is itchy is not conducive for learning. There has never been a more difficult year in trying to get kids to participate and express themselves. I have never had a year in which so many kids were discouraged, lacked intrinsic motivation to complete activities, or did not turn work in altogether. I have never experienced so many students talking about anxiety and other mental health concerns so often at their age.

12. Typically, I observe kids when I am on lunch duty. The lunchroom is the students’ “social turf”, their opportunity to move around, to make choices about what food they want and most importantly it is a learning experience where they learn how to use their own personal judgment in socializing with their friends and making decisions in a group setting. These interactions are foundational for the development of the whole child, as a human being. Cafeterias are often very loud and noisy, that is where many genuine relationships and friendships are fostered,

emotions are expressed, and stories are exchanged. When I was on lunch duty with sixth graders, the cafeteria is actually where their relationship with me began to develop, as the following year in 7th grade many students recall experiences and shared stories from our lunchroom interactions.

13. Under the Covid rules there were limited opportunities for joy and fun for students during the school day. The cafeteria is their opportunity to be themselves while becoming considerate citizens; to be social, to be kind, forgiveness and compromising, making room for another to sit, or to learn to clean up after themselves and friends that they chose to sit and socialize with. We did not have lunches due to the mandates, the cafeteria was only used for classroom accommodations and learning due to the circumstances.

14. The social aspects of receiving an education are largely how a lot of the children build their identity into high school and young adulthood; they do this from the experience of collaborating with others; development of their interpersonal skills is what empowers them as they move forward and onward into higher education, the workforce and life itself as they become independent. Under the masking orders, I truly saw the bare minimum of social interactions by most children. I also saw a substantial decline in simple human gestures like students saying “thank you” or “good morning.”

15. More students did not even attempt to do work than ever before. There was no desire to do things together collaboratively in groups. There was no talking, no enjoying some free time or being goofy to laugh with their peers as seventh graders will do. This was very different from prior years, most children

love group activities. After school there was little socializing between students; usually there are groups of students who hang around to chat but under the masking rules everyone kept interactions limited and went directly home.

16. Students who attended in-person in class minimized their conversations. I would have kids that would message me in the Zoom or Google classroom apps while they were in the classroom, instead of verbally responding to me aloud. I regularly could not hear students through the mask including both students with and without disabilities. It was very uncomfortable for the students and I would have to say I could not understand them and I would eventually have to ask, “Could you move your mask a bit or speak louder?” Typically, with a muffled voice due to the mask, there was a total lack of enthusiasm, but finally their contribution would be heard. Some students groaned and said “I’ll just type it” and I felt their frustrations and discouragement. Having students share or volunteer to read out loud became more challenging than ever before having to talk over the mask.

17. I found it challenging to have sincere discussions with students because I am wearing a mask and they could not see my facial expressions. This was of significance as we had discussions in my American Civics class on subjects that impact society and affect people’s emotions. The lack of facial expression affects my ability to give reassurance to a student, while having conversations that can be sensitive and require great care and compassion for their participation and development, and for the other students present as well. If I am acknowledging a perspective, response,

question or regarding sensitive topics such as Covid, the protests and riots, the Second Amendment, or something like immigration and citizenship, nonverbal communication is imperative for culminating an environment of acceptance, respect, and tolerance for all individual expressions, core values of our American duties and responsibilities. If a student expresses their opinions or is asking a question, you need to be able to reassure them that their participation is valuable and provide them with encouragement that is expressed beyond words. A child's willingness for being honest and transparent with their experiences or emotions should be honored and recognized often by expressing emotion nonverbally. Self-esteem and confidence develop gradually over time by how we feel and interpret others reactions and emotions. With the mask on I felt limited to nodding my head like a robot, while I communicated verbally but could not effectively express or reinforce the invaluable emotions of joy, excitement, compassion, or empathy.

18. Other subjects of a controversial nature were raised to which I could not respond fully to my satisfaction due to my face being masked. For example, many kids asked me who gets to determine what is an "essential" business under the Governor's executive orders. And they're only 12 years old, but I try to foster growth and development through curiosity and asking questions. Understanding the complexity of the times for students and their families, I felt unable to express my sincere concern and human emotions such as compassion and understanding for their needs. Students come from a variety of different settings having many different experiences with their families and loved ones. From businesses being closed to

different beliefs and concerns regarding health, each student was impacted differently. Many of them genuinely wondered and were seeking answers. This is what makes schools beautiful and brings communities together through our collective needs, desire to support one another and overcoming adversity together. With the masks I could not give any emotional support other than through words. Discussions felt cold, I couldn't share a smile, celebrate their curiosity, or express my interest in the stories they shared like a teacher normally would. I had to be more robotic, and limited and I lost that non-verbal context, to relate to their emotions and to truly resonate with the concerns they expressed. Among many simple things, children appreciate short, sincere, and genuine conversations that can be *felt* through what is said, but not actually said. Our use of non-verbal cues and communication is essential as human beings to resonate with each other. If we are being cognizant of how children develop their own inner self-confidence, self-esteem, and relationships with others, a lot is being taken away from their learning experience due to the masks.

19. With faces being covered it completely removes the social and emotional well-being of any school experience, either in the classroom, on a bus, or in the hallway. When you are working with a student you are trying to elevate their level of understanding from a reading excerpt or some other area in order to explain, synthesize, and apply their learning to then be able to analyze, evaluate, and create, or work with what they've learned in some meaningful way. But you can't even tell if a student is struggling when all you can see is their forehead and eyes.

Some of the most common *feedback* I traditionally receive as a middle school teacher is observing *the grin*, *the smirk*, the smile saying “yes I see!” or the “I *kind* of get it” gestures, the simple facial expression like biting a lip or making a confused face. In such case, I can see and understand that the student seems ambivalent. With masking, the student and I lose all of those opportunities to communicate nonverbally.

20. Without a doubt kids show by expression what they want or need. With masking I saw a significant difference in kids asking for help. I would ask various questions and you can’t see entirely, but the students are expressing something with their face under the mask. You can’t tell what they are thinking, so of course as a teacher you keep trying to be of assistance. Eventually you get the sense that you are now making them more uncomfortable because you can’t read them like you normally would, the child becomes more frustrated and distraught and now you need to give them some personal space and have to circulate back, creating additional obstacles to overcome now, because for many children they cannot always articulate what their needs even are or why they feel different emotions.

21. There are always some highly motivated and independent students who will shine bright. However, the overwhelming majority of students need that support and that educators’ experience of patience, care, and understanding to reach the next level. A lot of students value the relationships with professional teachers who can read them even when they may not be saying in words that they need help, or when something is wrong or distracting them; this

is largely communicated through body language and non-verbal communication and expressions. Having the ability to understand their emotional needs can then enhance their academic performance. It's a gradual process that evolves over time and varies from each school day depending on different circumstances. Knowing the social and emotional needs of *each individual* student factors into the academic process and social dynamics of group activities and classroom discussions. A prime example would be insecurities regarding their appearance, voice, previous performances, or confidence in their skills and abilities.

22. Typically, a school is a very vibrant place where there is a lot of talking, interactions, and excitement often expressed in the form of laughing, yelling, or even screaming, though usually overdramatizing something, there is always that energy of life, kids being kids. With the masks it was enormously reduced to the point where it was almost non-existent. The phrase I used to reference what I felt was that it felt like a "Zombie apocalypse", whereas children are walking, looking down, looking deflated, quiet, and very isolated. Usually when students leave for the day they say things enthusiastically with an expressive face "Goodbye, Mr Z. I'll see you next week!" while running, catching up to friends. With masking there was a complete departure from that normal practice.

23. As a civics teacher another concerning aspect for me is that because the masks were mandated and were not a matter of choice or personal discretion, there were children afraid to express themselves in fear their peers would view them differently. Some students expressed fears about being honest with their classmates or teachers. Courage and strength

became ever more challenging to express for a child because a student would fear being labeled by their peers as inconsiderate if they so much as questioned the changes, masks, or expressed their family maybe had different beliefs. This was in an American civics classroom. As a professional educator, I felt very similar; the fear was entirely suppressive of any dialogue or discussion. If a family believes wearing a mask is in their best personal interest or health, then it's within their own right and, as a voluntary mask, would be a reasonable accommodation on an individual basis. The mask mandate has implications on the learning and development process of our youngest citizens. They are human beings, and I believe this is a humanitarian issue for both the short and long term development of children, regarding not only their cognitive development and academic growth, but also their social and emotional developmental needs as well as their general mental health.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 15, 2021.

/s/ John Zammit

**DECLARATION OF ROBERT WILBUR
(AUGUST 15, 2021)**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CYNTHIA STEPIEN, ON BEHALF OF HERSELF AND
HER MINOR CHILD; STAMATIA DIMATOS SCHRECK
ON BEHALF OF HERSELF AND HER THREE MINOR
CHILDREN; RYAN CODY, ON BEHALF OF HIMSELF AND
HIS MINOR CHILD J.C.; KELLY FORD, ON BEHALF OF
HERSELF AND HER MINOR CHILD A.F.; SIMONA
CHINDEA, ON BEHALF OF HERSELF AND HER TWO
MINOR CHILDREN; GABE MCMAHON; M.F.; M.K.N.;
K.B.; B.W.; L.R.; J.V.P.; V.P.; D.M.; B.M.; A.M.;
DANIELLE ESCAYG; AND ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs,

v.

PHILIP D. MURPHY, GOVERNOR;
ANGELICA ALLEN-MCMILLAN, COMMISSIONER
OF EDUCATION; JUDITH M. PERSICHILLI,
COMMISSIONER OF HEALTH,

Defendants.

Docket No: 21-cv-13271

ROBERT EVAN WILBUR declares as follows:

1. I am over the age of 18 and I was a student who graduated Howell High School in Farmingdale, New Jersey this past June, 2021. I make this declaration in support of the motion to enjoin Executive Order 251 that mandates masking of all students in New Jersey schools beginning in September 2021.
2. The masking mandates that we lived with in the 2020-2021 school year burdened my speech, association and privacy rights.
3. The mask was not optional and we were required to wear it at all times. The use of masking and separation mandates interfered with interactions between students by keeping people separate from each other, including the use of shields so that each student has a mask, is kept six feet apart and has a plexiglass shield around each desk.
4. When you are in the classroom with these limitations it is a large distraction in the school environment — the practice of mask wearing limited any type of learning because a lot of learning consists of visual cues and a visual environment. Teachers were masked, too.
5. Without a mask you can present yourself in a much more friendly manner and a human connection is present; when everyone is wearing the mask you cannot see anyone's face except for the eyes. When you remove the mask, you humanize people and there is a real interaction — you can see them smile and watch them laugh. During the hallway class changes, when you are looking around and you are seeing people you may not even recognize them with a mask;

the experience does not all feel there and it is not completely fulfilling.

6. What was frightening was the difference between when teachers saw our class on the screen at home without masks (during virtual learning, a part of last year) and when we returned for in-person learning. Once we returned, it was really hard to differentiate people with the mask on. Some teachers struggled to make the distinction and it took away the distinctness of being a human being and we became a number or statistic.

7. High School was vital to my associational interests. I was there for such a long period of my life and I use it a lot to identify myself since I was there for a long time. It has become part of my life.

8. High School is ranked the highest among the places where I would meet with people, develop friendships and communicate with people. It was the most intense place where I would associate with people. Mask usage was definitely constraining and created limitations in that ability.

9. For example, I am a big fan of high school movies such as “Ferris Bueller’s Day Off” and others, and I was looking forward to these events at school, including the “Battle of the Classes” and “Mr. Howell High School”. Some of these did not happen but when they did take place it would be horrible as we were all wearing masks; this practice really robbed us of the experience. It is a completely different event in and of itself when people are masked. When you are looking around in a masked crowd, you are not really seeing your friends as who they really are; all you are seeing is a crowd of people wearing masks and

you cannot see their reactions and feelings. Looking at someone's eyes says a lot about them but when masked you are still missing a lot of that interaction. People look like robots and not human beings.

10. When I accepted an athletics award (I was on the track team) this year everyone was wearing a mask. It was depressing and sad. And when I walked on stage I saw my two coaches sitting in the front row and they had masks on. When I shook their hand I did not see their facial reaction; it would have been more a complete moment as a senior if I shook their hand, saw my coach smile as he said "Great job, Rob". I would have known that I did a good job and that I did not just get this award that 100 other students received that night. I would have had a sense of validation and I lost that. A lot of the reasons that people do anything is for validation and you search for that validation at the end of the road, at the end of your high school academic career and I sought that validation. There is a feeling of belonging with that validation. The same applied to the Board members and the officials whose faces were also masked. You can't see someone smile and I would have appreciated that.

11. We returned to school October 19, 2020 for half-time in-person learning with the mask mandate. When you are in a class and you are wearing masks you are a lot less likely to try to interact with other people because they just don't look welcoming and friendly. I have had my circle of friends and thought that this past year would be a good opportunity to meet new people but the opportunity was limited not only by the basic Covid restrictions but because the mask made you much less likely to interact with

others; you are also not likely to initiate conversation because people cannot hear through the masks; it was definitely harder to have conversations and making real friendships was impossible with masks and it strained existing relationships.

12. When we came back to school with masks, if you did not have the teacher previously and were not close to the teacher the mask presented an unfriendly environment and dissuaded you from talking to other people including teachers; it makes it difficult to foster those relationships. In my experience, masks are definitely affecting speech between students and adults because students are less likely to reach out to adults and build upon their communication skills when masked.

13. Usually a student is most likely to reach out and ask for help when the teacher is relating to the students but the masks do not encourage such interaction and were very harmful to the student-teacher relationship. The impact is worse for a student who struggles socially and academically. The lack of teacher relationship was not as big a problem for me as I am a good student.

14. I have a social relationship with my teachers but it was not the same with masking — the relationship would have been much stronger had the masks not been in place. It was really disappointing to see this happen to classes in my final year because the overall environment was completely different. For example, my English teacher, who I had freshman year, was also my English teacher for senior year and I was very excited to have him again; I had hoped for the same magic in the classroom but the mask changed all of that: masking, the separation

and the plexiglass dividers are a distraction from learning and the impact the teacher would normally have on the class. The impact of the teacher is what counts in a class and I lost much of that due to these distractions; I did not learn as much and did not get as much out of the class experience due to the masking. Fiddling with the masks takes away the learning opportunity and it is harder to breathe. We would also have to leave the room even to drink water from a bottle, even though we were already surrounded by plexiglass.

15. We were surrounded by plexiglass in every class except study hall that was in the cafeteria. All others had plexiglass around each desk — it made no sense that study hall did not require plexiglass if all other classes used it. The desks were the same distance from each other in study hall as in regular classrooms. To me this made no sense as there was no standard.

16. Plexiglass was put around each desk during the fourth marking period once the hybrid virtual learning program was ended and all students had to attend in-person. One day we came into school and three pieces of Velcro were on top of each desk, one on each side. One large piece of plexiglass was attached to the velcro so the shields surrounded three sides of each desk. This eliminated desk space and made it harder to have a computer and note book. I do not know if the plexiglass was washed by the school but very soon into the marking period it became dirty and you were forced to see your classmates and the teacher through this dirty plexiglass.

17. The use of plexiglass made no sense as I could peek my head out and slouched in my chair so

my face was outside of the shielding; it acted only as a distraction. The desks were also parallel to each other, six feet apart so there was no gain from the plexiglass since the part of the desk not glassed was parallel to the same part of your neighbor's desk so everyone was speaking anyway without the glass shield. It merely was a distraction, blocking our view of the teacher and others in the room.

18. It was very sad to walk in and see this set up that was not a real class room with six foot separation and glass around every desk. The class environment was dystopian and was very unwelcoming and it affected learning as it was a distraction because you are viewing everything through the shield including the teacher. The plexiglass was probably two feet high on each desk. In my school, the teachers did not have a shield-they just sat behind their desk.

19. Masks and glass interfered with hearing people especially if they were more than six feet away.

20. Coming into this year I wanted to make new friends and form relationships and this was hindered because of coming to school every day with the mask on. In a classroom environment you are less likely to talk to someone if they are wearing a mask; you are also less likely to talk to someone because you have to yell across the room for them to hear you due to separation and plexiglass shielding. In addition, you are not seeing their expression. In the hallway you cannot smile at someone with a mask and the interaction is lost if you are not giving these visual cues.

21. High school was the cream of the crop when it came to places for my relationships and associational

interests and the cream of the crop within that would be lunch time. That 40 minutes was when we were free to walk around and see all of our friends—that's when you would see everyone, even people you did not have classes with. That was the epicenter of my associations.

22. We did not have lunch period in May and Jun because our school was on half-day but the over the last year typical lunch arrangement at high school prior to such time was that after third period everyone was sort of let loose for lunch. Because everyone was eating lunch at the same time and the cafeteria could not accommodate everyone, you could also go to the main gym; the secondary gym and two wings of classrooms were also available. It was very open and free. You could walk about pretty much and were free to meet and talk with anyone you chose. This ended under the Covid restrictions.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 15, 2021.

/s/ Robert Evan Wilbur

Dated: August 15, 2021.

**DECLARATION OF RHIANNON MINDAS
(AUGUST 16, 2021)**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CYNTHIA STEPIEN, ON BEHALF OF HERSELF AND
HER MINOR CHILD; STAMATIA DIMATOS SCHRECK
ON BEHALF OF HERSELF AND HER THREE MINOR
CHILDREN; RYAN CODY, ON BEHALF OF HIMSELF AND
HIS MINOR CHILD J.C.; KELLY FORD, ON BEHALF OF
HERSELF AND HER MINOR CHILD A.F.; SIMONA
CHINDEA, ON BEHALF OF HERSELF AND HER TWO
MINOR CHILDREN; GABE MCMAHON; M.F.; M.K.N.;
K.B.; B.W.; L.R.; J.V.P.; V.P.; D.M.; B.M.; A.M.;
DANIELLE ESCAYG; AND ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs,

v.

PHILIP D. MURPHY, GOVERNOR;
ANGELICA ALLEN-MCMILLAN, COMMISSIONER
OF EDUCATION; JUDITH M. PERSICHILLI,
COMMISSIONER OF HEALTH,

Defendants.

Docket No: 21-cv-13271

RHIANNON MINDAS declares as follows:

1. I am a licensed New Jersey teacher. I have been teaching for 17 years in the fifth and sixth grades at Mill Pond Elementary School in Lacey Township in Ocean County.
2. I have a B.A. degree in psychology and education that I received from Rowan University in 2004.
3. During the virtual learning and mask mandates in the 2019-20 and 2020-21 school years following the onset of the Covid-19 pandemic, I was teaching in the fifth grade. Typically, by the end of fifth grade kids start to go into their cliques, such as athletes, Dungeons & Dragons players, and other groups. Children in this age group come in to school timid and, as the year goes forward, make their friends and begin to find interest groups.
4. In the past school year, 2020-2021, we started school virtually and went to a half schedule of part in-person and part virtual learning. Due to the restrictions, students were unable to work together, even during the in-person classes. All lessons were done live on computer for the virtual students while the in-person students heard the same teaching in class. During this past year, the kids in each cohort would not speak to each other as they sat behind masks. Often kids at home would not put their camera on to avoid showing home scenes.
5. Once we had both groups together, in the spring of this year, the students felt it was like the first day of school since they were finally getting to meet the class.

6. We did not have lunch or recess this past year but I would take the class outside when weather was nice so they could get out of the masks and have some socialization. This was their favorite part of the day.

7. Not until June, when it became hot, were we allowed to have the masks made optional. At this time the kids began to socialize with each other and began to criticize one another, to be sarcastic as ten year olds will do. Until this time the children had had no opportunity to socialize and act out in a normal way for this age group.

8. It is normally at the lunch table where fifth graders learn to socialize and learn how to handle their problems. This past year they did not have the opportunity to gain this experience, such as how to handle one another when difficulties arise, in the absence of recess or lunch periods. Aside from some minor communication and occasional birthday parties that some students planned, their social development was delayed throughout the year. The students could not use their lockers and snack had to be taken with plexiglass barriers up and around each student's desk. Plexiglass shields were attached by Velcro to each desk and surrounded three sides. Children in the back of the room were behind so many layers of glass that they could not see the Promethean Board-our classroom smart-board.

9. The children did not communicate in the beginning of the year. They would only type in the chat room that was available as part of the virtual learning program but would not raise their hand to speak. A lot of negative or inappropriate behaviors came through in the chat that students would not have indulged in had they been speaking verbally.

For example, in world language, where an outside teacher ordinarily comes in to the class, the teacher was remote; as she was explaining her background and introduced herself one student typed “nobody cares, just stop”. This would not have happened if they were speaking out loud in class.

10. In June, on the day we were allowed to remove masks, at first the kids were very timid and first wanted to see who else took them off. Once that happened, the goofing around and typical 10-year old behavior started to show itself once more. Before this, it was very quiet; the students had been held back socially throughout the year while wearing the masks. They were quiet and you could not see their personalities.

11. For the sixth grade teachers this coming year who are getting my fifth graders from last year, there is going to be a longer time to teach routines because the kids did not learn how to conduct themselves in the cafeteria or use of lockers-they had no responsibility this year. They were not allowed to use lockers; learning to take only those things you need from the locker is a big part of children’s learning responsibility. Typically, they also work on how to introduce yourself, how to assert yourself, how to ask someone to do something and they had no such opportunities this year. I predict that this coming year my former fifth graders will have difficulty in these areas: as conflicts arise they will not be able to solve them independently but will have to be coached through those resolutions by an adult.

12. Having the students masked led to a level of isolation. The students would be sitting next to each other in the classroom and would type in the

chat rather than speak to one another. The mask definitely inhibited speech in that it muffles their voices and they had to repeat themselves and to talk louder. They were already insecure so shouting out is not something they would do comfortably. Even I would get dizzy with headaches and be out of breath — by the time I got through giving an example on a problem and speaking to the back of the room, I was highly fatigued. The student's attention spans were reduced from normal — it was definitely very hard to keep their attention. Students lost the ability and willingness to speak; this was a combined effect of having the computer camera turned off at home and being masked at school — no one is ever able to see your face.

13. Not only as a teacher but as a parent I experienced these problems arising from the mask mandate. I have four children, all attending school last year in Lacey Township; one has since graduated high school.

14. My middle schooler who will be 13 next week was a seventh grader last year and was afraid during the mask mandate to communicate with her peers; she would not make friends and would not answer the teacher in class but was comfortable only with the computer. My daughter did not make any new friends last year until the mask mandate was lifted in June and then she promptly made four new friends and invited them over. This did not happen until the mandate ended.

15. My high school daughter was a freshman last year and she suffered severe depression and self harm. She reported to me as to “the monotony of the days” and that “there’s no more joy left in school”.

She told me that “I know the adults don’t think it is a big deal but the lunch break is when we get to see our friends, to let our stress and get to have some fun but without that we have only school”. She went from straight A to barely passing last year. She will be 16 this coming March.

16. My seven year old was in first grade last year. We went back and forth between in-person and virtual learning. She is now developmentally behind in reading and I am looking into an IEP. She refused to work at home and went from loving kindergarten in 2019-2020 (when the pandemic began) to hating school and “feeling dumb”. She expressed that she did not like the mask, that it bothered her face and is uncomfortable. As a result of the mask, she said she had trouble hearing the teacher and had trouble paying attention. She could not always hear what the teacher was saying.

17. As a teacher I saw relationships form when the masks came off in the last three weeks of school this past year. The students were then willing to talk to one another. Once the masks came off they would speak to everyone in the room and it again became that classroom community that I am used to seeing.

18. Normally in fifth grade there are about 25 students to a class. Ordinarily, they would be sarcastic to one another, support each other’s ideas and give discussions as to different viewpoints. When we had the masks they would just answer questions but without the masks they would engage in discussion and conversation. After the masks came off, it was an evolution into having conversations again. When the masks were on, they did not joke around with each other but there was banter once again after the

masks came off. All of this is very important to fifth graders: it gives them a sense of when the joke goes too far and they have to learn to apologize, learn the limits and read social cues. Ordinary conversation and banter by children also lightens the mood of the classroom; the joking around is important to their education because it allows them to find humor in things. Humor that came through the computer chat was more likely to be inappropriate because the kids had a sense of bravery that they did not have when they were speaking out loud. But when they would verbalize again, after the masks were removed, their humor became more natural and less inappropriate. Some kids, of course, would always speak but the quiet kids started speaking out only when the masks came off.

19. As a fifth grade teacher I drop the class off to the lunchroom and lunch aides and a teacher supervise. But there was no lunch last year and the students could only have snack at their seats inside the plexiglass barriers. I have been on lunch duty when we served lunches before the pandemic. At lunch, students choose who to sit next to and learn how to deal with someone who bothers them or is tossing food at them; they learn to choose their neighbors at the lunch table. This is an important part of the students' day. Typically at this age the boys tend to sit with each other and girls with each other. They talk about their plains, what they have going on after school; they make gross concoctions from their food and dare each other to eat it. Boys are more apt to talk about sports but there are some sporty girls. Before the pandemic the boys would bring trading cards to lunch, *i.e.*, football cards or

Pokemon. Girls would typically bring art work or trade bracelets. A school cafeteria is really loud — it is never quiet in the cafeteria.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 16, 2021.

/s/ Rhiannon Mindas