No. 24-

IN THE

Supreme Court of the United States

JANE DOE, ON BEHALF OF HERSELF
AND HER MINOR CHILD SARAH DOE,

Petitioner,

v.

FRANKLIN SQUARE UNION
FREE SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a child has a fundamental right to refuse an experimental medical intervention that places her at serious risk of harm.

2. Whether strict scrutiny still applies if a fundamental right is infringed by a purported public health measure.

3. Whether the state has a valid interest in mandating an experimental medical product that cannot stop the transmission of disease.

PARTIES TO THE PROCEEDING

Petitioner Jane Doe ("Jane") is the parent of Sarah Doe ("Sarah"), a medically fragile child who was wrongfully denied a mask exemption and severely harmed as a result. Respondent is the Franklin Square Union Free School District (the "School District District"), which wrongfully denied her medical exemption requests without justification.

RELATED PROCEEDINGS

- *Jane Doe, on behalf of herself and her minor child Sarah Doe v. Franklin Square Union Free School District*, No. 23-582, U.S. Court of Appeals for the Second Circuit. Judgment entered April 25, 2024.

- *Jane Doe, on behalf of herself and her minor child Sarah Doe v. Franklin Square Union Free School District*, No. 2:21-cv-5012, U.S. District Court for the Southern District of New York. Judgment entered March 28, 2023; and Orders entered March 24, 2023, and October 26, 2021.

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DECISIONS BELOW

The district court's decision granting Respondent's motion to dismiss on March 24, 2023 (Pet.App. 32a-42a) is not reported. The district court's order denying a stay pending interlocutory appeal on October 26, 2021 (Pet. App. 43a-97a), which was incorporated by reference into the final order of dismissal, is not reported.

The Second Circuit's ruling affirming in part and reversing in part the district court's dismissal is reported at *Doe v. Franklin Square Union Free Sch. Dist.*, 100 F.4th 86 (2d Cir. 2024) (Pet.App. 1a-31a).

STATEMENT OF JURISDICTION

On April 25, 2024, the Second Circuit affirmed the district court's decision to dismiss the Constitutional claims at issue in this Petition. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3) and the Second Circuit under 28 U.S.C. § 1291. This Court has appellate jurisdiction under 28 U.S.C. § 1254(1). On July 18, 2024, an application (24A81) to extend the time to file a petition for a writ of certiorari was submitted to the Honorable Justice Sotomayor. On July 25, 2024, the Honorable Justice Sotomayor granted the application (24A81) extending the time to file until September 23, 2024.

PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

The United States Constitution amendment XIV § 1 commands:

> "No state * * * shall deprive any person of life, liberty or property without due process of law."

INTRODUCTION

This petition seeks the Court's clarification on a critical circuit split regarding a question of immense nationwide significance: Is there a fundamental right to a medical exemption from public health mandates that may place a child at serious risk of harm? Alternatively, can the government deny medical exemption requests, compelling vulnerable children to undergo medical interventions against medical advice, without the obligation to demonstrate that such denials serve a compelling state interest?

Sarah Doe, a nine-year-old little girl with multiple health issues, was unable to medically tolerate a mask yet was compelled by her school district to wear one against medical advice for a year and a half. This mandate inflicted significant and lasting harm on her health, leading to repeated severe asthma and anxiety attacks. The School District's aggressive response contributed to a deterioration in Sarah's condition, ultimately resulting in an eating disorder and profound emotional scars. Once a happy and thriving child, she now struggles to engage with her peers and maintain a safe weight.

The School District's refusal to exempt Sarah from the mask mandate appeared driven by political motivations rather than public health necessity. While the lower courts acknowledged the lack of adequate studies supporting prolonged mask use for Sarah, they nevertheless declined to intervene. This reluctance adheres to a troubling circuit split interpreting *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), as eliminating judicial scrutiny of fundamental rights in public health contexts.

As this Court has repeatedly noted, *Jacobson* does not endorse abandoning strict scrutiny of fundamental rights in public health matters. On the contrary, it affirms that medical exemptions are constitutionally protected, and courts must intervene when an individual asserts that a mandated public health intervention could seriously impair her health. *Jacobson*, 197 U.S. at 38-39. Despite Justice Gorsuch's clarifying concurrence in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 71 (2020) on this point, many circuits continue to misapply the so-called "*Jacobson*" public health exception.

The Second Circuit's application of *Jacobson* in this case unlawfully deprived Sarah of essential judicial review. The rights implicated here warrant strict scrutiny when infringed. The right to refuse medical interventions—even lifesaving ones—is undeniably fundamental. When the intervention is experimental, lacks proven benefits, and poses serious risks, as in this case, this right reaches the level of a jus cogens norm—an essential natural right vital to the legitimacy of any society. While the state has the right to protect itself from harm, individuals possess that right as well. When these rights conflict, courts must assess the evidence of relative risks and burdens to

ensure that vulnerable children are not sacrificed without compelling justification.

The recent pandemic starkly highlighted the need for courts to safeguard constitutional rights, especially during times of crisis. This case presents an ideal opportunity for the Court to reaffirm that lower courts have a responsibility to protect these rights before the next emergency arises. The facts are clear, the lower courts have directly addressed the issues, and the legal questions at stake carry significant national importance.

STATEMENT OF THE CASE

Beginning in the fall of 2020 and continuing throughout the early stages of the COVID-19 pandemic, the New York State Department of Health ("NYSDOH") issued various temporary regulations mandating the use of face masks in school for any child over the age of two years old who could medically tolerate one. [Pet.App.3a]. Each version permitted exceptions, providing that "[s]tudents who are unable to medically tolerate a mask, including students where such mask would impair their physical or mental health are not subject to the requirement of a mask." [Pet. App.4a].

I. Sarah's attempts to get a reasonable accommodation

Sarah was unable to medically tolerate prolonged mask use, as it impaired her physical and mental health. She suffers from multiple health issues, including asthma and anxiety. *See* First Amended Complaint [*Doe v. Franklin Square*, 2:21-cv-5012, ECF No. 33 ("FAC") ¶ 2]. Her mother, Jane, made exhaustive attempts to persuade the School District to allow Sarah an exemption, as

authorized in the regulation. [*Id.* ¶ 27]. Jane explained that Sarah's health was deteriorating, that she was suffering anxiety, was dizzy, unable to concentrate, having increased serious asthma attacks and was unable to breathe due to mask use. [*Id.* ¶ 38]. Sarah's lifelong pediatrician shared Jane's concerns about Sarah's safety and wrote multiple requests for accommodation and exemption, which were all denied. [*Id.* ¶¶ 52-84; Pet.Ap.5a-6a].

Sarah's mother was informed by the Superintendent that the district's official policy was to deny all medical exemptions. [FAC ¶ 43; Pet.Ap.5a]. The School District nurse subsequently also told Jane that the School District had a strict policy that "no medical exemptions would be allowed" from the Mandate. [*Id.* ¶ 48]. The School District's "no accommodation" policy was so inflexible that Sarah was not even allowed to take off her mask during high-intensity outdoor activity, though the World Health Organization expressly cautioned that it was unsafe for children to wear masks while exercising, and even after Sarah's classmate lost consciousness from running in a mask. [*Id.* ¶ 28]. Nor would the School District allow Sarah to join virtual learning, even though it was offered at the time as an option for all other students, even those who were able to tolerate a mask. [*Id.* ¶ 66].

After Jane threatened to file a lawsuit, the School District's official explanation for denying an exemption for the 2020-2021 School District year was that the district contract physician, Dr. Marino, an osteopath with no expertise in Sarah's conditions who has never met or treated her, advised them that Sarah did not need an exemption. [*Id.* ¶ 58]. Initially, Dr. Marino insinuated that his recommendation was made jointly after he and Sarah's doctor spoke. [*Id.* ¶ 59]. Alarmed at the

misrepresentation, Sarah's doctor wrote a follow up letter to the School District correcting the record on his position about Sarah's need for a mask, which stated: "I requested a mask exemption for [Sarah]. After speaking with Dr. Marino, he refused to grant it. It was not my decision to deny her mask medical exemption. Dr. Ron Marino made the decision to deny her medical exemption. He overruled my request for my patient's medical needs." [*Id.* ¶ 60].

In the fall of 2021, Sarah submitted a third medical exemption request from her physician, along with letters from her attorneys. But once more, the School District rejected her request. The School District's lawyer explained that the exemption was being denied because "in its guidance dated April 7, 2021, the CDC has taken the position that people with moderate to severe asthma are at an increased risk to be hospitalized for COVID-19 and therefore should wear a mask to cover their nose and mouth to reduce the risk of severe illness. *See CDC Guidance: People with Moderate to Severe Asthma* (last updated 4.7.2021)." [FAC at ¶ 87].

The CDC "FAQ" pages on masks that the School District relied on are not a substitute for medical advice from a treating physician and offer no links to any studies or reputable data to support the assertions made therein. Rather, the CDC's FAQ noted that people with asthma must avoid asthma triggers to stay safe and should talk to their doctors if they have concerns. [*Id.* at 91-93]. Nothing on the cited webpage provides a reasonable basis to conclude that all people with asthma can safely tolerate a mask for eight hours a day, or that Sarah's exemption should have been denied because one of her impairments is asthma. [*Id.* at 88].

After the lower court received an affidavit from Sarah's mother detailing the severity of her deteriorating health and indicated it might impose a preliminary injunction, the School District agreed to let Sarah try wearing a "mesh mask" as a temporary accommodation to avoid a hearing. [FAC ¶¶ 210-214]. While the mesh mask offered some relief, it quickly proved inadequate. The mask—unauthorized by the FDA for any medical purpose—became soggy and caused fungal rashes. Sarah also continued to experience panic attacks and difficulty breathing while wearing it. [*Id.* ¶¶ 215-216]. Although the School District acknowledged that the mesh mask provided no protective benefit—essentially serving only as a costume—it refused to allow Sarah to stop wearing it when it became clear that the mesh mask was insufficient. [*Id.* ¶¶ 218-219].

Throughout, instead of providing support to Sarah as she struggled to breathe and suffered increasingly frequent asthma and anxiety attacks, School District employees mocked her, punished her, and even filmed her as she desperately sought refuge in a corner to lower her mask and catch her breath. [FAC ¶¶ 68-70]. The trauma from this ordeal continues to haunt Sarah. She developed an eating disorder and depression, which have not abated. [*Id.* ¶¶ 72, 99]. Once a joyful student who excelled socially and academically, her grades have slipped and she now begs to stay home, burdened by a lasting fear of being ostracized by her peers and staff, and struggling to eat or maintain a safe weight.

II. Masks cannot stop the spread of Covid-19 and have not been studied to ensure they are safe for children.

The complaint (which must be deemed true at this stage) asserts that masks do not stop the spread of COVID-19, and no adequate studies established that they are safe for children, particularly children with underlying health conditions. [FAC ¶¶100-160]. Even if masking were effective, allowing Sarah an exemption would not create a significant risk of harm to the public health. Importantly, the regulations themselves required exemptions for students, like Sarah, who could not tolerate them. [FAC at ¶¶161- 172]. And the School District allowed Sarah to wear a mesh mask, which even the School District acknowledged had no public health benefit. [*Id.* at 219].

Most European countries did not mask children during the pandemic because of the acknowledged risk of harm to learning, as well as the known increased depression, anxiety, and health impacts that prolonged mask use in children can cause. [*Id*. at ¶¶ 144-160]. The district court acknowledged, in denying preliminary injunctive relief, and ultimately dismissing the constitutional claims, that there is no peer reviewed evidence that establishes that prolonged daily mask use for is safe for any child (leave aside a child with underlying vulnerabilities), stating:

> Our country is being challenged to rationally decide how to best protect the health of our children in uncharted waters that make all of us medical guinea pigs. Indeed, there is no conclusive study as to either the short-term or long-term effects that mask wearing could have on children."

[Pet.App.44a].

Nor was there evidence that masks were effective. Before the district court dismissed the constitutional claims, a Cochrane Review (considered to be the gold standard for data review) conducted the most comprehensive analysis of the data on the efficacy of masking to date. The conclusions, said Tom Jefferson, the Oxford epidemiologist who is its lead author, were unambiguous. "There is just no evidence that they"—masks—"make any difference," he told the journalist Maryanne Demasi. "Full stop." *See*, Exhibit submitted in *Doe v. Franklin Square*, 2:21-cv-5012, ECF No. 62-5].

REASONS FOR GRANTING THE WRIT

I. Certiorari is Warranted Because of the Nationwide Significance of the Issues at Stake.

The Court should grant certiorari to clarify that there is a fundamental right to refuse a medical intervention that places a child at risk of serious harm. This issue is important and recurring, and it is imperative for the Court to clarify the parameters of the right to medical exemptions to prevent further harm to children. The COVID-19 pandemic resulted in a significant surge in mandates, leading to alarming reports of individuals unable to safely comply and suffering serious harm or even death due to ambiguity surrounding their fundamental right to medical exemptions. In this era of recurring pandemics, it is crucial for the Court to settle whether it is constitutionally permissible to deny medical exemptions to children or adults who are at risk of serious harm or death from such measures without any judicial review. If the Court holds that judicial review of the fundamental rights at stake is warranted, the Court must articulate a

prima facie pleading requirements. This clarification is vital to ensure that vulnerable children have a mechanism of review to ensure that any denial is narrowly tailored to further a compelling state interest. Right now, they have no recourse and desperately need this Court's intervention.

A. A Medical Exemption is a Fundamental Right Rooted in Self-Defense.

The right to a medical exemption is a fundamental right. At its core, the right is about self-defense. This right derives not just from a liberty interest, but from the inalienable and superior right to life—and the associated right to defend and preserve one's life or health from harm.

The right to protect oneself from harm is a natural right, deeply rooted in our nation's history and tradition. Political scholars consider the sanctity of this right to be antecedent to the validity of any governmental system. *See*, *e.g.*, A.J. ASHWORTH, SELF-DEFENCE AND THE RIGHT TO LIFE, 34 Cambridge L.J. 282, 282 (1975). John Locke discussed self-preservation from infringements on the right to one's bodily security as being so fundamental to basic human nature that "no law can oblige a man to abandon it." *Id* (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, Ch II, 6, 1690). In his Commentaries on the Laws of England, William Blackstone described the right to protect one's "life and limb" from harm as "the primary law of nature," holding that it is an "absolute right" which "every man has a right to enjoy." *Id.* (citing 1 W. BLACKSTONE, COMMENTARIES 119).

The concept of self-defense is fundamental to the structure of the common law, and in turn, forms the bedrock of the social contract woven into our constitutional guarantees. *See*, Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. Rev. 1, 33-34 (1999). The right to self-defense is so well-protected that it forms the basis of a general exception to nearly all criminal laws, including laws against murder, assault, weapon possession, and the like. See, e.g., N.Y. PENAL LAW §§ 35.15(2)(a)–(b) (McKinney Supp. 2006); MODEL PENAL CODE § 3.04 cmt. 4(a), at 48 & n.35 (Official Draft and Revised Comments 1985) (as adopted in 1962). Thus, even in cases where attempts to defend oneself will end in the *death* of another person, the right to self-preservation (or even the preservation of a stranger) is protected. *See* MODEL PENAL CODE § 3.05; *see*, also, PAUL H. ROBINSON, CRIMINAL LAW § 133 (1984 & Supp. 2006).

If a person is allowed to be exempt from laws criminalizing murder based on this right, how can it be that a little girl cannot opt out of a mask mandate when her treating physician certifies it is seriously harming her, and the government has established no compelling need to force her to ignore that advice?

When a government mandate places a person's life or health at serious risk, the highest level of scrutiny must apply. Indeed, almost a hundred and twenty years ago, this Court recognized a sufficient medical exemption as a constitutional prerequisite to any valid public health law. *Jacobson*, 197 U.S. 11 at 36-39. The *Jacobson* decision balances two competing rights to self-defense—the right of the state to defend its population from communicable disease, and the right of the individual to protect herself

from harm caused by the state's defensive efforts. In *Jacobson*, the Court concluded that a state's police power overrides nonspecific liberty interests in declining a smallpox vaccine during a raging outbreak. But in the same breath, the Court cautioned that this police power is not unlimited, and that "even if based on the acknowledged police powers of the state," a public health measure "must always yield in case of conflict with . . . any right which [the Constitution] gives or secures." *Id.* at 25.

When *Jacobson* was decided in 1905, the Bill of Rights had not yet been incorporated to apply against the states, and "fundamental liberty interests" were not protected as they are today. But the right to a medical exemption is so deeply rooted and implicit in the concept of ordered liberty that even then, the Court recognized the right as constitutionally required. In fact, the *Jacobson* court held that it would not only be unconstitutional, but "cruel and inhuman in the last degree" to apply the $5 penalty from the vaccine mandate against a person "if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health or probably cause his death." *Id.* at 39. In such cases, though tiers of scrutiny were not yet recognized, the Court stressed that the judiciary was required to provide rigorous judicial review and intervene "to protect the health and life of the individual concerned." *Id.*

More than a century later, public health scholars still acknowledge this principle of harm avoidance as part of the foundational holding of *Jacobson* and a floor to any constitutionally valid public health measure. *See*, e.g., LAWRENCE O. GOSTIN, PUBLIC HEALTH

LAW: POWER, DUTY, RESTRAINT 126-28 (2d ed. 2008) (pursuant to *Jacobson*, public health regulations require five elements to be constitutional: (1) public health necessity, (2) reasonable means, (3) proportionality, (4) harm avoidance, and (5) fairness). Since *Jacobson*, this Court's medical exemption cases consistently uphold the harm avoidance principle, clarifying that, if a medical exemption is written in such a way as to risk excluding even a few who might need it, it is unconstitutional on its face, not just as applied. *See*, *e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 937 (2000); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006).

The circuit court acknowledged that the right to a medical exemption is fundamental but subsequently held that the denial of this right cannot be scrutinized. The court stated, "Put simply, Doe challenges not the absence of a medical exemption from the mask mandate (since the mandate contains such an exemption), but the method that the School District used in determining whether to grant such an exemption to Sarah." By concluding that it sufficed to show that an exemption exists rather than that it was granted, the circuit court applied a highly deferential rational basis review. This allowed the court to uphold the dismissal of Sarah's claim by reasoning that it is hypothetically "reasonable for the government to condition the application of a medical exemption to a public health mask mandate on a determination that the individual would, in fact, be harmed by wearing a mask." As a result, the court denied Sarah the right to judicial review of her denial. [Pet.App. 16a].

This framework is deeply unjust and must be invalidated. First and foremost, the circuit court erred

by holding that the right to self-defense is satisfied by the regulation's statement that medical exemptions should be allowed. This is not a facial challenge to the mask regulation. This is an as-applied challenge to the School District district's refusal to grant an exemption to Sarah. If the right to self-preservation is fundamental, as the court appears to acknowledge, then the court must apply strict scrutiny to cases where the right is denied. This principle applies to analysis of the infringement of any fundamental right. For instance, a free speech claim cannot be dismissed simply because a state actor could have protected the plaintiff's speech under state law but chose not to; similarly, Sarah's claim should not be dismissed just because the School District had the authority to grant her an exemption yet failed to do so.

Second, the circuit court's ruling conflates the determination of whether a right is fundamental with the question of whether the state has a reasonable basis for infringing upon it. These are distinct inquiries. First, the nature of the right must be established, as outlined in *Leebaert v. Harrington*, 332 F.3d 134, 140 (2d Cir. 2003). If the right is deemed fundamental, the state then bears the burden of proving that it had to infringe upon it to serve a compelling state interest, and that this was done in the least burdensome manner, as stated in *Roman Catholic Diocese of Brooklyn*, 592 U.S. 14, 18–19. Whether or not the state might have a plausibly rational reason to want to violate the right has no bearing on whether the violation is entitled to strict scrutiny. The lower courts' conflation of the steps effectively shielded Sarah's denial and her evidence of harm from any level scrutiny.

Third, the circuit court's decision imposes an unreasonable certainty requirement on medical exemptions, granting school administrators full discretion to determine if it has been met. It is profoundly reckless to allow the state to evade judicial review of a medical exemption denial by simply asserting that a school district administrator is unsure whether a child will certainly be harmed without an exemption. This framework effectively sets up a game of Russian Roulette, forcing vulnerable children to endure experimental medical interventions against their physicians' advice without any possibility of judicial review to protect the child.

Fourth, the circuit court's reframing of the issue is disingenuous. The critical question is whether there is a right to a medical exemption from a public health mandate when an individual asserts they are at serious risk of harm, rather than whether that need can be established solely through a treating physician's certification. The determination of whether Sarah genuinely required a medical exemption to protect herself from harm is a factual issue that cannot be dismissed at this stage. Under F.R.C.P. 12(b)(6), the court must allow for factual disputes to be resolved at trial.

A treating physician's certification of medical necessity is likely sufficient to establish a *prima facie* case, and in this instance, Sarah's state-licensed physician provided multiple certifications confirming her need for an exemption. Furthermore, the complaint details how Sarah was not only *at risk* of harm but *was actually harmed*, suffering increasingly severe asthma and panic attacks, the development of an eating disorder likely to have long-term effects, extreme anxiety and significant

hair loss. In fact, the lower court itself already held that Sarah met her burden of establishing medical need for an exemption under the more rigorous preliminary injunction standard. *See Doe v. Franklin Square*, 2:21-cv-5012, ECF No. 37 (Transcript) at 13-15. If the School District disputes whether Sarah was genuinely at risk of harm from the mandate, or whether these harms were severe enough to warrant an exemption when balanced against the state's interests, these factual questions must be addressed at trial, not as a basis for dismissal.

B. The Right to Refuse Medicine—Even Lifesaving Medicine—is Fundamental.

Regardless of whether a child *needs* an exemption, there can be no doubt that the right to refuse medical interventions—even lifesaving ones—is fundamental all by itself. *See*, *e.g.*, Pet.App. 86a-87a: "There is no question that the right is fundamental." (quoting *Washington v. Glucksberg*, 521 U.S. 702, 722 n.17 (1997). In *Glucksberg*, this Court affirmed the right had been officially recognized as fundamental, noting: "In *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), we concluded that the right to refuse unwanted medical treatment was so rooted in our history, tradition and practice as to require special protection under the Fourteenth Amendment." *Glucksberg*, 521 U.S. 702 at 722 n.17. Closely related, and perhaps ultimately the same, is the well-established right to bodily integrity. According to this Court, "[n]o right . . . is held more sacred or is more carefully guarded, than the right of every individual to the possession and control of his own person." *Dobbs v. Jackson Women's Health Org*, 142 S. Ct. 2228, 2328 (2022) (Breyer J. dissenting) (cleaned up, citing *Union Pacifici R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

Recognizing these intertwined fundamental rights, the Supreme Court has repeatedly restricted the power of government to interfere with medical decisions, particularly when the state attempts to compel a medical intervention. *See*, *e.g.*, *Cruzan*, 497 U.S. at 278 (forced food and water); *Winston v. Lee*, 470 U.S. 753, 766-767 (1985) (forced surgery); *Rochin v. California*, 342 U.S. 165, 166 (1952) (forced stomach pumping); *Washington v. Harper*, 494 U.S. 210, 229, 236 (1990) (forced administration of antipsychotic drugs); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (forced sterilization).

The lower courts attempted to avoid strict scrutiny of these fundamental rights by asserting that masking is not a medical intervention. [Pet.App. 17a-19a and 87a]. Specifically, each court held that "[w]hile the mask mandate was obviously intended as a health measure, it no more requires a 'medical treatment' than laws requiring shoes in public places . . . " [Pet.App. 17a-19a and 87a]. This argument is a nonstarter. Unlike shoes, facemasks are defined as medical products under federal law. [FAC ¶¶ 161-172]. Pursuant to section 201(h) of the federal Food, Drug, and Cosmetic Act ("FDCA"), all masks employed for medical purposes, including disease mitigation, are considered "regulated medical devices." [*Id.*] Before any mask can be used "as a health measure," the FDA must license or specifically authorize it under an "Emergency Use Authorization" ("EUA"). To date, no mask has been fully licensed for use as a health measure. However, the FDA has authorized certain masks to be used under various temporary EUAs, subject to strict conditions. [*Id.*] Notably, no masks—except cloth masks—are authorized for use by children under these EUAs. The FDA declined to authorize surgical masks, N95 or KN95 masks for

children or in school settings. [*Id.* at ¶¶161-164]. Both the CDC and FDA warn that "N95 respirators are not designed for children" and may exacerbate breathing problems for those with underlying conditions. [Id.] It is beyond dispute that cloth masks, the only mask allowed for use by children under federal law, offer no public health benefit. [ECF No. 62-5].

The circuit court's secondary argument on this point, that masks are not medical treatment because they do not penetrate the body, is irrational. Many medical interventions are topical. For example, a cast does not penetrate the body, but it is nonetheless unquestionably a medical intervention that a person should have a right to refuse. Similarly, mental health therapy does not penetrate the body either, but is unquestionably a medical intervention that a person can fundamentally decide to refuse. The key is that the mandate here was "obviously intended as a health measure" and under well-established precedent, a person has a fundamental right to refuse any such health measures unless the state can meet its high burden of proving it had a compelling interest in making her submit to it.

C. The Right to Make Important Medical Decisions with One's Chosen Doctor is Fundamental.

The lower courts' total deference to School District principals to make medical decisions for vulnerable disabled children also flies in the face of another fundamental right articulated by this Court—that is, the right to make important medical decisions with one's chosen physician absent interferences from the state.

In *Doe v. Bolton*, 410 U.S. 179 (1973) this Court thoroughly analyzed and answered the question of how medical need is determined for purposes of granting a medical exemption to an otherwise permissible state health regulation. *Bolton* held that there is a fundamental right to have one's chosen physician make a medical need determination, and the state cannot interfere beyond requiring that the physician be licensed by the state. *Id.* According to *Bolton*, further interference in the determination of medical need would likely violate the right of the patient to make medical decisions in accordance with her trusted provider's best medical judgment.

Bolton was issued the same day as *Roe v. Wade*, 410 U.S. 113 (1973), but these companion cases address two very different rights. *Roe* addressed the liberty interest in choosing abortion, holding that a woman's liberty interest in abortion could override the state's interest in protecting the fetus initially, but not after viability. The Court recently overturned *Roe* and held that the liberty right to abortion is not fundamental. *Dobbs*, 142 S. Ct. 2228.

Bolton addressed the separate fundamental right to self-defense, examining limits on state interference in a woman's right to therapeutic abortions, regardless of the date of viability, to safeguard her life or health. 410 U.S. 179. The rights in *Bolton* are not derivative of any right to abortion, and its holding should not be impacted by *Dobbs*.

First, in 1977, *Bolton* was affirmed as applying to all medical need determinations, not just those concerning the right to a therapeutic abortion. In *Whalen v. Roe*, 429

U.S. 589 (1977), the Supreme Court upheld a challenge to a New York State law that required physicians to report prescriptions of certain controlled substances. One of the factors that the Court discussed to determine the constitutionality of the reporting requirement was that the regulation did not fall afoul of *Bolton*: "Nor does the State require access to these drugs to be conditioned on the consent of any state official or third party." The Court acknowledged that pursuant to *Bolton*, it would be impermissible for the state to interfere in the determination of medical need for the prescriptions. *Id.* at 603, fn 31; *see also*, *Pharm. Soc. of State of New York, Inc. v. Lefkowitz*, 586 F.2d 953, 958 (2d Cir. 1978) (Holding that the Supreme Court acknowledges a constitutional interest "in independence making certain kinds of important medical decisions," including "the (patient's) right to decide independently, with the advice of his physician, to acquire and use needed medication.") (citing *Whalen*, 429 U.S. at 599-600, 603).

Second, the Court's recognition, in *Whalen*, that the rights at stake in *Bolton* are not derivative of the abortion right is well supported. The right to self-defense is entirely distinct from the liberty right to an abortion. Even when abortion was illegal, courts routinely recognized a constitutional right to a medical exemption in cases where a woman's life or health was at risk. As a pre-*Roe* opinion put it (even while rejecting a constitutional right to nontherapeutic abortions), abortion bans almost universally had exceptions to protect the life of the mother because "self-defense has always been recognized as a justification for homicide." *Steinberg v. Brown*, 321 F. Supp. 741, 747 (N.D. Ohio 1970). Similarly, a 1938 English case held—in reading a "life of the mother"

exception into an abortion ban that didn't include such an exception—that, "as in the case of homicide, so also in the case where an unborn child is killed, there may be [a self-defense] justification for the act." *King v. Bourne*, (1938) 1 K.B. 687, 690–91 (C.C.C.); *see also People v. Belous*, 71 Cal. 2d 954, 963, 969 (1969) (noting the right to a medical exemption from abortion restrictions is a separate right). Indeed, this Court has always maintained that separation. The issuance of *Bolton* and *Roe* as separate companion cases articulating entirely different rights and standards for therapeutic and non-therapeutic abortions, reflects this Court's recognition of the distinction between these lines of cases.

Yet, the lower courts declined to follow *Bolton*, holding that it is inapposite because a mask exemption, unlike an abortion, implicates public health rather than personal decision making. [*See*, *e.g.*, Pet.App. 86a]. This reasoning is flawed. A post-viability abortion necessitates the intentional killing of another human being. It is *lethal* self-defense, one hundred percent of the time. By contrast, there is no evidence in the record that allowing Sarah a mask exemption would harm anyone. Mask exemptions are specifically allowed in the regulation, and the School District presented no evidence that Sarah would harm the public if exempted. In fact, the School District allowed her an exemption, in the form of the "mesh mask" accommodation, which they acknowledged had no public health impact and was essentially a costume, but refused to allow her to take the costume off when it was apparent it was harming her.

Even if the School District felt it could prove that allowing Sarah to remove the mesh mask would pose

a greater risk to society than a post-viability abortion, this is properly addressed at the strict scrutiny phase, not on a motion to dismiss. At the very least, the courts below should have continued the case, and made the School District meet it's burden under strict scrutiny of establishing that it could not allow a full exemption without imperiling public health. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. 63 at 67.

D. Fit Parents Have a Fundamental Right to Make Medical Decisions for their Children.

Similar errors infect the lower courts' rejection of the well-established right of fit parents to make medical decisions for their children. *See*, *e.g.*, *Troxel v. Granville*, 530 U.S. 57, 58 (2000); *Parham v. J.R.*, 442 U.S. 584, 604 (1979). In casting aside this fundamental right, the district court held:

> No one is forcing plaintiff to send her child to public School District or to live in New York State, but once she made those decisions she must comply with their rules. Her authority stops, so to speak, at the schoolhouse door. And for good reason. Like a physician with a patient, a parent may justifiably be expected to act in the child's best interest. But it is that very motivation—laudable in itself—that might lead the parent to misjudge what is best for the health of the community as a whole. That is precisely why we, as a society, have entrusted public institutions to make such decisions.

[Pet.App.89a].

The court's chilling remark that we cannot have medical need determined by those who have the child's best interest at heart can only lead to one outcome—complete and inhuman tyranny, and massive harm to vulnerable children. There are two steps to this inquiry—establishing if a child needs an exemption, and then determining whether the state can grant it safely. The medical need *must* be assessed by the parties that are focused on the best interest of the child. This step cannot be conflated with the second step of balancing the need against the needs of the community. These are two separate questions. A child's medical needs are not lessened by the fact that they could pose a danger to others if their need is met. This is why children have a fundamental right to have the need determination made by their parents and treating physicians, not the School District—it is because, as the court acknowledged, their parents and their treating physicians are the ones who have their best interests in mind, whereas the state has many other interests. It is for this very reason that the Nineth Circuit has split with the Second, affirming the importance of parental medical decision-making rights and holding: "The right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state." *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000).

The state's interest in safeguarding the rest of the community is properly balanced at the strict scrutiny phase. If courts skip the first step and fold it into the second, the child's health, and in some cases life, is sacrificed for the "greater good," with no means of ensuring that the draconian punishment was necessary, or that no less drastic measures could have been taken.

Likewise, the lower courts made a clear error of law by holding that a parent's authority "stops at the schoolhouse door." Rather, it is well-settled that families do *not* 'shed their constitutional rights' at the schoolhouse door. *Goss v. Lopez*, 419 U.S. 565, 574 (1975). The Second Circuit recognizes an exception to strictly scrutinizing infringement of parental rights in the context of curriculum decisions made by School Districts, reasoning that it would be unweildy to require School Districts to "establish that a course of instruction is narrowly tailored to support a compelling state interest before the School District could employ it with respect to the parent's child." *Leebaert*, 332 F.3d 134, 141 (2d Cir. 2003). But medical decisions are nothing like the curriculum decisions addressed in that line of cases. The school is empowered to decide how best to teach math class. But fundamental parenting decisions, such as medical decisions or whether a child should be raised as a Christian or a Jew, expressly belong to parents, who do not delegate their right to make these decisions by allowing their child to receive a mandated education. School Districts are not authorized or qualified to make medical decisions for their students. When they insist on doing so, it is not unreasonable to ask the government to show that refusing to allow a child to follow the medical advice of her treating physicians and parents is necessary and narrowly tailored to meet a compelling interest.

II. The Court Should grant Certiorari to Fix Rampant, Long Entrenched Misapplication of the *Jacobson* Decision.

This case also presents the ideal vehicle to address another widespread mistake plaguing lower court decisions in many circuits today—to wit, the persistent

and dangerous myth that courts should avoid judicial scrutiny when public health is involved.

A. *Jacobson* does not negate strict scrutiny.

The circuit court's primary reason for declining to apply strict scrutiny to the infringement of any of the fundamental rights burdened here was the mistaken belief that *Jacobson* requires the Court to decline to apply strict scrutiny to the violation of fundamental rights whenever public health is involved. [Pet.App. 18a-20a]. But, as set forth *supra* § IA, *Jacobson* held precisely the opposite when it comes to assessing medical assessments. *Jacobson* does not provide any authority for disregarding fundamental rights, particularly in the context of a medical exemption. *Jacobson* itself requires robust judicial scrutiny in a case where a person is at risk of serious harm from a vaccine. 197 U.S. 11 at 36-39. "We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned." *Id.*

This Court has clarified in dicta that the so-called *Jacobson* exception is invalid and does not justify deviating from modern tiers of scrutiny for any fundamental right. *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 71 (Gorsuch, J., concurring). Despite the clear guidance provided in that case, and the fact that all Justices appear to have agreed with it, too many circuit courts continue to "mistake this Court's modest decision in *Jacobson* or a towering authority that overshadows the Constitution." *Id.*

Some circuits initially appeared to adopt this Court's advice that *Jacobson* "hardly supports cutting the Constitution loose during a pandemic" *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 70, but considerable entrenched confusion persists and many have returned to applying the *Jacobson* exception as if the *Diocsese* case never existed. For example, immediately after this Court issued the *Diocese* decision, the Second Circuit reversed its prior holding in a related case and acknowledged that the *Jacobson* exception was invalid, adopting this Court's position and *Jacobson's* holding that "even if based on the acknowledged police powers of a state," a public-health measure "must always yield in case of conflict with . . . any right which [the Constitution] gives or secures." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020) (citing *Jacobson*, 197 U.S. 11 at 25). In *Agudath*, the Second Circuit affirmed that to the extent *Jacobson* was relevant in modern tiers of scrutiny, it was to the analysis of whether the government had a legitimate or compelling interest in mandating a public health measure, not whether the right infringed by it was fundamental and deserving of strict scrutiny. *Id.* But immediately after *Agudath* was decided, it was buried and forgotten, and the Second Circuit returned to its' old approach, once more holding that fundamental rights are no longer fundamental when infringed by a public health initiative.

The Second Circuit's extreme deference reflects a widespread, firmly entrenched misunderstanding of *Jacobson's* reach. In 2020, the Fifth Circuit similarly held that *Jacobson* instructs that all constitutional rights may be reasonably restricted [without strict scrutiny] to combat a public health emergency." *In re Abbott*, 954 F.3d 772 (5th Circ. 2020), vacated as moot sub nom. By *Planned*

Parenthood Ctr. for Choice v. Abbott, 141 S. Ct. 1261 (2021). The Fifth Circuit, like the Second, expressed the belief that all fundamental rights may be so constrained, stating: "*Jacobson* governs a state's emergency restriction of any individual right, not only the right to an abortion." *Id.* at 778, fn 1. Other courts found that *Jacobson* limits the First Amendment, which these courts refer to as "not absolute." *See*, *e.g.*, *Lighthouse Fellowship Church v. Northam*, 458 F.Supp. 3d 418, 428 (E.D. Va. 2020). One court stated that in times of crisis, *Jacobson* trumps all constitutional law, holding: During an epidemic, the *Jacobson* court explained, the traditional tiers of constitutional scrutiny do not apply." *Cassell v. Snyders*, 458 F. Supp. Ed 981, 993 (N.S. Ill. 2020).

During the COVID-19 outbreak, this same misapplication of *Jacobson* became the fountainhead for authorizing wholesale suspensions of constitutional rights. It was used to resolve disputes about religious freedom, gun rights, voting rights, the right to travel and many other rights. *See*, *generally*, Blackman, Josh, The Irrepressible Myth of Jacobson v. Massachusetts (August 17, 2021). Buffalo Law Review Vol. 70, No. 113 (2021), Available at SSRN: https://ssrn.com/abstract=3906452. As Professor Blackman eloquently warns, "*Jacobson* was pruned but was not overruled. This precedent still stands 'like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.' In 2020, COVID-19 pulled that trigger. At any moment, *Jacobson* can open another escape hatch from the Constitution during a future crisis. The Supreme Court should restore *Jacobson* to its original meaning and permanently seal that escape hatch. Future disputes should be resolved based on settled law, and not on an

irrepressible myth." *Id.* (citing *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

Plaintiff stands before this Court now, because the lower courts pulled that trigger in her case, and her daughter was severely injured as a result.

III. The Court Should Grant Certiorari to Resolve a Circuit Split about Whether the State has a Compelling (or Even Legitimate) Interest in Mandating an Experimental Medical Product that Cannot Stop the Spread of Disease.

The Court should also grant certiorari to resolve a circuit split about the legitimacy of a state's interest in mandating an experimental medical product that cannot stop the spread of disease. Such a mandate should not be able to withstand any level of review.

A. The State Lacks a Legitimate Interest in Mandating Experimental Medical Products.

The state lacks even a legitimate interest in mandating masks, let alone a compelling one, as it is illegal to mandate any product authorized under Emergency Use Authorization (EUA), including masks. Federal regulations clearly stipulate that users of an EUA product must be informed of their right to refuse its use. See 21 U.S.C. § 360bbb-3(e)(1)(A) ("Section 360bbb-3"). As outlined in the complaint, each governing mask EUA also explicitly states that it is unlawful to force or coerce individuals into using masks for virus mitigation or to assert that masks are safe and effective in preventing the spread of COVID-19. [FAC at ¶¶161-172]. While the state

may have a legitimate interest in preventing the spread of Covid-19, they are not empowered to do so by violating federal law.

Moreover, the fact that masks are defined by law as experimental medical products defeats the legitimacy of any state attempt to mandate them even if the EUA's had not expressly held so. The right to refuse an experimental medical product is not only fundamental, but absolutely protected as a *jus cogens* norm. *See*, *e.g.*, *Abdullah v. Pfizer*, 562 F.3d 163, 184 (2d Cir. 2009) (citing the Nuremburg Code, Article 7 of the ICCPR, the Declaration of Helsinki, the Convention on Human Rights and Biomedicine, the Universal Declaration on Bioethics and Human Rights, the 2001 Clinical Trial Directive, and the domestic laws of at least eighty-four states in recognizing that the right to decline experimental medical is a *jus cogens* norm). The right to be free of any coercion to use an experimental product is not only a fundamental constitutional right, but also fundamental human right incorporated into our binding law and precedent as a guarantee, which cannot be violated. *Id.*

Many plaintiffs asserted complaints about being forced to use EUA products during the pandemic, but most were brought in the vaccine context, and mooted when Pfizer hastily licensed one of the vaccines at "warp speed" or dismissed on standing. This case provides a straightforward vehicle for the Court to assess the claim that experimental medical products cannot be mandated. It does not depend on whether plaintiffs have standing to argue federal preemption, a question over which there are a lot of disputes. Here, the fact that there is an EUA goes to the legitimacy of the mandate under constitutional

analysis. A government's interest cannot be legitimate if it violates the most fundamental *jus cogens* norm.

The Court must urgently clarify the extent to which experimental medical interventions can be mandated. This summer, the Department of Health and Human Services adopted amendments to the emergency use regulations which allow the FDA to allow emergency use authorization for a much broader host of unapproved drugs, devices, products and vaccines. Already, the FDA has issued EUA's for the Monkeypox virus and the Bird flu virus, either of which might be mandated at any time.[1]

B. The State Lacks a Legitimate Interest in Mandating a Public Health Measures that Cannot Stop the Spread of Disease.

Another factual issue that must be resolved to determine if the state's interest is compelling or even legitimate, is whether masks actually have a public health benefit. The circuit court cites to J*acobson*, 197 U.S. 11, 27 (1905) to support the proposition that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." [Pet. App. 18a-20a]. And that is true. But here, the well-plead complaint plausibly asserts that denying mask exemptions cannot protect the community from the spread of disease because masks cannot stop the transmission of Covid-19

1. See, HHS Broadens Emergency Declaration to Facilitate Response to Bird Flu, Other Viruses with Pandemic Potential. Available at: https://www.aha.org/news/headline/2024-07-23-hhs-broadens-emergency-declaration-facilitate-response-bird-flu-other-viruses-pandemic-potential (last accessed September 23, 2024).

to any meaningful degree. The police powers articulated in *Jacobson* cannot apply to a medical product that is for personal benefit only, and state's otherwise lack a legitimate interest in compelling medical interventions on the public.

There is a circuit split on this issue between the Second and Ninth Circuits. In *Health Freedom Fund v Carvalho*, 104 F.4th 715 (9th Cir. 2024), the Ninth Circuit faced with proffered evidence that the Covid-19 vaccines do not prevent infection or transmission, the Ninth Circuit held that *Jacobson* provided no support for the premise that there was even a rational basis to compel mandatory injections of a medical product that could not meaningfully stop transmission of disease.

> *Jacobson*, however, did not involve a claim in which the compelled vaccine was "designed to reduce symptoms in the infected vaccine recipient rather than to prevent transmission and infection." [citations omitted] The district court thus erred in holding that *Jacobson* extends beyond its public health rationale—government's power to mandate prophylactic measures aimed at preventing the recipient from spreading disease to others—to also govern "forced medical treatment" for the recipient's benefit.

Health Freedom Defense Fund at 18. The Ninth Circuit reversed the lower court's dismissal, holding that factual disputes about whether the vaccine can meaningfully stop transmission of Covid-19 cannot be made on the pleadings, and that the Plaintiffs should have their chance

to submit their proofs at trial. But the Second Circuit took the opposite approach, rejecting similar allegations of ineffectiveness in the mask context, upholding dismissal of plaintiff 's claims and refusing to provide any scrutiny to assess whether the state actors had a legitimate interest in forcing Sarah to wear a mask against medical advice.

This Court should endorse the Ninth Circuit's approach, which recognizes that Plaintiffs must have their day in Court, and that the rights at issue are important enough on both sides that wholesale deference to the government is not just.

CONCLUSION

For the foregoing reasons, Plaintiff and her daughter respectfully urge this Court to grant their petition for a writ of certiorari. While it is understandable that the lower courts acted with caution during an emergency, it is now vital for them to recognize the profound injuries inflicted by granting government actors *carte blanche* authority to infringe upon our most sacred fundamental rights. Sarah Doe is not alone; countless children will endure the long-term consequences of this lack of accountability. Nevertheless, she hopes that in addition to getting some remedial relief for her own injuries, her experience can serve as a catalyst for change, protecting other vulnerable children in future emergencies. It is essential for the Court to seize this opportunity to reaffirm the fundamental nature of a medical exemption to those, like Sarah, who are at risk of harm, and ensure that the lower courts hold government actors to the task of establishing that

any denial are necessary to advance a compelling state interest.

Respectfully submitted,

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September 23, 2024

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED APRIL 25, 2024

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2023
No. 23-582-cv

JANE DOE, ON BEHALF OF HERSELF AND HER MINOR CHILD SARAH DOE,

Plaintiff-Appellant,

v.

FRANKLIN SQUARE UNION FREE SCHOOL DISTRICT,

Defendant-Appellee.[*]

ARGUED: JANUARY 9, 2024
DECIDED: APRIL 25, 2024

Before: LYNCH, NARDINI, and KAHN, *Circuit Judges.*

Plaintiff-Appellant Jane Doe ("Doe"), on behalf of herself and her minor daughter ("Sarah"), appeals from the judgment of the United States District Court for the Eastern District of New York (Frederic Block, *J.*)

* The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

dismissing her constitutional and statutory claims against Defendant-Appellee Franklin Square Union Free School District ("School District"). On appeal, Doe argues that the district court erred in concluding that the School District did not violate the Due Process Clause of the Fourteenth Amendment by refusing to grant Sarah an accommodation from a school mask mandate implemented in response to the COVID-19 pandemic. Doe further argues that the district court erred in dismissing her claims under the Americans with Disabilities Act ("ADA") and § 504 of the Rehabilitation Act because she failed to exhaust her administrative remedies under the Individuals with Disabilities Education Act ("IDEA"). We conclude that the School District did not violate Doe or Sarah's constitutional rights by denying their request for an accommodation; however, we agree with Doe that she was not required to satisfy the exhaustion requirement of the IDEA and, accordingly, hold that the district court erred in dismissing Doe's ADA and § 504 claims.

We therefore **AFFIRM** in part and **REVERSE** in part the judgment of the district court. We **REMAND** for further proceedings consistent with this opinion.

MARIA ARAÚJO KAHN, *Circuit Judge*:

During the COVID-19 pandemic, as schools reopened in the fall of 2020, the Commissioner of the New York State Department of Health ("NYSDOH") implemented a regulation requiring preschool through 12th grade school students and staff to wear masks. Plaintiff-Appellant Jane Doe ("Doe") brought this action, on behalf of herself

and her minor daughter, Sarah Doe ("Sarah"), against Defendant-Appellee Franklin Square Union Free School District ("School District"), alleging that the School District violated the Due Process Clause of the Fourteenth Amendment, the Americans with Disabilities Act ("ADA"), and § 504 of the Rehabilitation Act ("§ 504") by refusing to grant Sarah an accommodation from the school mask mandate for her asthma. The United States District Court for the Eastern District of New York (Frederic Block, *J.*) dismissed Doe's constitutional claim after concluding that the School District's conduct survived rational basis review, and her federal statutory claims for failure to exhaust administrative remedies under the Individuals with Disabilities Education Act ("IDEA"). As explained below, we conclude that the School District's denial of Sarah's accommodation request did not violate either Doe's or Sarah's constitutional rights, and we therefore affirm the district court's dismissal of Doe's constitutional claim. We disagree, however, with the district court's dismissal of Doe's claims under the ADA and § 504 because we conclude that Doe was not required to exhaust her administrative remedies under the IDEA. Accordingly, we affirm in part and reverse in part the district court's judgment in this case, and we remand the case for further proceedings consistent with this opinion.

BACKGROUND

Beginning in the fall of 2020 and continuing throughout the early stages of the COVID-19 pandemic, the NYSDOH issued a series of interim guidance governing in-person instruction at schools. The first interim guidance, which

was issued on August 26, 2020, required all "students, faculty, staff, and other individuals" at schools to wear "at least, an acceptable face covering," App'x at 199, and permitted "exemptions of alternatives for those medically unable to wear masks," *id.* at 201. Later in the 2020-21 school year, on April 9, 2021, NYSDOH issued an updated interim guidance to ensure its policies were "align[ed] . . . with the most recent recommendations from the Centers [for] Disease Control and Prevention (CDC)." *Id.* at 203. The updated interim guidance included a mask mandate similar to that in the first interim guidance and permitted exemptions from the school mask mandate for "[s]tudents who are unable to medically tolerate a mask, including students where such mask would impair their physical health or mental health." *Id.* at 206. The School District was permitted to reopen for in-person learning for the 2020-21 school year on the condition that it complied with the mask mandate. Accordingly, it implemented a reopening plan that required all individuals to wear face masks while on school premises.

Sarah, who attends a school in the School District, suffers from asthma, which, according to Doe, prevents her from being able to medically tolerate wearing a face mask. In her complaint, Doe alleged that she attempted to work with the School District during the 2020-21 school year to secure a medical exemption from the mask mandate for Sarah. Doe initially requested a partial exemption from the mask mandate, which would allow Sarah to remove her mask during physical activity, but that request was denied. Sarah's asthmatic symptoms then worsened. After additional, unsuccessful attempts by Doe to obtain an accommodation for Sarah, Doe was advised to acquire

a formal exemption letter from a physician. Taking that advice, on April 27, 2021, Doe sent the School District a note from Sarah's treating physician indicating that Sarah had been diagnosed with asthma and that she should be allowed to engage in physical activity without a mask in order to prevent wheezing. In response, the District Superintendent of Schools, Dr. Jared Bloom, called Doe and informed her that Sarah's exemption request had been denied, but that, as an alternative, Sarah could request "mask breaks." App'x at 149. Dr. Bloom noted "that the district had adopted an official policy not to give *any child* a mask exemption." *Id.* At Doe's request, Dr. Bloom followed up with a letter indicating that the School District was denying Sarah's medical exemption request based on the opinion of the School District's hired consultant, Dr. Ron Marino, who had reviewed the request and spoken to Sarah's doctor. Dr. Marino found that "the mask was not creating difficulty with [Sarah's] asthma." *Id.* at 151.

Doe subsequently petitioned the School District to permit Sarah to attend school remotely. When that request was unsuccessful, Doe requested that Sarah be placed in a classroom with air conditioning and that she be allowed to wear a face shield or mesh mask as opposed to a cloth mask. These accommodation requests were also denied. On June 16, 2021, Doe sent a letter to the School District, through counsel, stating that the School District's policies violated Sarah's constitutional and statutory rights, and demanding an exemption from the mask mandate for Sarah for the remainder of the 2020-21 school year as well as the upcoming 2021-22 school year. The 2020-21 school year ended shortly thereafter.

Before the start of the 2021-22 school year, Doe inquired whether the NYSDOH intended to reimpose the mask mandate for the upcoming school year and was told "that guidance might be forthcoming." App'x at 154. On August 24, 2021, Doe sought yet another exemption for Sarah from the mask mandate with a certification from Sarah's doctor that "she is not medically able to tolerate a mask." *Id.* In a letter dated September 2, 2021, the School District denied the exemption sought by Doe based upon the recommendation of Dr. Marino. The School District represented in that letter that Sarah's classrooms would be air conditioned in the 2021-22 school year and stated that any failure by the School District to comply with the NYSDOH's regulations could result in fines being imposed by the NYSDOH against the School District or Doe. On the same day, the NYSDOH issued an interim guidance for the 2021-22 school year pursuant to 10 N.Y.C.R.R. § 2.60 and in accordance with CDC guidance. The NYSDOH interim guidance required that "all students, personnel, teachers, administrators, contractors, and visitors must wear masks at all times indoors, regardless of vaccination status" and permitted exemptions for "[p]eople with medical or developmental conditions that prevent them from wearing a mask." App'x at 232.

On September 7, 2021, Doe filed a complaint against the School District alleging various violations of her and Sarah's constitutional and statutory rights.[1] The next day, Doe moved for a temporary restraining order and

1. Doe's complaint was also filed against the Commissioner of the NYSDOH; however, that individual is no longer a party to this appeal.

preliminary injunction prohibiting the School District from requiring masks for any student who asserts a medical need to opt out of the school mask policies, or, alternatively, from enforcing mask requirements for Sarah pending resolution of this matter.

In a scheduling order filed on September 8, 2021, the district court denied Doe's motion for a temporary restraining order and set a briefing schedule for the preliminary injunction motion. On September 15, 2021, the School District filed a pre-motion letter indicating that it intended to move to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and (6). The district court then held oral argument on Doe's motion for injunctive relief and the School District's anticipated motion to dismiss. By Memorandum and Order dated October 26, 2021, the district court denied Doe's motion for a preliminary injunction. *See Doe v. Franklin Square Union Free Sch. Dist. ("Doe I")*, 568 F. Supp. 3d 270 (E.D.N.Y. 2021). As relevant here, in denying the motion, the district court concluded that rational basis review applied to the mask mandate because the mandate "[did] not impinge upon any fundamental right." *Id.* at 291. The district court, however, reserved decision on whether Doe was entitled to preliminary injunctive relief on her state law claims. *Id.* at 295. At the request of the parties, the district court continued the hearing to November 3, 2021, to allow the parties to pursue settlement negotiations. *Id.* at 294.

On November 3, 2021, the parties reported that they had reached an agreement wherein the School District agreed to allow Sarah to wear a mesh mask at school.

The same day, the district court entered an order stating that "[i]n light of the parties['] agreement regarding an accommodation, the [continued] hearing . . . is canceled; the accommodation shall remain in effect unless vacated by the Court." App'x at 7.

Doe filed an amended complaint (the "Amended Complaint") on January 20, 2022, alleging seven causes of action: (1) "declaratory judgment action based upon federal preemption/violation of the Supremacy Clause" ("Count One"); (2) "violation of plaintiff[']s fundamental right to refuse medical interventions that place the child at risk of harm as documented by a licensed physician[,] 42 U.S.C. § 1983" ("Count Two"); (3) "violation of New York State's recognized common law rights to refuse unwanted medical treatment and make medical decisions for one's children" ("Count Three"); (4) "declaring the mask mandate unconstitutional under the United States Constitution and corresponding separation of powers clause of the New York Constitution" ("Count Four"); (5) "violation of Title II of the [ADA]—42 U.S.C. § 12101 *et seq.*—failure to provide reasonable accommodations" ("Count Five"); (6) "violations of [§] 504 of the Rehabilitation Act of 1973-29 U.S.C. § 794 *et seq.*" ("Count Six"); and (7) "violations of the New York State Human Rights Law [('NYSHRL')]" ("Count Seven"). App'x at 177-98.

The Amended Complaint contains allegations regarding the effectiveness of the mesh mask accommodation provided to Sarah as a result of the settlement negotiations. Doe alleges that with the mesh mask accommodation, Sarah "can breathe a little better" and "is having fewer [asthma] attacks." *Id.* at 176. But Doe

asserts that the mesh mask accommodation is insufficient because "Sarah still has trouble breathing sometimes," and "the mesh mask has caused her to develop fungal rashes, causing her to miss school, or have to temporarily wear another mask that caused more breathing problems." *Id.* Thus, Doe claims that a full exemption from the mask mandate is necessary for Sarah.

The School District moved to dismiss the Amended Complaint, arguing in part that Doe's requests for injunctive and declaratory relief were moot given that the NYSDOH's regulation requiring masks in schools had been lifted on March 2, 2022, and the School District had adopted a new, mask-optional policy. At the district court's request, the parties provided supplemental briefing on the issue of whether Doe's claims for injunctive and declaratory relief were mooted by the repeal of the mask mandate.

On March 24, 2023, the district court issued a Memorandum and Order granting the School District's motion to dismiss the Amended Complaint in its entirety. *See Doe v. Franklin Square Union Free Sch. Dist. ("Doe II")*, No. 21-cv-5012 (FB), 2023 U.S. Dist. LEXIS 50666, 2023 WL 2632512 (E.D.N.Y. Mar. 24, 2023). The district court concluded that, due to the lifting of the mask mandate, the Amended Complaint was "moot insofar as it seeks declaratory and injunctive relief," and therefore the court dismissed Counts One and Four, which "state[d] no cognizable claim beyond declaratory and injunctive relief." 2023 U.S. Dist. LEXIS 50666, [WL] at *2. The district court also concluded that the Amended Complaint did not plausibly allege a substantive due process

violation because the mask mandate did not infringe on a fundamental constitutional right. 2023 U.S. Dist. LEXIS 50666, [WL] at *3. The court, therefore, dismissed Doe's substantive due process claim (Count Two) for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Id.* As for Doe's failure-to-accommodate claims under the ADA (Count Five) and § 504 (Count Six), the district court first concluded that the claims were limited to injuries suffered prior to November 3, 2021, the date the School District granted the mesh mask accommodation, because the accommodation had been "deemed acceptable by all parties." *Id.* The district court then concluded that the claims based on conduct predating November 3, 2021, failed as a matter of law because Doe had not exhausted her administrative remedies under the IDEA. 2023 U.S. Dist. LEXIS 50666, [WL] at *4. Finally, Doe's failure-to-accommodate claim under the NYSHRL (Count Seven) was dismissed for her failure to satisfy the New York Education Law's notice of claim requirement, which stripped the court of subject matter jurisdiction over the claim. *Id.*[2] This appeal followed.

On appeal, Doe challenges the district court's dismissal of her substantive due process claim and her claims under the ADA, § 504, and the NYSHRL (Counts Two, Five, Six, and Seven).[3] Specifically, with respect to her

2. The district court also dismissed Doe's New York State law claim for violation of her right to refuse unwanted medical treatment (Count Three) as abandoned because Doe failed to respond to the School District's arguments in support of dismissal. *See* 2023 U.S. Dist. LEXIS 50666, [WL] at *3.

3. Doe does not challenge the district court's dismissal of Counts One, Three, and Four. Accordingly, she has abandoned those

constitutional claim, Doe argues that the School District "infringed multiple well-established fundamental rights in this case, and the [district] court should have applied strict scrutiny" when considering the constitutionality of the School District's enforcement of the mask mandate. Appellant's Br. at 28. She further argues that even under rational basis review, dismissal was improper because the state lacks any legitimate interest in denying what she refers to as "a necessary medical accommodation from an experimental medical product"—the mask. *Id.* As to her claims under the ADA and § 504, she argues that the district court erred in limiting her claims to the time period prior to the mesh mask accommodation because a factual dispute exists as to whether the mesh mask was a reasonable accommodation. She further argues that the district court erred in concluding that she was required to satisfy the exhaustion requirements of the IDEA. And for her claim under the NYSHRL, Doe argues that the Amended Complaint adequately pleads that she met the notice of claim requirements under N.Y. Educ. Law § 3813(1).

DISCUSSION

We review dismissals pursuant to Fed. R. Civ. P. 12(b)(6) *de novo*. *See Palin v. New York Times Co.*, 940 F.3d 804, 809 (2d Cir. 2019). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its

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claims. *See United States v. Joyner*, 313 F.3d 40, 44 (2d Cir. 2002) ("It is well established that 'an argument not raised on appeal is deemed abandoned' and lost." (quoting *United States v. Babwah*, 972 F.2d 30, 34 (2d Cir. 1992))).

face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). We must "accept as true all allegations in the complaint and draw all reasonable inferences in favor of the non-moving party." *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 115 (2d Cir. 2008) (internal quotation marks omitted). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

I. Constitutional Claim

We turn first to Doe's constitutional claim. Doe contends that the School District's actions in enforcing the mask mandate against Sarah violated the Due Process Clause of the Fourteenth Amendment because they infringed on multiple fundamental constitutional rights and fail to satisfy strict scrutiny. She further argues that even if rational basis review applies, the School District's conduct was unconstitutional. The School District contends that we should affirm the district court's dismissal of Doe's constitutional claims because the School District's actions did not implicate a fundamental constitutional right and easily satisfy rational basis review. We agree with the School District.

A. Applicable Law

To determine whether a government action "infringes a substantive due process right, we first 'determine

whether the asserted right is fundamental.'" *Goe v. Zucker*, 43 F.4th 19, 30 (2d Cir. 2022) (quoting *Leebaert v. Harrington*, 332 F.3d 134, 140 (2d Cir. 2003)). "Rights are fundamental when they are . . . deeply rooted in the Nation's history and tradition." *Leebaert*, 332 F.3d at 140 (internal quotation marks omitted). Strict scrutiny review applies only when the government infringes a "fundamental" right. *Id.* "Where the claimed right is not fundamental," we apply rational basis review, and the government action "need only be reasonably related to a legitimate state objective."[4] *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461 (2d Cir. 1996).

B. Does the School District's mask mandate implicate a fundamental right?

Doe argues that the School District's enforcement of the mask mandate against Sarah infringed essentially three fundamental rights: (1) the right to a medical exemption deriving from the right to self-preservation, (2)

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4. We note that the district court grappled with whether to apply a "shocks the conscience" standard, *see Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952), as opposed to the modern tripartite standard of constitutional scrutiny. *See Doe I*, 568 F. Supp 3d at 274-75. On appeal, both parties assume that the School District's actions should be evaluated under the tripartite standard. *See* Appellant's Br. at 44-66 (arguing that strict scrutiny rather than rational basis review should apply); Appellee's Br. at 47 (arguing that the district court correctly applied rational basis review). We thus apply that framework here. We do not decide whether, under *Goe v. Zucker*, the School District's application of the mandate, which is at issue here rather than the mandate itself, is properly reviewed under the "shocks the conscience" test.

the right to refuse medical treatment, and (3) the parental right to make medical decisions for one's own children. Doe claims that the district court erred in dismissing her substantive due process claims because strict scrutiny, as opposed to rational basis review, applies to the School District's implementation and enforcement of the mask mandate. We disagree.

1. Right to a medical exemption

Doe first argues that the School District infringed Sarah's right to self-preservation by declining to accommodate her request for a medical exemption. This argument stems from the idea that "a sufficient medical exemption [is] a constitutional prerequisite to any valid public health law." Appellant's Br. at 46-47 (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 36-39, 25 S. Ct. 358, 49 L. Ed. 643 (1905)). Given that the mask mandate at issue in the present case undisputedly contains a medical exemption,[5] Doe specifically argues that Sarah has a fundamental constitutional right to a medical exemption from the relevant mask mandate based exclusively on her physician's recommendation. Put simply, Doe challenges not the absence of a medical exemption from the mask mandate (since the mandate contains such an exemption), but the method that the School District used in determining whether to grant such an exemption to Sarah.

We have not previously considered whether a student has a fundamental right to a medical exemption from a

5. *See* 10 N.Y.C.R.R. § 2.60(a) (Aug. 27, 2021) (requiring compliance with the mask mandate in schools only by those "over age two and able to medically tolerate a face-covering").

mask mandate imposed during the COVID-19 pandemic based solely on a treating physician's recommendation. We have, however, concluded that no such fundamental right exists in the context of school immunization requirements. *See Zucker*, 43 F.4th at 31-32. In *Zucker*, the plaintiffs sought an exemption from a mandatory school immunization policy—which permitted medical exemptions in certain circumstances—based "*solely* on the recommendation -- or say-so -- of a child's treating physician." *Id.* at 31. The school denied the plaintiffs' requests for exemption. *Id.* at 27. In rejecting the plaintiffs' claim that the policy infringed on their fundamental right to a medical exemption from the school policy, among other rights, *id.* at 30, we recognized that the requirement under the policy that a physician certify that a student "has a medical contraindication or precaution to a specific immunization consistent with [CDC] guidance or other nationally recognized evidence-based standard of care," ensures that exemptions comply with "evidence-based national standards" and are not made "in conclusory fashion or for non-medical reasons," *id.* at 31 (internal quotation marks omitted).

Zucker's reasoning applies with equal force to Doe's request for an exemption from the school mask mandate policy based solely on her physician's recommendation. It is not unreasonable for a school policy to require that requests for a medical exemption be reviewed by the school's physician, particularly when the policy is designed to protect the health of all students and staff. More generally, it is reasonable for the government to condition the application of a medical exemption to a public health mask mandate on a determination that the

individual seeking the exemption would, in fact, be harmed by wearing a mask. The plaintiff offers no persuasive authority to support her suggestion that an individual is entitled to a medical exemption whenever that individual can identify a licensed medical provider who will support her request.

Doe's reliance on several abortion cases does not alter our analysis. *See* Appellant's Br. at 48 (citing first *Stenberg v. Carhart*, 530 U.S. 914, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000); and then *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006)). In those cases, the Supreme Court held that the lack of an adequate medical exemption to an abortion restriction placed an undue burden on a woman's fundamental right to the procedure. *See, e.g., Stenberg*, 530 U.S. at 937. As the district court correctly noted below, the Supreme Court's recognition of such a right in those cases does not compel the conclusion "that there is a standalone fundamental right to have one's own physician determine the need for compliance with every public health measure." *Doe I*, 568 F. Supp. 3d at 290. In the abortion cases to which Doe cites, the Supreme Court framed the right at issue in terms of deeply intimate and personal medical decisions related to the termination of a pregnancy. By contrast, the mask mandate at issue here is evaluated more properly as a matter of public health and requires the weighing of the effect on the patient with the potential harm to society as a whole. In the context of a mask mandate, as in the case of a more intrusive vaccination policy, there is no fundamental right to a medical exemption based exclusively on the recommendation of a plaintiff's physician. *See Zucker*,

43 F.4th at 31 ("[N]o court has ever held that there is a right to a medical exemption from immunization based solely on the recommendation of a physician. Nor has any court held that such a right is 'implicit in the concept of ordered liberty, or deeply rooted in this Nation's history and tradition.'" (quoting *Leebaert*, 332 F.3d at 140)).

2. Right to refuse medical treatment

Doe next argues that the School District's enforcement of the mask mandate infringed upon Sarah's right to refuse unwanted medical treatment. This argument requires us to consider whether the wearing of a mask qualifies as medical treatment. We agree with the district court that "[w]hile the [m]ask [m]andate was obviously intended as a health measure, it no more requires a 'medical treatment' than laws requiring shoes in public places or helmets while riding a motorcycle." *Doe I*, 568 F. Supp. 3d at 290 (citations omitted). The alleged "restraint" at issue here—a face covering to help slow the spread of a disease that has killed hundreds of thousands in this nation alone—is neither a medical treatment nor a restraint so onerous as to merit heightened constitutional scrutiny.

Indeed, courts in other Circuits that have considered the issue have similarly concluded that wearing a mask is not appropriately considered a "medical treatment." *See Health Freedom Def. Fund, Inc. v. City of Hailey*, 590 F. Supp. 3d 1253, 1266 (D. Idaho 2022) ("[T]he wearing of a cloth (or even medical grade) face covering is *not* medical treatment. It is not an intrusion on the body."); *Zinman v. Nova Se. Univ. Inc.*, No. 21-cv-60723

(RAR) (JMS), 2021 U.S. Dist. LEXIS 165341, 2021 WL 4025722, at *17 (S.D. Fla. Aug. 30, 2021) ("With respect to Plaintiff's bodily intrusion and medical treatment contentions, such characterizations are implausible. A mask requirement does not plausibly qualify as a 'compulsory bodily intrusion.' Wearing a mask on the outer surface of one's face to cover one's nose and mouth does not 'intrude' within one's body." (footnote omitted)), *report and recommendation adopted sub nom. Zinman v. Nova Se. Univ.*, No. 21-cv-60723 (RAR) (JMS), 2021 U.S. Dist. LEXIS 175170, 2021 WL 4226028 (S.D. Fla. Sept. 15, 2021), *aff'd sub nom. Zinman v. Nova SE. Univ., Inc.*, No. 21-13476, 2023 U.S. App. LEXIS 7402, 2023 WL 2669904 (11th Cir. Mar. 29, 2023); *Forbes v. Cty. of San Diego*, No. 20-cv-00998 (BAS) (JLB), 2021 U.S. Dist. LEXIS 41687, 2021 WL 843175, at *8 (S.D. Cal. Mar. 4, 2021) ("The Court also doubts that requiring people to wear a mask qualifies as 'medical treatment' within the meaning of the Due Process Clause."). We agree that a requirement to wear a mask does not constitute a "medical treatment."

Finally, we note that even if we were to assume that the wearing of a mask constitutes a medical treatment, the School District did not infringe any fundamental right to refuse such a treatment in this case. In *We The Patriots USA, Inc. v. Hochul*, we explained that "[b]oth this Court and the Supreme Court have consistently recognized that the Constitution embodies no fundamental right that in and of itself would render vaccine requirements imposed in the public interest, in the face of a public health emergency, unconstitutional." 17 F.4th 266, 293 (2d Cir. 2021) (per curiam) (citing *Jacobson*, 197 U.S. at 25-31, 37).

There, we examined rights similar to those Doe asserts in the present case, including the right to "medical freedom" and "bodily autonomy," and found that a rule requiring certain health care employees to be vaccinated against COVID-19 did not infringe any such right. *Id.* at 293 & n.35.

The logic animating *We The Patriots* applies with equal force to the mask mandate, which was imposed for the same public safety reasons as the vaccine mandate at issue in that case. There, we found that "an individual's liberty interest in declining an unwanted [] vaccine was outweighed . . . by the State's interest in preventing disease." *Id.* (internal quotation marks omitted). So too here. In the face of such an unprecedented public health emergency, an individual's desire to refuse to wear a face covering is outweighed by New York's interest in safeguarding public health and preventing the spread of COVID-19. We therefore hold that wearing a mask does not constitute "medical treatment," and, even if it did, the School District did not infringe any fundamental right to refuse medical treatment by denying Doe's request for an exemption to the mask mandate for Sarah.[6]

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6. To the extent that Doe attempts to argue that the School District infringed any related medical decision-making right, including any "right to bodily integrity," "right to be free of coercion in deciding whether to take an experimental medical product," or "right to make medical decisions in accordance with one's chosen physician's best medical judgment," Appellant's Br. 50, those attempts fail. Again, Doe relies exclusively on authorities that are too far afield of this case to suggest that the School District infringed any fundamental right in denying Doe's request for an exemption to the mask mandate. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35

3. Parents' right to make medical or educational decisions for their children

Doe's argument that the School District's enforcement of the mask mandate violated her parental rights is also unavailing. The Supreme Court has "recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children," *Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), but parents "have no constitutional right to provide their children with . . . education unfettered by *reasonable* government regulation," *Immediato*, 73 F.3d at 461 (quoting *Runyon v. McCrary*, 427 U.S. 160, 178, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976)); *see also Zucker*, 43 F.4th at 31 ("While the right to an education is an important right, it is not a 'fundamental right' such as to require strict scrutiny review.").

Doe has not identified, and the Court is not aware of, any cases standing for the proposition that school masking requirements violate the right of parents to raise their children. Although parents possess the right to make decisions regarding the upbringing of their children, *see Troxel*, 530 U.S. at 66, Doe has not shown that any such right is infringed by a school district denying a medical exemption from a public health measure based solely on the recommendation of a child's physician. As with the other rights addressed above, the cases on which Doe

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L. Ed. 2d 201 (1973) (abortion); *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 11 S. Ct. 1000, 35 L. Ed. 734 (1891) (court-ordered surgical examination of a plaintiff in a civil lawsuit); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) (Alien Tort Statute case involving involuntary testing of antibiotics on children).

relies are readily distinguishable from this one. *See, e.g.*, *Parham v. J.R.*, 442 U.S. 584, 603, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979) (state-administered institutional mental health care for children); *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000) (investigatory physical examinations of children).

In sum, we hold that Doe has not shown that the School District infringed any of Sarah's or Doe's fundamental rights by denying Sarah a medical exemption to the mask mandate.

C. Does the School District's mask mandate survive rational basis review?

With no fundamental constitutional right at stake, we apply rational basis review, rather than strict scrutiny. *See Zucker*, 43 F.4th at 30. Under rational basis review, the challenged government action is afforded a strong presumption of validity and need only be reasonably related to a legitimate state objective to survive. *See Heller v. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) ("[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity."). Government action fails under rational basis review only when it "rests on grounds wholly irrelevant to the achievement of the State's objective." *Id.* at 324 (internal quotation marks omitted).

Here, the School District's application of the NYSDOH's mask mandate to Sarah survives rational basis review because it was reasonably related to a

legitimate state objective: ensuring the health and safety of all students, teachers, and visitors on school grounds by curbing the spread of COVID-19. It is well settled that public health is a legitimate state interest. *See Jacobson v. Massachusetts*, 197 U.S. 11, 27, 25 S. Ct. 358, 49 L. Ed. 643 (1905) ("[A] community has the right to protect itself against an epidemic of disease which threatens the safety of its members."); *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 45 n.8 (2d Cir. 2010) ("promoting public health" is a legitimate state interest (internal quotation marks omitted)); *see also Kane v. De Blasio*, 19 F.4th 152, 166 (2d Cir. 2021) (holding that New York City's mandatory vaccination requirement for teachers "plainly satisfies" rational basis review).

Further, the School District's enforcement of the mandate against Sarah was reasonably related to that legitimate interest. The School District could have rationally determined that granting Sarah an exemption would have endangered the health of other students and faculty within the district. It also could have rationally determined that Sarah could medically tolerate a mask since the School District's consulting physician determined as much after conferring with Sarah's physician.

Accordingly, we agree with the district court that the School District's enforcement of the mask mandate in the present case was reasonably related to a legitimate state objective and satisfies rational basis review. We affirm the judgment of the district court dismissing Doe's constitutional claim.

II. ADA and § 504 Claims

In Counts Five and Six, Doe alleges that the School District violated the ADA and § 504 of the Rehabilitation Act by failing to reasonably accommodate Sarah's disability.[7] Claims brought under Title II of the ADA and § 504 of the Rehabilitation Act are considered together, since the standards adopted by the statutes are nearly identical. *See McElwee v. Cnty. of Orange*, 700 F.3d 635, 640 (2d Cir. 2012). Doe must show that "(1) [Sarah] is a qualified individual with a disability; (2) the [School District] is subject to one of the Acts; and (3) [Sarah] was denied the opportunity to participate in or benefit from the [School District's] services, programs, or activities, or was otherwise discriminated against by the [School District] because of [her] disability." *Id.* Under either statute, a defendant's failure to make a reasonable accommodation to allow a plaintiff with a disability to access the public service in question is considered discrimination. *Id.*

Here, the district court first held that Doe's request for an accommodation from the mask mandate was satisfied by the parties' November 3, 2021, agreement that Sarah could wear a mesh mask, as opposed to a cloth mask, at school. The court assessed that the agreement, which was "deemed acceptable by all parties," cut off claims for damages arising after the mesh mask accommodation

7. The district court did not reach the question of whether Sarah had a disability under the ADA or § 504 and instead resolved her federal statutory claims on other grounds. Accordingly, for purposes of this discussion, we assume without deciding that Sarah has a qualifying disability.

was reached. *Doe II*, 2023 U.S. Dist. LEXIS 50666, 2023 WL 2632512, at *3. Therefore, the court concluded that Doe could seek damages only for the School District's failure to grant an accommodation before November 3, 2021. *Id.* The court further held, however, that any such claim for damages was prohibited because Doe failed to exhaust her administrative remedies under the IDEA. 2023 U.S. Dist. LEXIS 50666, [WL] at *4. Doe argues that the district court erred in arriving at both of these conclusions. We agree.

A. Limitation of damages claims

In concluding that damages are not available to Doe for injuries allegedly sustained after November 3, 2021, the district court implicitly held that the mesh mask accommodation was "reasonable" for purposes of Doe's disabilities claims. *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 400, 122 S. Ct. 1516, 152 L. Ed. 2d 589 (2002) ("An *ineffective* 'modification' or 'adjustment' will not *accommodate* a disabled individual's limitations.").

Our court has held that "the determination of whether a particular [accommodation] is 'reasonable' involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the [accommodation] in light of the nature of the disability in question." *Mary Jo Co. v. N.Y. State & Loc. Ret. Sys.*, 707 F.3d 144, 153 (2d Cir. 2013) (internal quotation marks omitted). Indeed, the "[r]easonableness analysis is 'highly fact-specific' . . . [and] cannot be determined on the pleadings [where] the relevant factors are numerous and balancing them

requires a full evidentiary record." *Austin v. Town of Farmington*, 826 F.3d 622, 630 (2d Cir. 2016) (quoting *Hovsons, Inc. v. Twp. of Brick*, 89 F.3d 1096, 1104 (3d Cir. 1996)).

The mesh mask accommodation offered to Sarah was not *per se* reasonable simply because she agreed to it at the outset. Doe alleged that after the accommodation was implemented, it became clear that the mesh mask was not effective for Sarah. According to Doe, even with the mesh mask "Sarah still has trouble breathing sometimes," and the mesh mask caused Sarah to develop fungal rashes, which, in turn, caused her to miss school or temporarily wear another type of mask that exacerbated her issues with breathing. App'x at 176. Accepting these allegations as true, as we must at the motion to dismiss stage, Doe plausibly alleges that the mesh mask accommodation was not effective.[8] As such, we cannot conclude that the School District afforded Sarah a plainly reasonable accommodation. Therefore, we reverse the district court's judgment insofar as it cut off Doe's claims for damages after November 3, 2021, and remand the case for further proceedings on this issue.

B. Exhaustion under the IDEA

Claims brought under the ADA and Rehabilitation Act are subject to the exhaustion requirements of the

8. We do not hold that the offered accommodation was unreasonable as a matter of law. We rule only that the district court erred in determining that it was reasonable as a matter of law at the pleading stage.

IDEA when they seek relief that would also be available under the IDEA. *See Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 165, 137 S. Ct. 743, 197 L. Ed. 2d 46 (2017); 20 U.S.C. § 1415(l) (stating that "[n]othing [under the IDEA] shall be construed to restrict or limit the . . . remedies" available under, *inter alia*, the ADA and the Rehabilitation Act, "except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA]," plaintiffs must exhaust their remedies under the IDEA). "[E]xhaustion is not necessary[, however,] when the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee—what the Act calls a 'free appropriate public education [("FAPE")].'" *Fry*, 580 U.S. at 158 (quoting 20 U.S.C. § 1412(a)(1)(A)). FAPE "means, *inter alia*, 'special education and related services that . . . have been provided at public expense, under public supervision and direction, and without charge'; that 'meet the standards of the State educational agency'; and that 'include an appropriate preschool, elementary school, or secondary school education in the State involved.'" *A.R. v. Conn. State Bd. of Educ.*, 5 F.4th 155, 157 (2d Cir. 2021) (quoting 20 U.S.C. § 1401(9)). The district court held that "[b]ecause the gravamen of Doe's suit is the denial of free appropriate public education, the IDEA exhaustion requirement applies to her ADA and Rehabilitation Act claims." *Doe II*, 2023 U.S. Dist. LEXIS 50666, 2023 WL 2632512, at *4. We disagree.

To determine whether a suit complains of a denial of a FAPE, "a court should look to the substance, or gravamen, of the plaintiff's complaint." *Fry*, 580 U.S. at 165. The Supreme Court articulated the following "pair of hypothetical questions" to guide the inquiry:

> First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library? And second, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance? When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject; after all, in those other situations there is no FAPE obligation and yet the same basic suit could go forward.

Fry, 580 U.S. at 171.

In determining the gravamen of Doe's claim, the School District urges us to look to the allegation in Doe's Amended Complaint that "[t]he failure to accommodate Sarah's disability has deprived Sarah of her right to an education as a person with a disability." App'x at 196. Because she alleges as much, the School District argues that Doe cannot now contend that she could have brought her disability claim if the underlying conduct had occurred at a different public facility or that an adult at the school could have pressed the same grievance. But the mere allegation that Sarah was deprived "of her right to an education as a person with a disability," *id.*, alone, is insufficient to demonstrate that the gravamen of the Amended Complaint concerns the denial of a FAPE. As the Supreme Court instructed in *Fry*, the examination of a plaintiff's complaint "should consider substance, not surface. The use (or non-use) of particular labels and terms is not what matters." *Fry*, 580 U.S. at 169.

Here, a thorough reading of Doe's Amended Complaint makes clear that she is seeking a remedy for the School District's alleged failure to accommodate Sarah's medical needs under the ADA and § 504. Just because the alleged conduct arose in a school setting does not automatically transform Doe's objection to that conduct into a claim of a denial of a FAPE. Applying the two-part test in *Fry*, it is clear that Doe could have brought this same lawsuit against any public facility she sought to enter that had a mask requirement. Likewise, an adult accessing the school could have pressed the same grievance as the mask mandate applied to any individual (including, among others, teachers, contractors, or visitors) on school premises.

The claim here is akin to the hypothetical posed in *Fry*, whereby "a wheelchair-bound child sues his school for discrimination under Title II . . . because the building lacks access ramps." *Id.* at 171. Although, as the Supreme Court noted, this claim could have "educational consequences" as a result of the child's inability to enter the school, the denial of a FAPE would not be the gravamen of such a claim. *Id.* at 172. That is because "the child could file the same basic complaint if a municipal library or theater had no ramps" and "an employee or visitor could bring a mostly identical complaint against the school." *Id.* That logic applies with equal force here. While Sarah's education may have been disrupted by her alleged inability to tolerate a face mask, her real complaint is one of disability-based discrimination, grounded in the School District's refusal to provide a reasonable accommodation.

The School District also argues that exhaustion was required because Doe is seeking the type of equitable relief available under the IDEA. Doe counters that her claims are not subject to the IDEA exhaustion requirements because she now seeks only damages, which is not a form of relief available under the IDEA. In interpreting 20 U.S.C. § 1415(l), which extends the IDEA exhaustion requirements to cover claims under the ADA and Rehabilitation Act seeking relief available under the IDEA, we previously have "decline[d] to excuse appellants from the [IDEA] exhaustion requirement merely because in their suit they seek, *inter alia*, pecuniary damages, a remedy unavailable under the IDEA." *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 247 (2d Cir. 2008); *see also Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 789 (2d Cir. 2002) ("A plaintiff cannot evade the IDEA's exhaustion requirement simply by framing his or her action as one for monetary relief."); *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 488 (2d Cir. 2002) ("The fact that [plaintiff] seeks damages, in addition to relief that is available under the IDEA, does not enable her to sidestep the exhaustion requirements of the IDEA."). But the Supreme Court clarified in *Luna Perez v. Sturgis Public Schools* that suits seeking damages under another federal law are not subject to the IDEA exhaustion requirements. 598 U.S. 142, 147-48, 143 S. Ct. 859, 215 L. Ed. 2d 95 (2023). This is because, the Supreme Court reasoned, § 1415(l) "applies *only* to suits that 'see[k] relief . . . also available under' IDEA" and compensatory damages are unavailable under the IDEA. *Id.* at 147. In light of the inconsistency between this Supreme Court decision and our precedent holding

that suits seeking damages may be subject to the IDEA exhaustion requirements, we must conclude that such precedent is "no longer good law." *Wojchowski v. Daines*, 498 F.3d 99, 109 (2d Cir. 2007); *accord In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 154-55 (2d Cir. 2015), *as amended* (Dec. 17, 2015), *aff'd sub nom. Jesner v. Arab Bank, PLC*, 584 U.S. 241, 138 S. Ct. 1386, 200 L. Ed. 2d 612 (2018).

Applying *Luna Perez* here, we conclude that Doe's suit is not subject to the IDEA exhaustion requirements. Doe sought equitable relief and damages in her Amended Complaint. However, Doe's claims for equitable relief became moot upon the lifting of the mask mandate. Accordingly, the only claims remaining are for damages. Because damages are not available under the IDEA, Doe was not required to satisfy the statute's exhaustion requirement.[9] For those reasons, we reverse the district court's judgment on Counts Five and Six and remand for further proceedings on those claims.

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9. To the extent that the School District argues that the IDEA exhaustion requirements nevertheless apply to all of Doe's ADA and Rehabilitation Act claims because Doe sought equitable relief at one point during the litigation, we disagree. In *Luna Perez*, the Supreme Court explained that "a plaintiff who files an ADA action seeking both damages and the sort of equitable relief IDEA provides may find his request for equitable relief barred or deferred if he has yet to exhaust" his remedies under the IDEA. 598 U.S. at 150. Thus, where, as here, a plaintiff seeks both damages and equitable relief, the failure to exhaust remedies under the IDEA bars (or defers) only the equitable relief portion of the suit, not the damages portion as well. It follows that, once the equitable claims have become moot, there is no exhaustion bar to the continued pursuit of the damages claim.

III. NYSHRL Claim

Doe argues that the district court erred by dismissing her NYSHRL claim for lack of subject matter jurisdiction based on her purported failure to meet the notice of claim requirement under N.Y. Educ. Law § 3813(1). Doe contends that she sufficiently alleged that she satisfied the notice requirement, pointing to allegations about two letters that counsel sent to the School District on June 16, 2021, and August 24, 2021. But Doe did not raise that argument below. She has therefore forfeited her argument about the NYSHRL claim, and we decline to exercise our discretion to consider it for the first time on appeal. *See Katel Ltd. Liab. Co. v. AT&T Corp.*, 607 F.3d 60, 68 (2d Cir. 2010). Thus, we affirm the district court's dismissal of the NYSHRL claim.

CONCLUSION

We have considered the parties' remaining arguments and find them to be without merit. For the reasons set forth above, we **AFFIRM** in part and **REVERSE** in part the judgment of the district court and remand for further proceedings consistent with this opinion.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED MARCH 24, 2023

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Case No. 2:21-CV-5012-FB-SIL

JANE DOE ON BEHALF OF HERSELF AND HER MINOR CHILD, SARAH DOE,

Plaintiff,

-against-

FRANKLIN SQUARE UNION FREE SCHOOL DISTRICT, AND JAMES V. MCDONALD, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF HEALTH,

Defendants.

MEMORANDUM AND ORDER

BLOCK, Senior District Judge:

Plaintiff Jane Doe ("Plaintiff" or "Doe") brings this action on behalf of herself and her minor daughter, Sarah Doe, against defendants Franklin Square Union Free School District (the "School District") and the Commissioner of the New York State Department of Health

in his official capacity[1] (the "Commissioner" and together, "Defendants"). Doe alleges that the Commissioner's regulation requiring New York State's school students to wear masks (the "Mask Mandate") violates their constitutional rights. She also alleges violations of the New York State Constitution, the Americans with Disabilities Act, ("ADA"), the Rehabilitation Act of 1973, and the New York State Human Rights Law ("NYS HRL"). Defendants have moved to dismiss Doe's amended complaint under Federal Rules of Civil Procedure ("FRCP") 12(b)(6) and 12(b)(1). For the reasons that follow, Defendants' motions are granted.

I. FACTS

The Court relayed the facts of this case in its October 26, 2021 Memorandum and Order denying Doe's motion for a preliminary injunction (the "M&O"). The Court assumes the parties' familiarity with those facts and incorporates them herein by reference.

Less than one week after the Court issued the M&O, the parties represented that they had come to an agreement regarding a reasonable accommodation for Sarah Doe. Plaintiff subsequently amended her complaint to add claims for a violation of the ADA, the Rehabilitation Act, and NYS HRL. Significantly, the Mask Mandate was lifted as of March 2, 2022, and as of February 9, 2023, the Commissioner announced that he would not

1. James V. McDonald replaced Mary T. Bassett as Commissioner and is automatically substituted as a party. Fed. R. Civ. P. 25(d)

seek reissuance of 10 NYCRR § 2.60 ("Section 2.60"), the emergency regulation underlying the Mask Mandate. As of February 12, 2023, Section 2.60 expired.

Defendants now move to dismiss the amended complaint. For the purposes of this motion, the Court accepts the facts that Doe alleges in her amended complaint as true and draws all reasonable inferences in her favor. *See, e.g., Gamm v. Sanderson Farms, Inc.*, 944 F.3d 455, 458 (2d Cir. 2019).

II. LEGAL STANDARDS

a. Rule 12(b)(6)

"To survive a motion to dismiss [under FRCP 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). The pleading must offer more than "bare assertions," "conclusory" allegations, and a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

b. Rule 12(b)(1)

"Rule 12(b)(1) requires that an action be dismissed for lack of subject matter jurisdiction when the district court lacks the statutory or constitutional power to adjudicate the case. The party asserting subject matter jurisdiction carries the burden of establishing, by a preponderance of the evidence, that jurisdiction exists . . ." *Salvani v. ADVFN PLC*, 50 F. Supp. 3d 459, 468 (S.D.N.Y. 2014). "In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court . . . may refer to evidence outside the pleadings." *Makarova v. U.S.*, 201 F.3d 110, 113 (2d Cir. 2000). Courts must accept all material factual allegations as true in evaluating a 12(b)(1) motion, but unlike with a 12(b)(2) motion, does not draw inferences in favor of the plaintiff. *See J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004).

III. ANALYSIS

The Court now turns to Defendants' motions to dismiss the amended complaint.

a. Declaratory and Injunctive Relief — Counts I and IV

Since the Mask Mandate is no longer in effect and Section 2.60 has lapsed, Doe's amended complaint is moot insofar as it requests declaratory and injunctive relief.

Under Article III of the Constitution, the Court's jurisdiction is limited to justiciable "cases and controversies," *Campbell-Ewald Co. v. Gomez*, 577 U.S.

153, 160, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016), and may not render mere advisory opinions on issues which are moot. *United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 446, 113 S. Ct. 2173, 124 L. Ed. 2d 402 (1993). "A case becomes moot . . . when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016). "[T]o obtain declaratory relief, a plaintiff must show 'how [she] will be injured prospectively and that the injury would be prevented by the equitable relief sought.'" *Pinckney v. Carroll*, No. 18-CV-12198, 2019 U.S. Dist. LEXIS 209835, 2019 WL 6619484, at n. 3 (S.D.N.Y. Dec. 4, 2019) (quoting *Marcavage v. City of New York*, 689 F.3d 98, 103 (2d Cir. 2012)). Similarly, to establish standing to obtain injunctive relief, plaintiffs must demonstrate a non-speculative risk of continuing or future irreparable injury in the absence of such an order. *See* 2019 U.S. Dist. LEXIS 209835, [WL] at *4 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)).

Voluntary cessation of the Mask Mandate does not undermine a finding of mootness. Only when a plaintiff is "under a constant threat" of a challenged practice being reinstated is declaratory or injunctive relief not rendered moot by a cessation of the practice in question. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68, 208 L. Ed. 2d 206 (2020). To defeat Doe's claim that she is under constant threat of the Mask Mandate's reimposition, Defendants must show that "the possibility of recurrence is merely speculative." *Dark Storm Indus. LLC v. Hochul*, No. 20-CV-2725, 2021 U.S. App. LEXIS

29863, 2021 WL 4538640, at *1 (2d Cir. Oct. 5, 2021). The Court joins its peers in this Circuit which consistently have found that the threat of COVID-19 measures being reimposed is merely speculative. *See Mongielo v. Hochul*, No. 22-CV-116, 2023 U.S. Dist. LEXIS 34088, 2023 WL 2307887, at *9 (W.D.N.Y. Mar. 1, 2023) (holding that plaintiffs' claims seeking declaratory and injunctive relief regarding the school mask mandate were moot: "Given the current state of the pandemic . . . there is no reasonable threat—let alone a constant threat—that the mandate will be reimposed."); *see also Dark Storm Indus. LLC*, 2021 U.S. App. LEXIS 29863, 2021 WL 4538640, at *1 (2d Cir. 2021); *Nat'l Rifle Ass'n of Am. v. Hochul*, No. 20-CV-3187, 2021 U.S. App. LEXIS 33909, 2021 WL 5313713, at *1 (2d Cir. 2021); *Lebovits v. Cuomo*, No. 20-CV-1284, 2022 U.S. Dist. LEXIS 20858, 2022 WL 344269, at *3 (N.D.N.Y. Feb. 4, 2022). Therefore, Doe's amended complaint is moot insofar as it seeks declaratory and injunctive relief. Count one, which seeks a declaratory judgment for violation of the Supremacy Clause, and count four, which seeks a declaration that the Mask Mandate is unconstitutional, are dismissed since they state no cognizable claim beyond declaratory and injunctive relief.

b. Substantive Due Process Claim — Count II

Count two alleges a substantive due process claim for the alleged violation of Doe's right to refuse medical interventions that place her child at risk of harm. For the reasons explained at length in the Court's M&O denying Doe's request for a preliminary injunction, the facts Doe alleged do not implicate any substantive due process

violation. There is no fundamental right to receive an education. *See Smith v. Guilford Bd. of Educ.*, 226 F. App'x 58, 61 (2d Cir. 2007); *Marino v. City Univ. of New York*, 18 F. Supp. 3d 320, 339 (E.D.N.Y. 2014). Nor is there a fundamental right to refuse to wear a mask or to receive a medical exemption from wearing a mask. *See, e.g., Doe v. Zucker*, 520 F. Supp. 3d 218, 251 (N.D.N.Y. Feb 17, 2021) (holding that there is no fundamental right to a medical exemption to the state's vaccine requirement for children to attend public school); *Klaassen v. Trs. Of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021); *Alan v. Ige*, 557 F. Supp. 3d 1083, 2021 WL 3892657, at *8 (D. Haw. 2021); *Forbes v. Cty. of San Diego*, No. 20-CV-00998, 2021 U.S. Dist. LEXIS 41687, 2021 WL 843175, at *5 (S.D. Cal. Mar. 4, 2021); *Oberheim v. Bason*, No. 21-CV-01566, 565 F. Supp. 3d 607, 2021 WL 4478333, at *7 (M.D. Pa. Sept. 30, 2021); *Young v. James*, 2020 U.S. Dist. LEXIS 198392, 2020 WL 6572798, at *3 (S.D.N.Y. Oct. 26, 2020). The Mask Mandate also does not implicate the fundamental right of parents to direct the care and upbringing of their children. *See Zucker*, 520 F. Supp. 3d at 250-51 (holding that the school vaccine mandate did not interfere with a parent's fundamental rights even when refusing to comply meant barring their children from attending school). Having failed to identify the implication of any constitutional right or violation thereof, Doe fails to state a claim as to her second count and accordingly it is dismissed.

c. Abandoned Claim — Count III

Doe failed to respond to Defendants' motions to dismiss as they pertain to count three, her New York State claim for violation of her right to refuse unwanted medical

treatment. Courts "may, and generally will, deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed." *Arma v. Buyseasons, Inc.*, 591 F. Supp. 2d 637, 643 (S.D.N.Y. 2008) (quoting *Lipton v. Cnty. of Orange, N.Y.*, 315 F. Supp. 2d 434, 446 (S.D.N.Y. 2004)). Therefore, count three of Doe's amended complaint is deemed abandoned.

d. ADA, Rehabilitation Act, and NYS HRL Claims — Counts V, VI, and VII

In counts five and six, Doe alleges violations of Title II of the ADA, 42 U.S.C. § 12101 et seq., and § 504 of the Rehabilitation Act, 29 U.S.C. § 794 et seq., against all defendants for failing to reasonably accommodate her daughter's alleged disability.

Claims brought under Title II of the ADA and § 504 of the Rehabilitation Act are considered together, since the two statutes are nearly identical. *See McElwee v. Cnty. of Orange*, 700 F. 3d 635, 640 (2d Cir. 2012). Under either, Doe must show that "(1) [her daughter] is a qualified individual with a disability; (2) the defendant is subject to one of the Acts; and (3) [her daughter] was denied the opportunity to participate in or benefit from the defendant's services, programs, or activities." *Id.* Under either statute, a defendant's failure to make a reasonable accommodation to allow a disabled plaintiff to access the public service in question is considered discrimination. *Id.*

By November 3, 2021, the School District had already provided Sarah Doe with an accommodation deemed acceptable by all parties, which was to wear a

mesh mask. Plaintiff's amended complaint specifically seeks the accommodation of not wearing a mask at all. However, plaintiffs are not entitled to the accommodation of their unilateral preference—they are only entitled to a reasonable one. Insofar as Doe seeks this accommodation or any remedy from the point at which the accommodation was established onward, her ADA and Rehabilitation Act claims must be dismissed. *See A.M. ex rel. J.M. v. NYC Dep't of Educ.*, 840 F. Supp. 2d 660, 680 (E.D.N.Y. 2012) ("[W]here alternative reasonable accommodations to allow for 'meaningful access' are offered or already in place, a Section 504 reasonable accommodations claim must fail.") (quoting *Henrietta D. v. Bloomberg*, 331 F. 3d 261, 282 (2d Cir. 2003))).

Therefore, what remains of counts five and six is any part of the failure to accommodate claims prior to the time when the accommodation for Doe's daughter was established. The remainder of these claims fail because Doe did not exhaust her administrative remedies. Claims brought under the ADA and Rehabilitation Act are subject to the exhaustion requirements of the Individuals with Disabilities Education Act ("IDEA") when they seek relief that would also be available under IDEA. *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 137 S. Ct. 743, 755, 197 L. Ed. 2d 46 (2017). Because the gravamen of Doe's suit is the denial of free appropriate public education, the IDEA exhaustion requirement applies to her ADA and Rehabilitation Act claims. *Id.* She plainly failed to seek any administrative remedy, and accordingly these claims are dismissed. *See Martinez v. New York City Dep't of Educ.*, No. 17-CV-3152,

2018 U.S. Dist. LEXIS 144549, 2018 WL 4054872, at *5 (E.D.N.Y. Aug. 24, 2018) (holding that IDEA's exhaustion requirements applied to plaintiff's failure to accommodate claims brought under the ADA and Rehabilitation Act); *see also S.G. v. Success Acad. Charter Sch., Inc.*, No. 18-CV-2484, 2019 U.S. Dist. LEXIS 45866, 2019 WL 1284280, at *10 (S.D.N.Y. Mar. 20, 2019) (finding that the IDEA exhaustion requirement applied to plaintiff's failure to accommodate claims because they "are properly classified as complaints about the adequacy of educational services," therefore "based on the denial of a FAPE" which placed them "within the scope of the IDEA.").

Finally, count seven, which alleges an NYS HRL claim against the School District, is dismissed because Doe failed to satisfy her requirement to file a notice of the claim. To file an action against a school district, plaintiffs must serve a notice of claim. N.Y. Educ. Law § 3813(1). A plaintiff's failure to do so deprives the Court of subject matter jurisdiction. *See, e.g., Gloria E. Jones-Khan v. Westbury Bd. of Educ. - Pless Dickerson*, No. 21-CV-3908, 2022 U.S. Dist. LEXIS 17173, 2022 WL 280646, at *8 (E.D.N.Y. Jan. 31, 2022); *Bertuzzi v. Copiague Union Free Sch. Dist.*, No. 17-CV-4256, 2020 U.S. Dist. LEXIS 43351, 2020 WL 5899949, at *20 (E.D.N.Y. Mar. 9, 2020), *report and recommendation adopted as modified*, 2020 U.S. Dist. LEXIS 124897, 2020 WL 3989493 (E.D.N.Y. July 15, 2020); *Peritz v. Nassau Cnty. Bd. of Coop. Educ. Servs.*, No. 16-CV-5478, 2019 U.S. Dist. LEXIS 96079, 2019 WL 2410816, at *2 (E.D.N.Y. June 7, 2019). Accordingly, this claim is dismissed.

Appendix B

CONCLUSION

For the foregoing reasons, the defendants' motions to dismiss are **GRANTED**. All claims are dismissed and the Clerk of Court is directed to close this case.

SO ORDERED.

/s/ Frederic Block
FREDERIC BLOCK
Senior United States District Judge

Brooklyn, New York
March 24, 2023

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED OCTOBER 26, 2021

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Case No. 2:21-CV-5012-FB-SIL

JANE DOE ON BEHALF OF HERSELF AND HER MINOR CHILD, SARAH DOE,

Plaintiff,

-against-

FRANKLIN SQUARE UNION FREE SCHOOL DISTRICT, AND MARY BASSETT, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF HEALTH,

Defendants.

MEMORANDUM AND ORDER

BLOCK, Senior District Judge:

Plaintiff brings this action on behalf of herself and her minor daughter against defendants Franklin Square Union Free School District (the "School District") and the Commissioner of the New York State Department of

Public Health in her official capacity (the "Commissioner")[1] alleging that the Commissioner's regulation requiring that New York State's school students wear masks (the "Mask Mandate") violates their constitutional substantive due process rights.

Plaintiff has moved for a preliminary injunction to prohibit defendants from enforcing the Mask Mandate. That motion is denied as a matter of law based on the parties' submissions. But plaintiff also has two state law claims, and the Court has ordered a factual hearing as to whether preliminary injunctive relief should be fashioned based on those claims.

I. Background

The web that has entangled our nation in dealing with the myriad challenges spawned by the COVID-19 pandemic has ensnared our children. Now that the new school year has begun, the debate rages as to whether they should be required to be masked while attending school. Our country is being challenged to rationally decide how to best protect the health of our children in uncharted waters that make all of us medical guinea pigs. Indeed, there is no conclusive study as to either the short-term or long-term effects that mask wearing could have on children.

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1. Pursuant to Federal Rule of Civil Procedure 25(d), Mary Bassett, the Commissioner of Health, has been substituted for former Commissioner Howard Zucker.

Nonetheless, for the following reasons, I am constrained to deny plaintiff's request for preliminary injunctive relief based on her alleged constitutional violations. However, since the Court is sensitive to the concerns that parents have for their children, it believes that a full exploration of the national mask mandate dynamics at play and the reach of the Commissioner's actions is warranted, as well as the reasons why the Court, *sua sponte*, ordered a hearing on the state law claims to determine whether they might separately merit preliminary injunctive relief.

The logical starting point is to comprehend the balance struck by our founding fathers between the powers of the federal government and those of the states, which informs us as to which level of government they decided should be responsible for enacting laws affecting our country's health and safety, and the standards that judges must employ in assessing the constitutionality of those laws.

A. The Tenth Amendment and the Police Power

The Tenth Amendment reads:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. Am. X.

By contrast, unlike those of the federal government, the States' powers do not flow from the Constitution, and they do not need Constitutional authorization to act. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535-36, 132 S.

Ct. 2566, 183 L. Ed. 2d 450 (2012): "Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the 'police power.'" *Id.*

The police power has traditionally encompassed "the authority to provide for the public health, safety, and morals . . . ." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991). The protection of public health is one of the historical underpinnings of the police power. *See, e.g., Stone v. State of Mississippi*, 101 U.S. 814, 818, 25 L. Ed. 1079, 1 Ky. L. Rptr. 146 (1879) ("No one denies . . . that it extends to all matters affecting the public health or the public morals."); *Mugler v. Kansas*, 123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1887) (police power entitles the legislature to enact measures "for the protection of the public morals, the public health, or the public safety.").

In the landmark *Slaughter-House Cases*, the Supreme Court noted that the police power incorporates the principle "that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community." 83 U.S. 36, 62, 21 L. Ed. 394 (1872). Thus, "[the police power] extend[s] to the protection of the lives, health, and property of the citizens . . . and demand[s] the application of the maxim, *salus populi suprema lex*." *Bos. Beer Co. v. State of Massachusetts*, 97 U.S. 25, 33, 24 L. Ed. 989 (1877).[2]

2. "[S]alus populi suprema lex, derived from Cicero, is typically translated as 'let the good of the people be the supreme law.'" Stephen R. Miller, *Community Rights and the Municipal Police Power*, 55 Santa Clara L. Rev. 675, 687 (2015).

Appendix C

In 1905, the Supreme Court applied the police power to vaccine mandates in *Jacobson v. Commonwealth of Massachusetts*. 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905). Explicitly citing the police power, the Court upheld a broad construction of the States' powers to regulate public health and reaffirmed that public health is the domain of the states and their legislatures. *Id.* at 24-25. A matter of public health is "for the legislative department to determine in the light of all the information it had or could obtain." *Id.* at 30. Consistent with the historical conception of the police power, the *Jacobson* court noted that, at least where the police power is concerned, liberty of the individual is tempered by the common good:

> The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.

Id. at 26-27.

Jacobson established a two-part test for judicial review of public health regulations: Such a regulation should only be struck down if it (1) "has no real or substantial relation" to public health, or (2) "is, beyond

all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 31.

But *Jacobson* predates judicially established tripartite nuanced tiers of review to assess a statute's constitutionality. Under those tiers, if the right infringed is fundamental or the law relies upon a suspect classification, strict scrutiny is applied. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973). Under that standard, a law is upheld only if it is narrowly tailored to a "compelling state interest." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). If the law does not infringe upon a fundamental right but "incidentally" burdens a First Amendment right or implicates a quasi-suspect classification such as one predicated on gender, intermediate scrutiny would apply. *See United States v. O'Brien*, 391 U.S. 367, 376, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968) (First Amendment); *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (gender discrimination). Under that standard the law must also be narrowly tailored but must need be "no greater than is essential" to the furtherance of an important or substantial governmental interest. *O'Brien*, 391 U.S. at 376-77. In all other cases, rational basis review is the standard. *See San Antonio*, 411 U.S. at 17. Under that standard, the law would be constitutionally flawed only if it was not "rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440.

Thus, courts are challenged today with the task of harmonizing *Jacobson* and the test it iterates with the

tripartite modern standards of review typically used by courts evaluating constitutional challenges.

Further complicating the challenge is some inconsistency in the Supreme Court's substantive due process jurisprudence. In *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952), the defendant swallowed morphine capsules during a search, whereupon sheriff deputies took him to a hospital to have his stomach pumped to recover evidence. The Supreme Court held 8-0 that such conduct violated the Due Process Clause because it "shocks the conscience." *Id.* at 209. Three years later, it articulated the modern formulation of rational basis review in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955). Nevertheless, courts have continued to invoke the "shocks the conscience" standard in substantive due process cases. For example, in *Maniscalco v. New York City Department of Education*, 2021 U.S. Dist. LEXIS 184971, 2021 WL 4344267 (Sept. 23, 2021) *aff'd* No. 21-2343 (2d Cir. Oct. 15, 2021),[3] Judge Cogan held that a mandatory vaccination order for employees of the city's Department of Education was not "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." 2021 U.S. Dist. LEXIS 184971, [WL] at *3 (quoting *Hurd v. Fredenburgh*, 984 F.3d 1075, 1087 (2d Cir. 2021)).

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3. The Second Circuit affirmed Judge Cogan's denial of a temporary restraining order "for substantially the reasons stated in [his] thoughtful memorandum decision of September 23, 2021 . . . ." *Maniscalco v. N.Y.C. Dep't of Educ.*, No. 21-2343, 2021 U.S. App. LEXIS 30967 (2d Cir. Oct. 15, 2021).

Appendix C

Although the interplay between the "shocks the conscience" standard and rational basis review is not clear, it appears that the former is generally reserved for evaluating individual governmental actions not embodied in a statute, regulation or similarly binding statement of policy. Since the Mask Mandate is a regulation, the Court applies the tripartite levels of scrutiny rather than the "shocks the conscience" standard.

One circuit court has recently applied the more permissive *Jacobson* standard. *See In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020) (overturned on unrelated grounds). As stated in *Abbott*:

> [W]hen faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some real or substantial relation to the public health crisis and are not beyond all question, a plain, palpable invasion of rights secured by the fundamental law.

In re Abbott, 954 F.3d at 784.

However, at least in the context of the free exercise clause, the Supreme Court has rejected *Abbott's* embrace of *Jacobson. See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020) (applying strict scrutiny). And the Second Circuit has followed suit. *See Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020) (noting that reliance on *Jacobson* is "misplaced"

in the context of a free exercise challenge to COVID-19 restrictions); *see also Hopkins Hawley LLC v. Cuomo*, 518 F. Supp. 3d 705, 712 (S.D.N.Y. 2021) (Crotty, J.) ("Have those decisions abrogated *Jacobson*'s relevance in all Constitutional cases arising from the pandemic? . . . . Or can they be cabined to the free exercise context in which their holdings arose?").

Thus, the continued vitality of the *Jacobson* test is in flux. However, in the present case, the Court concludes that rational basis review is the applicable standard; that under that standard the plaintiff's challenge to the Mask Mandate's constitutionality is not viable; and that it also fails under the more deferential *Jacobson* test embraced by *Abbott*.

B. The Mask Mandate

New York's Mask Mandate, applicable to P-12 school children, is a convoluted mix of the Commissioner's regulation; the Commissioner's implementing "determination" embracing "[f]indings of necessity," which adopt as "requirements" recommendations of the Centers for Disease Control and Prevention ("CDC"); a Department of Health "interim" guidance document "for classroom instruction;" and "guidelines" which the State's Education Department has promulgated.

1. The CDC

The Supreme Court has recognized that courts should generally defer to "the reasonable medical judgments of

public health officials," *Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 288, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987), and the CDC "is the federal agency responsible for protecting the public health of the country by providing leadership and direction in the prevention and control of diseases." *Smith v. Potter*, 187 F. Supp. 2d 93, 97 (S.D.N.Y. 2001).

Although recognizing that its guidelines are not dispositive, the Seventh Circuit has cogently articulated the significance and importance of the CDC's COVID-19 pandemic determinations.

> [E]ven if not dispositive, implementation (and proper execution) of guidelines that express an expert agency's views on best practices are certainly relevant to an objective reasonableness determination. . . . This is particularly true here, where the CDC Guidelines provide the authoritative source of guidance on prevention and safety mechanisms for a novel coronavirus in a historic global pandemic where the public health standards are emerging and changing.

Mays v. Dart, 974 F.3d 810 (7th Cir. 2020), *cert. denied*, No. 20-990, 142 S. Ct. 69, 211 L. Ed. 2d 9, 2021 U.S. LEXIS 4162, 2021 WL 4507625 (U.S. Oct. 4, 2021).

Thus, the CDC has consistently been cited as an acceptable rationale for government officials during the pandemic. *See, e.g., Denis v. Ige*, No. CV 21-00011 SOM-RT, 538 F. Supp. 3d 1063, 2021 U.S. Dist. LEXIS 91037,

2021 WL 1911884, at *10 (D. Haw. May 12, 2021) ("In the midst of a pandemic, it is clearly reasonable for state and local officials to follow the CDC's guidance."); *Henry v. DeSantis*, 461 F. Supp. 3d 1244, 1255 (S.D. Fla. 2020) ("The Executive Orders explain the Governor used scientifically-based-research policies from the U.S. Centers for Disease Control. There is nothing arbitrary about the Governor's actions. Using science, medicine, and data, the Governor took reasonable steps clearly related to the legitimate interest in protecting the public health."); *Beahn v. Gayles*, No. GJH-20-2239, 2021 U.S. Dist. LEXIS 139794, 2021 WL 3172272, at *10 (D. Md. July 26, 2021) ("Plaintiffs also do not allege facts suggesting that the policy lacked a rational basis; indeed, as the Directives were issued in response to rising COVID-19 infection rates and based on CDC guidance regarding reopening schools"); *Harris v. Univ. of Massachusetts, Lowell*, No. 21-CV-11244-DJC, 2021 U.S. Dist. LEXIS 162444, 2021 WL 3848012, at *6 (D. Mass. Aug. 27, 2021) ("Defendants' affidavits attest that the Vaccine Policy was supported by, among other things, CDC guidance and research that the vaccines were safe and effective at reducing the incidence and severity of COVID-19 . . . .")

2. The Underlying Regulation

Title 10, Section 2.60 of the Commissioner's regulations, effective August 27, 2021, provides:

> (a) As determined by the Commissioner based on COVID-19 incidence and prevalence, as well as any other public health and/

> or clinical risk factors related COVID 19 disease spread, any person who is over age two and able to medically tolerate a face-covering may be required to cover their nose and mouth with a mask or face-covering when
>
> (1) in a public place and unable to maintain, or when not maintaining, social distancing; or
>
> (2) in certain settings as determined by the Commissioner, *which may include schools* . . . and which may distinguish between individuals who are vaccinated against COVID-19 and those that are not vaccinated. The Commissioner shall issue findings regarding the necessity of face-covering requirements at the time such requirements are announced.

N.Y. Comp. Codes R. & Regs. tit. 10, § 2.60 (emphasis added). Subdivision (e) of the regulation provides that "face-coverings shall include, but are not limited to, cloth masks, surgical masks, and N-95 respirators that are worn to completely cover a person's nose and mouth." Section 2.60 expires 90 days from its filing, sunsetting on November 25, 2021. *See* N.Y. Comp. Codes R. & Regs. tit. 10, § 2.60, *Regulatory Impact Statement*.

3. The Findings of Necessity

On the same date that the regulation took effect, the Commissioner promulgated "[f]indings of necessity" which "demonstrate[d] the necessity for the implementation of layered prevention strategies, which include[d] face-coverings/masks." The Commissioner noted that "CDC research supports that there are no significant health effects or changes in oxygen or carbon dioxide levels from mask wear." There was no separate finding prescinding between children and the adult population.

Given these findings, the Commissioner issued a number of "masking requirements" that same day including the following for "P-12 school settings:"

> After careful review and consideration of CDC recommendations for face coverings/masks in school settings, *I hereby adopt such recommendations, imposing them as requirements*, where applicable, until this determination is modified or rescinded. Accordingly, universal masking of teachers, staff, students, and visitors to P-12 schools over the age of two *and able to medically tolerate a face covering/mask and regardless of vaccination status*, is required until this determination is modified or rescinded. Such requirement is subject to applicable CDC-recommended exceptions.

New York State Dep't of Health, *Comm'n's Determination on Indoor Masking Pursuant to 10 NYCRR 2.60* (Aug. 27, 2021) (emphasis added).

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These CDC masking recommendations were hyperlinked by the Commissioner to the CDC's document entitled *Guidance for COVID-19 Prevention in K-12 Schools*, Centers for Disease Control and Prevention (updated Aug. 5, 2021) ("Prevention Strategies") https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html. Thus, they constitute the CDC's recommendations that the Commissioner adopted as requirements.

The CDC recognized that "in general, people do not need to wear masks when outdoors." In that regard, it recommended "that people who are not fully vaccinated wear a mask in crowded outdoor settings or during activities that involve sustained close contact with other people."

Other than differentiating between indoor and outdoor mask wearing, the CDC recognized an exception for any masking for "[a] person who cannot wear a mask, or cannot safely wear a mask, because of a disability as defined by the Americans with Disabilities Act ["ADA"] (42 U.S.C. 12101 et seq.)."

The CDC recommended in Section 1 of its Prevention Strategies that "all teachers, staff and eligible students be vaccinated as soon as possible." However, it recognized that because "schools have a mixed population of both people who are fully vaccinated and people who are not fully vaccinated . . . these variations require K-12 administrators to make decisions about the use of COVID-19 prevention strategies in their schools and are reasons why CDC recommends universal indoor masking

regardless of vaccination status at all levels of community transmission."

The CDC recognized, however, that "schools should consider multiple factors when they make decisions about implementing layered prevention strategies," and "[s]ince schools typically serve their surrounding communities, decisions should be based on the school population, families and students served, as well as their communities." Per the CDC's Prevention Strategies:

The primary factors to consider include:

- Level of community transmission of Covid-19.
- Vaccination coverage in the community and among students, teacher and staff.
- Strain on health systems capacity for the community.
- Use of frequent SARS-CO-V-2 screening testing for students, teachers, and staff who are not fully vaccinated.
- COVID-19 outbreaks or increasing trends in the school or surrounding community.
- Ages of children served by K-12 schools and the associated social and behavioral factors that may affect risk of transmission and the feasibility of different prevention strategies.

Therefore, a careful reading of the Commissioner's regulatory language and the CDC's binding "recommendations" tell us that (1) school children must always wear masks indoors unless they cannot be "medically tolerate[d];" (2) each school district can adopt a broad swath of additional "preventive strategies;" (3) outdoor mask wearing is also required "in crowded outdoor settings or during activities that involve sustained close contact with other people;" and (4) the school districts must always comply with the ADA.

4. Guidance for Wearing Masks: Help Slow the Spread of COVID-19

Defendants attach to their papers a second CDC masking document, "Guidance for Wearing Masks: Help Slow the Spread of COVID-19" (April 19, 2021) ("April 2021 Guidance for Wearing Masks"). https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html. Possibly because this document applies to the general population, and not specifically to schoolchildren, the Commissioner's determination did not link to it.

Nonetheless, in addition to recommending that masks should be worn by people two years old or older while in public, it notes that "[m]ost people with underlying medical conditions can and should wear masks," and that "[i]f you have asthma, you can wear a mask." April 2021 Guidance for Wearing Masks. However, it recommends that those with asthma "[d]iscuss with [their] healthcare provider if [they] have any concerns about wearing a mask." *Id.*

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5. Interim NYSDOH Guidance for Classroom Instruction in P-12 Schools During the 2021-2022 Academic Year (Sept. 2, 2021)

Defendants also attach to their papers a New York State Department of Health document providing "guidance" for "the minimum expectations for classroom instruction in P-12 schools." New York State Dep't of Health, *Interim NYSDOH Guidance for Classroom Instruction in P-12 Schools During the 2021-2022 Academic Year* (Sept. 2, 2021). It provides in relevant part:

> 4. Masks:
>
> a) In accordance with the Commissioner's determination issued pursuant to 10 NYCRR 2.60, all students, personnel, teachers, administrators, contractors, and visitors must wear masks at all times indoors, regardless of vaccination status.
>
> b) People with medical or developmental conditions that prevent them from wearing a mask may be exempted from mask requirements, as documented by a medical provider.
>
> c) People do not need to wear masks when eating, drinking, singing, or playing a wind instrument; when masks are removed for these purposes, individuals must be spaced six feet apart. This may mean that meals cannot be eaten in classrooms that have been

> arranged to accommodate shorter distances between students during instruction time. Students should not be excluded from in-person learning in order to meet a minimum distance requirement.
>
> d) All mask requirements must be applied consistently with any state and federal law (e.g., Americans with Disabilities Act).

Id. at 2. It also recommends means by which "improved ventilation can make classrooms more comfortable for students wearing masks." *Id.* at 8.

This "guidance," also embraces the "School Guidance developed by the [CDC]" and gives the school districts "the authority to decide how to implement that 'Guidance' based on local conditions, needs, and input from their Local Health Department (LHD)." However, "[u]ltimately, the decision to adopt certain mitigation measures will reside with the local community based on local circumstances, unless otherwise required in this document or other relevant guidance, regulations, or orders." *Id.*

6. Education Department Guidelines

As explained in its overview, the State Education Department's Guide focuses on the implementation of the additional "layered approach to mitigation strategies." New York State Dep't of Health, *Comm'n's Determination on Indoor Masking Pursuant to 10 NYCRR 2.60* (Aug. 27, 2021). In that regard, it states:

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> As transmission levels rise, schools should be prepared to take steps such as increasing physical distancing to minimize transmission. Schools should plan for all contingencies and be prepared to pivot to remote instruction as necessary. These plans should be clearly communicated to students, families, staff, and community stakeholders.

Id. The practical upshot of the Commissioner's regulation, its cryptic adoption of the CDC's recommendations and its Prevention Strategies, the Health Department's guidance, and the Education Department's guidelines is that the school districts and their administrators do not know what precisely they can or cannot do to implement the Mask Mandate. For instance, there is no guidance as to how a school district is to determine if wearing a mask cannot be medically tolerated, either indoors or outdoors, or how to implement the outdoor mask mandate. But one thing is perfectly clear: neither the Commissioner's regulation, nor Prevention Strategies, nor any Health or Education Department's guidance or guidelines, render nugatory mandatory masking for schoolchildren.

As shown by this case, all this has left the School District adrift. At oral argument, the Court pressed the parties to identify the precise policies at issue. When asked whether there was a written mask policy, the School District's counsel replied "No. . . . [a]ll we have is

a reopening plan." 9.24.21 Tr. at 12.[4] This is hardly an articulation that gives comfort to the Court or the School District's parents.

Nor has plaintiff managed to do much better. During oral argument, her counsel described the applicable policy as follows:

> Some of the policy is reflected—the school district policy is reflected in that reopening plan and some of it has been admitted in emails from superintendents and from the school district papers themselves in this case. But the specific policy we are challenging as un-Constitutional is the school district's decision to substantively review and overrule treating physicians, and the manner in which they are doing it.

9.24.21 Tr. at 13.

Notwithstanding the Court's displeasure with the complexities and uncertainties of New York State's prolix school Mask Mandate materials, the Court is tasked with deciding whether the Commissioner's regulation can nonetheless pass constitutional muster.

C. The Other States

State approaches to mask mandates fall into one of three buckets: (1) states, such as New York and

4. 9.24.21 Tr. refers to the transcript of the in-court oral argument of September 24, 2021.

Massachusetts, that require masks at a statewide level; (2) states, such as Georgia, that allow localities, municipalities, or school boards to decide whether mask mandates are appropriate for their community; and (3) states, such as Texas, that prohibit mask mandates.

1. Bucket 1: Statewide Mandates - Massachusetts

On September 27, 2021, the Massachusetts Department of Elementary and Secondary Education issued detailed guidelines governing COVID-19 related safety measures in public schools, including a mask mandate.

The Massachusetts school mask mandate provides, like New York's, that masks must be used indoors; however, they are optional outdoors. Similar to New York, the Massachusetts mandate provides an exemption for medical reasons. And it specifically provides exceptions for behavioral and pedagogical reasons, such as a band class. It differs from New York's mandate in one critical aspect: "if a school demonstrates a vaccination rate of 80 percent or more of all students and staff in the school . . . vaccinated individuals in that school would no longer be subject to the mask requirement." Massachusetts Dep't of Elementary and Secondary Educ., *Extension of DESE Mask Requirement* (Sept. 27, 2021). The Massachusetts mask mandate is in place until November 1, 2021, and must be reviewed by the Commissioner "as warranted by public health data." *Id.*

Other than its 80% vaccination rate provision, Massachusetts and fifteen other states, including New York, essentially fall into this bucket.

2. Bucket 2: The Hybrid Approach - Georgia

In Georgia, the decision whether to require children to wear masks is left to individual school boards. "At least 56 of Georgia's 180 traditional school districts are now requiring masks in at least some schools, up from only a handful of districts before class started in August. The rules cover nearly 950,000, or about 55%, of Georgia's 1.7 million public school students."[5]

An example of one such district is Baldwin County. Its mandate reads, in relevant part:

> Effective Wednesday, August 11th, masks will be required for students, staff, and visitors when inside all Baldwin County School District facilities and on school buses, regardless of vaccination status. Masks will not be required during breakfast/lunch or outdoor activities. This decision is based on updated information regarding the spread of the Delta variant, the increase in the number of positive COVID-19 cases in Baldwin County, and the change in the community transmission level from moderate to substantial spread.

Some districts, such as Glynn County, attempt to split the difference by encouraging, but not requiring, masks.

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5. Jeff Amy, *Mask mandates spread in Georgia schools as child cases soar*, AP (Aug. 25, 2021) https://apnews.com/article/health-education-georgia-coronavirus-pandemic-c157ce983cf256641379d14ae71ff40a.

Glynn's operating procedures change based on the severity of the pandemic in the area. When the virus afflicts less than or equal to 1% of the school system or 2% of the school, the school is in "Normal Operations" and "[a]s per CDC and DPH guidance, masks are *recommended* inside school facilities." (emphasis added). When rates exceed 1% in the system or 2% in the school, masks become required. And when the rates are greater than or equal to 3% in the system and 5% of the school, in-person instruction is suspended, and distance learning is implemented.[6]

Twenty-six states fall into this bucket.

3. Bucket 3: Prohibition on Mask Mandates - Texas

Some states not only do not require masks but prohibit school districts from requiring masks. Texas is one such

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6. Like many school systems that do not require masking, Glynn County must occasionally revert to remote learning.

> But many other districts tried to open their doors as mask-optional. Some switched positions within days, while others held out for weeks. During that time, infections leaped. More than 1% of school-age children in Georgia have tested positive for COVID-19 in the past two weeks. Children between the ages of 5 and 17 are now more likely than adults as a whole to test positive for COVID-19. The state Department of Public Health reported more than 30 infection clusters in schools statewide, the highest since the epidemic began.

Jeff Amy, *Mask mandates spread in Georgia schools as child cases soar*, AP (Aug. 25, 2021) https://apnews.com/article/health-education-georgia-coronavirus-pandemic-c157ce983cf256641379d14ae71ff40a

state. According to executive order GA-38, enacted on July 29, 2021:

> no governmental entity, including a . . . school district . . . may require any person to wear a face covering or to mandate that another person wear a face covering.

The order does not cite any scientific evidence in support of its position; rather, it simply states that it is necessary "to ensure the ability of Texans to preserve livelihoods while protecting lives." *See* GA-38.

Several large school districts elected to defy the order. For example, the Dallas Independent School District requires masks, and declared:

> Governor Abbott's order does not limit the district's rights as an employer and educational institution to establish reasonable and necessary safety rules for its staff and students. Dallas ISD remains committed to the safety of our students and staff.[7]

As of September 21, 2021, twenty-nine school districts have sued the Governor in an attempt to strike down his

7. Brian Lopez, *Gov. Greg Abbott's order banning mask mandates in Texas schools faces lawsuit, defiance by big-city districts*, The Texas Tribune (Aug. 10, 2021) https://www.texastribune.org/2021/08/09/texas-mask-order-schools/.

anti-mask mandate order.[8] And the Governor, in turn, has sued some 15 more. In addition, the U.S. Department of Education has opened an investigation of the Texas Education Agency, having determined that Texas's anti-mask mandate order may be "preventing school districts in the state from considering or meeting the needs of students with disabilities."[9]

The status of Texas's order remains in flux, but eight states, including Florida, have jettisoned mask mandates.

II. The Facts

The following facts are from the Complaint and plaintiff's submissions. "In deciding a motion for preliminary injunction, a court may consider the entire record including affidavits and other hearsay evidence." *Park Irmat Drug Corp. v. Optumrx, Inc.*, 152 F. Supp 3d 127, 132 (S.D.N.Y. 2016).

A. The Complaint

Sarah suffers from asthma and "cannot medically tolerate wearing a mask." Complaint at P 1. Plaintiff

8. Joshua Fechter, *Gov. Greg Abbott and local officials are fighting several legal battles over mask mandates. Here's what you need to know.*, The Texas Tribune (Sept. 21, 2021) https://www.texastribune.org/2021/09/21/texas-school-mask-mandates/.

9. Brian Lopez, *Texas' ban on school mask mandates draws federal investigation for possibly violating the rights of students with disabilities*, The Texas Tribune (Sept. 21, 2021) https://www.texastribune.org/2021/09/21/texas-schools-mask-mandates-education-department/

unsuccessfully sought a medical exemption for her daughter from the school district based principally on a physician's letter. *Id.* at §§ 36-37. She also unsuccessfully petitioned the school district to permit Sarah to attend school remotely. *Id.* at § 55. Finally, she submitted written proposals for accommodations to the School District to allow Sarah to attend school under various conditions, including the use of a face shield instead of a face mask and a guarantee that Sarah's classrooms have air-conditioning. *Id.* at 56. The School District also rejected that proposal.[10] *Id.* at 58.

B. Plaintiff's Submissions

Plaintiff relies upon several studies and government declarations to bolster her argument. To support her contention that there is no scientific evidence that masks are an effective measure against the transmission of COVID-19, she points to product labeling requirements in FDA Emergency Use Authorizations for face masks, surgical masks, and respirators. *See* Gibson Aff. Exs. 1-3. To further that argument, she cites several scientific studies.

First, Plaintiff points to a study comparing cloth and medical mask usage in adult healthcare workers, which concluded that rates of influenza infection were higher in participants who used cloth masks compared to those who used surgical masks. *See* C. R. MacIntyre *et al., A cluster randomised trial of cloth masks compared with medical*

10. On October 15, 2021, the Court held a second hearing in this case. The School District represented that it has provided Sarah with air-conditioning. *See* 10.15.21 Tr. at 8.

masks in healthcare workers, BMJ Open (2015). But that study had nothing to do with mask use by children or even the general public; indeed, its authors recognized that "[f]urther research is needed to inform the widespread use of cloth masks globally," and limited its findings to a precaution that cloth masks were not appropriate in the healthcare setting. *Id.* at 4.

Next, plaintiff relies on a study published by the CDC evaluating the effectiveness of various personal protective measures against influenza, including hand hygiene, respiratory etiquette (for example, the covering of one's face with a tissue when sneezing or coughing), and mask usage. Xiao J, Shiu E, Gao H, et al. *Nonpharmaceutical Measures for Pandemic Influenza in Nonhealthcare Settings—Personal Protective and Environmental Measures*, Emerging Infectious Diseases (2020). The study reported no statistically significant decrease in influenza transmission with the use of masks. *Id.* at 11-12. However, the authors of the study do not represent that face masks in general are inadvisable: indeed, they note that "[i]n theory, transmission should be reduced the most if both infected members and other contacts wear masks, but compliance in uninfected close contacts could be a problem." *Id.* at 12. In addition, while the authors did not find a statistically significant reduction in influenza transmission with use of a mask, they nonetheless noted that "face masks might be able to reduce the transmission of other infections and therefore have value in an influenza pandemic when healthcare resources are stretched." *Id.* at 15.

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Plaintiff also submits a study published in the New England Journal of Medicine, examining COVID-19 transmission in U.S. Marine Corps recruits. A.G. Letizia, A. Ramos, et al *SARS-CoV-2 Transmission among Marine Recruits during Quarantine*, 383 New Eng. Journal of Medicine 2407 (2020). That study found that after two weeks, 2.8% of recruits strictly observing mitigation measures that included masks tested positive for COVID-19, and 1.7% of those who did not undertake mitigation measures did. *Id.* at 2412. But that study tested conditions that are hardly typical for school students: The recruits were required to undertake a two-week home quarantine prior to reporting for duty, and upon reporting, undertook a *second*, strictly supervised, quarantine. Indeed, the authors noted that "[o]ther settings in which young adults congregate are unlikely to reflect similar adherence to measures intended to reduce transmission." *Id.* at 2413.

In addition, plaintiff relies on *Effectiveness of Adding a Mask Recommendation to Other Public Health Measures to Prevent SARS-CoV-2 Infection in Danish Mask Wearers*, a study in the Annals of Internal Medicine. Henning Bundgaard *et al.*, *Effectiveness of Adding a Mask Recommendation to Other Public Health Measures to Prevent SARS-CoV-2 Infection in Danish Mask Wearers: A Randomized Controlled Trial*, Annals of Internal Medicine (2020). That study did not find a statistically significant relationship between mask wearing and lower rates of COVID-19 transmission. However, it only examined adults and was undertaken "in a setting where mask wearing was uncommon and was not among other

recommended public health measures . . . ." *Id.* at 5. The study emphasizes that it did not measure the effect of masking as source control, and notes that its findings "do not provide data on the effectiveness of widespread mask wearing in the community in reducing SARS-CoV-2 infections." *Id.* at 7.

Plaintiff cites *Novel risk factors for Coronavirus disease-associated mucormycosis (CAM): a case control study during the outbreak in India*, for the proposition that mask usage can cause coronavirus disease-associated mucormycosis ("CAM"), a fungal disease. Arora, *et al., Novel risk factors for Coronavirus disease-associated mucormycosis (CAM): a case control study during the outbreak in India*, MedRXiv (2021). However, that study, which was undertaken in India, could not obtain information about the frequency of laundering or discarding of masks, which affects fungal growth. It further noted that CAM is strongly associated with diabetes, poor glycemic control, and systemic steroid use.

The only scientific material plaintiff cites that deals with mask use in children is a "mini review" published in Acta Pædiatrica, a peer-reviewed international medical journal. Martin Eberhart, *et al., The impact of face masks on children - A mini review*, 110 Acta Pædiatrica 1778 (2021). This document notes, however, that there was "a lack of information on the consequences of children wearing face masks," and that "[a]s using face masks could be a long-term preventive measure in the COVID-19 era, further studies are needed, particularly to explore the impact on pre-existing respiratory problems in children

and adults." *Id.* at 1782. The review also acknowledges that "[f]ake news about the negative effects of face masks has been rising. This has included false reports about face masks causing an increasing number of illnesses and even deaths among children." *Id.* at 1779. The review cites to only two pediatric studies. The first was of 106 children in Singapore and concluded that masks did not affect a child's heart rate, respiratory rate, or oxygen saturation. The second study was of 24 children in the United Kingdom. It did not collect physiological data—only subjective information from the children—whose "main complaint was that their face was hot." *Id.* at 1779.

The review also contained eight adult studies, one of which concluded that "face masks did not cause any clinically relevant changes in oxygen or carbon dioxide concentration." *Id.* at 1781.

Plaintiff's scientific materials are ill-fitted to her arguments. Most of the studies deal with mask usage by adults in environments very different from that of a school—for example, a high-risk hospital ward, MacIntyre, *supra*, or a locked down and quarantined Marine training camp, Letizia, *supra*. The only evidence she musters with respect to mask wearing by children is a "mini review," which acknowledges that there is "a lack of information on the consequences of children wearing face masks." Eberhart, *supra*.

Some of plaintiff's arguments mirror spurious claims publicly aired by one of her attorneys, Robert F. Kennedy Jr., and the organization he founded, Children's Health

Defense ("CHD"), which have been criticized for spreading false information about vaccines and the pandemic.[11] For example, in an article misleadingly titled "*California is Still Masking Children Despite Proven Physical and Psychological Danger*," CHD represents that "thousands" of scientists decry mask use in children, which CHD claims causes "cognitive fog," "depression," "despair," "detrimental psychological harms," and "dehydration," while "lower[ing] children's oxygen levels in the blood," "suppress[ing] the immune system," and "collect[ing] and coloniz[ing] viruses, bacteria, microbes, and mold."[12] Reputable sources have debunked these unfounded claims.[13]

For his part, Kennedy has tirelessly spread a wide variety of pseudoscience, including anti-vaccine

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11. *See, e.g.*, Jonathan Jarry, *The Anti-Vaccine Propaganda of Robert F. Kennedy, Jr.*, McGill Office for Science and Society (Apr. 16, 2021), https://www.mcgill.ca/oss/article/covid-19-health-pseudoscience/anti-vaccine-propaganda-robert-f-kennedy-jr.

12. Beth Giuffre, *California is Still Masking Children Despite Proven Physical and Psychological Danger*, Children's Health Defense (Jul. 9, 2021) https://ca.childrenshealthdefense.org/school/ca-still-masking-children-despite-proven-physical-psychological-danger/.

13. *See, e.g.*, Dr. Kimberly Frodl, *Debunked myths about face masks*, Speaking of Health, Mayo Clinic Health System (Jul. 10, 2020) https://www.mayoclinichealthsystem.org/hometown-health/speaking-of-health/debunked-myths-about-face-masks; Keeley LaForme, *Myths about Masks and Other Coronavirus Facial Coverings*, Newsroom: Johns Hopkins All Children's Hospital (Jul. 22, 2020) https://www.hopkinsallchildrens.org/ACH-News/General-News/Myths-about-Masks-and-Other-Coronavirus-Facial-Cov.

propaganda (both during the COVID-19 pandemic and before it) and the myth that 5G cellular phone service causes "almost unimaginably devastating impacts on our health + environment."[14] Although plaintiff parrots some of the claims raised by CHD, she wisely does not submit them or any of their references to the risks of masking as one of her exhibits.

C. Defendants' Submissions

In contrast to the materials submitted by plaintiff, defendants embrace the findings and recommendations of the CDC. Their submissions all focus on the reduced spread of COVID-19 in schools with mask mandates.

First, defendants submit the abstract of an article examining COVID-19 transmission in North Carolina public schools based on research conducted by the ABC Science Collaborative, a public health organization associated with Duke University. Kanecia Zimmerman, *et al.*, *Incidence and Secondary Transmission of SARS-CoV-2 Infections in Schools*, 147 Pediatrics (2021). That

14. *See* Keziah Weir, *How Robert F. Kennedy Jr. Became the Anti-vaxxer Icon of America's Nightmares*, Vanity Fair (May 13, 2021); Robert F. Kennedy Jr. (@RobertKennedyJr), Twitter (Jan. 7, 2020, 7:50PM), https://twitter.com/robertkennedyjr/status/1214710810921955328?s=21. Indeed, he has been listed amongst the so-called "Disinformation Dozen," the top twelve spreaders of pandemic-related false information on social media. *See, e.g.*, Jonathan Jarry, *A Dozen Misguided Influencers Spread Most of the Anti-Vaccination Content on Social Media*, McGill Office for Science and Society (Mar. 31, 2021) https://www.mcgill.ca/oss/article/covid-19-health/dozen-misguided-influencers-spread-most-anti-vaccination-content-social-media.

research concludes that mitigation measures that included masks had lower COVID-19 transmission rates in schools than those school rates in surrounding communities. *Id.* at 6. In addition, the Science Collaborative notes that "[m]ost of the cases of secondary transmission . . . were related to absent face coverings." *Id.* It concluded that "[p]roper masking is the most effective mitigation strategy to prevent secondary transmission in schools when COVID-19 is circulating and when vaccination is unavailable, or there is insufficient uptake." *Id.* at 3.

Defendants also attach a series of CDC-published Morbidity and Mortality reports, each authored by groups of physicians, professors, and members of the CDC COVID-19 Response Team. Those reports examined COVID-19 transmission in schools in Utah,[15] Missouri,[16] Georgia,[17] and Wisconsin.[18] Each report concluded that

15. Rebecca Hershow *et al., Low SARS-CoV-2 Transmission in Elementary Schools—Salt Lake County, Utah, December 3, 2020-January 31, 2021*, 70 Morbidity and Mortality Weekly Report 442 (2021).

16. Patrick Dawson, *et al., Pilot Investigation of SARS-CoV-2 Secondary Transmission in Kindergarten Through Grade 12 Schools Implementing Mitigation Strategies — St. Louis County and City of Springfield, Missouri, December 2020*, 70 Morbidity and Mortality Weekly Report 449 (2021).

17. Jenna Gettings, *et al., Mask Use and Ventilation Improvements to Reduce COVID-19 Incidence in Elementary Schools — Georgia, November 16-December 11, 2020*, 70 Morbidity and Mortality Weekly Report 779 (2021).

18. Amy Falk, *et al., COVID-19 Cases and Transmission in 17 K-12 Schools — Wood County, Wisconsin, August 31-November 29, 2020*, 70 Morbidity and Mortality Weekly Report 136 (2021).

in schools with mitigation measures including masks, the COVID-19 transmission rate was lower than in the surrounding community.

Each study recommended that mask usage guidelines be adopted as part of school reopening. For example, the CDC's study of Utah's school reopening concluded that "in-person elementary schools can be opened safely with minimal in-school transmission when critical prevention strategies *including mask use* are implemented." Hershow, *supra* at 447 (emphasis added). In the study examining Missouri schools, the authors recommended that "K-12 schools should continue implementing SARS-CoV-2 mitigation strategies that include mask use policies . . . ." Dawson, *supra* at 453.

The CDC's Georgia study focused on kindergarten through fifth grade and found that "[a]djusting for county-level incidence, COVID-19 incidence was 37% lower in schools that required teachers and staff members to use masks," but it did not produce a statistically significant result with respect to schools that required mask use among students. Gettings, *supra* at 779. The authors concluded that "[b]ecause universal and correct use of masks can reduce SARS-CoV-2 transmission . . . and is a relatively low-cost and easily implemented strategy, findings in this report suggest universal and correct mask use is an important COVID-19 prevention strategy in schools as part of a multicomponent approach." *Id.*

Defendants' studies are better tailored to the issue before the Court than plaintiff's. Unlike plaintiff's

submissions, they examined the transmission of the virus in school-aged children and in the school environment.

Thus, defendants have provided ample support for their position. Notably, since their submissions, a recent decision by Judge Kahn of the Northern District of New York cited two subsequent studies supporting school mask mandates. *L.T. v. Zucker*, No. 121CV1034LEKDJS, 2021 U.S. Dist. LEXIS 196906, 2021 WL 4775215, at *10 n.15 (N.D.N.Y. Oct. 13, 2021).[19]

The first study found that "the odds of a school-associated COVID-19 outbreak in schools without a mask requirement were 3.5 times higher than those in schools with an early mask requirement," and the second found that "[c]ounties without school mask requirements experienced larger increases in pediatric COVID-19 case rates after the start of school compared with counties that had school mask requirements." *Id.*[20] The Court's

19. Megan Jehn, *et al., Association Between K-12 School Mask Policies and School-Associated COVID-19 Outbreaks — Maricopa and Pima Counties, Arizona, July-August 2021*, Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report, Vol. 70, September 24, 2021, and Samantha E. Budzyn, *et al., Pediatric COVID-19 Cases in Counties With and Without School Mask Requirements — United States, July 1-September 4, 2021*, Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report, Vol. 70, September 24, 2021

20. As recounted in a recent article in Newsday, Long Island's leading newspaper: At the end of this past September—one month after the reopening of its schools—"Long Island reported the second-highest number of COVID-19 cases among students for any region in the state . . . ." John Hildebrand, *Report Card: LI has second-highest*

research has not disclosed any subsequent studies to add to plaintiff's submissions.

III. The Constitutional Issues

Because plaintiff's submissions lacked clarity as to the precise basis for her constitutional contention that she was entitled to preliminary injunctive relief, the Court held a hearing to attempt to understand it. During the hearing, plaintiff's counsel clarified that "the specific policy we are challenging as unconstitutional is the school district's decision to substantively review and overrule treating physicians, and the manner in which they are doing it." 9.24.21 Tr. at 19; *see also* 9.24.21 Tr. at 34 ("Can [the School District] deny a medical exemption by a treating physician?"; 9.24.21 Tr. at 9 ("[W]hat's unconstitutional, in my opinion . . . is that the school district has taken it upon themselves, without any kind of regulatory authority,[21] to intervene in [the plaintiff-doctor] relationship, to second guess the treating physician, to overrule them . . . .").

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number of COVID-19 cases for kids, school staff in state, NEWSDAY (Sept. 29, 2021) https://www.newsday.com/long-island/education/long-island-school-covid-ranking-1.50373619. The defendant school district is located in Long Island.

21. The Court has also considered and rejects plaintiff's allegation questioning the Commissioner's power to act. The Mask Mandate is within the Commissioner's delegated authority. *See Boreali v. Axelrod*, 71 N.Y.2d 1, 517 N.E.2d 1350, 523 N.Y.S.2d 464 (1987); *Citizens for an Orderly Energy Policy v. Cuomo*, 78 N.Y.2d 398, 410, 582 N.E.2d 568, 576 N.Y.S.2d 185 (1991). In any event, plaintiff did not rely upon this argument in her motion papers or at either oral argument.

In her extensive brief, plaintiff bloused out her principal contention by identifying the fundamental rights which she contends are violated by the Mask Mandate:

> the right to be free from nonconsensual medical interventions and other rights derived from the fundamental right to choose what happens to one's own body; the right to a medical exemption; the right of parents to make medical determinations for their child in accordance with their physician's independent medical judgment; and the right to breathe unencumbered by an experimental medical product.

Pl. Brief. at 18.

A. The Standard

Where "a preliminary injunction will affect government action taken in the public interest pursuant to a statute or regulatory scheme, the moving party must demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 631 (2d Cir. 2020).

Because the Court finds that plaintiff has not demonstrated a likelihood of success on the merits, it need not consider the other two preliminary injunction requisites.[22]

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22. The Court notes, however, that as Judge Cogan wrote: "In the Second Circuit, it is well-settled that an alleged constitutional violation constitutes irreparable harm. . . . Because plaintiffs allege

B. Existing Law on School Mask Mandates

To date, only a few federal court cases have directly examined school mask mandates.

In *Resurrection School v. Hertel*, a religious school challenged Michigan's school mask mandate "because it interferes with the school's religiously oriented disciplinary policies and prevents younger students from partaking fully in a Catholic education." 11 F.4th 437, 447 (6th Cir. 2021). The case arose in the religious liberty context, and much of the Sixth Circuit's analysis focused on that issue. Once the court determined that rational basis review applied, it upheld the mandate: "Defendants cite more than ample evidence that requiring masks in the school setting minimizes the spread of COVID-19." *Id.* at 460.

In *W.S. by Sonderman v. Ragsdale*, a group of Georgia public school students challenged the Cobb County School

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that their substantive due process rights have been violated, no further showing of irreparable injury is necessary." *Maniscalco v. New York City Department of Education*, 2021 U.S. Dist. LEXIS 184971, 2021 WL 4344267, at *2 (Sept. 23, 2021) (internal quotation and citation omitted); *but see KM Enterprises, Inc. v. McDonald*, No. 11-CV-5098, ADS ETB, 2012 U.S. Dist. LEXIS 20469, 2012 WL 540955, at *3 (E.D.N.Y. Feb. 16, 2012) ("[E]ven if a constitutional claim was asserted, "merely asserting a constitutional injury is insufficient to automatically trigger a finding of irreparable harm."); *Pinckney v. Bd. of Educ. of Westbury Union Free Sch. Dist.*, 920 F. Supp. 393, 400 (E.D.N.Y. 1996) ("[O]ther courts have found that the mere allegation of a constitutional infringement in and of itself does not constitute irreparable harm."). Moreover, for reasons stated, *supra*, an injunction would clearly not be in the public's best interest.

District's mask mandate. No. 1:21-CV-01560-TWT, 540 F. Supp. 3d 1215, 2021 U.S. Dist. LEXIS 98185, 2021 WL 2024687, at *1 (N.D. Ga. May 12, 2021). Because "[t]he mandate neither discriminates against a protected class nor infringes a fundamental right," the court applied rational basis review. 2021 U.S. Dist. LEXIS 98185, [WL] at *2. Expressly noting that Cobb County relied on guidance from the CDC and Georgia state public health authorities, the court upheld the mandate. 2021 U.S. Dist. LEXIS 98185, [WL] at *2.

In *Oberheim v. Bason*, a group of parents brought suit on behalf of their children to challenge a mask mandate promulgated by the Montoursville Area School District. No. 4:21-CV-01566, 2021 U.S. Dist. LEXIS 188843, 2021 WL 4478333, at *1 (M.D. Pa. Sept. 30, 2021). The court rejected arguments that students had a fundamental right to attend class without a mask, or that the mask mandate infringed a parent's fundamental right to raise their children without undue interference. 2021 U.S. Dist. LEXIS 188843, [WL] at *7. Like plaintiff here, the parents in *Oberheim* argued that masks are not effective in preventing the spread of COVID-19. The court rejected that argument, too, noting that "such a dispute is left to the resolution of the policymakers[.]" 2021 U.S. Dist. LEXIS 188843, [WL] at *8. Ultimately, the court applied rational basis review. Because the school district relied upon the decree of state public health authorities in crafting it, the court upheld the mandate. *Id.*

In addition, defendants have submitted a copy of *M.F. v. Cuomo*, a decision from the state Supreme Court of Nassau County. *M.F. v. Cuomo*, No. 607277/21, 2021

NYLJ LEXIS 862 (N.Y. Sup. Ct. Jun. 21, 2021). Plaintiff was the mother of four school-aged children. She raised many of the same arguments made by plaintiff here, including that the Mask Mandate violates the Nuremberg Code, that face masks are experimental devices, and that they are ineffective. *Id.* at 5. The court rejected them, holding the analogy "too strained for . . . credence." *Id.* at 6. Applying rational basis review, the court upheld the mandate. *Id.* at 7.

In addition to these cases, some federal courts have considered mask mandates in broader circumstances. They have uniformly found that public mask mandates do not implicate fundamental rights, and that such mandates easily clear rational basis review. *See e.g. Forbes v. County of San Diego*, No. 20-CV-00998-BAS-JLB, 2021 U.S. Dist. LEXIS 41687, 2021 WL 843175 (S.D. Cal. Mar. 4, 2021) (mask mandates do not implicate fundamental rights); *Oakes v. Collier County*, 515 F. Supp. 3d 1202, 1206-07 (M.D. Fla. 2021) ("Some may disagree with the public health efficacy of mask orders. But federal courts do not sit in a policy-checking capacity to second guess the wisdom of state legislative acts."); *Whitfield v. Cuyahoga County Public Library Foundation*, No. 1:21 CV 0031, 2021 U.S. Dist. LEXIS 92944, 2021 WL 1964360, at *2 (N.D. Ohio May 17, 2021) ("[T]here is no general constitutional right to wear, or to refuse to wear a face mask in public places.").

C. Substantive Due Process and Fundamental Rights

"[T]he Due Process Clause of the Fourteenth Amendment embodies a substantive component that protects against 'certain government actions regardless of

the fairness of the procedures used to implement them.'" *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 460 (2d Cir. 1996) (quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)). In general, a regulation "need only be reasonably related to a legitimate state objective." *Id.* at 461 (citing *Reno v. Flores*, 507 U.S. 292, 303-06, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993)). However, when the regulation infringes a fundamental right, it must, as noted, be "narrowly tailored to serve a compelling state interest." *Flores*, 507 U.S. at 302. A right is fundamental if it is "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325-26, 58 S. Ct. 149, 82 L. Ed. 288 (1937), or "deeply rooted in this Nation's history and tradition," *Moore v. E. Cleveland*, 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977).

In some cases, identifying the right at issue as fundamental is straightforward. For example, because the right to assemble for religious worship is clearly protected by the Free Exercise Clause of the First Amendment, the Supreme Court had concluded that COVID-related limits on attendance at churches and synagogues were subject to strict scrutiny, rather than *Jacobson*'s lesser standard. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66, 208 L. Ed. 2d 206 (2020) (per curiam); *see also Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 632 (2d Cir. 2020) ("[A] policy that expressly singles out religion for less favored treatment, as here, is subject to strict scrutiny.").

Here, plaintiff asserts several rights that she claims trigger strict scrutiny. For the following reasons, the Court does not agree that fundamental rights are implicated.

Appendix C

1. Right to a Medical Exemption

Plaintiff principally argues that the Constitution entitles her to a medical exemption from the Mask Mandate (and, indeed, any "public health law," Pls.' Mem. of Law at 14). She cites *Jacobson v. Massachusetts*, for the proposition that it would be "cruel and inhuman in the last degree" to require someone to be vaccinated "if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health, or probably cause his death." 197 U.S. 11, 39, 25 S. Ct. 358, 49 L. Ed. 643 (1905). But *Jacobson* reached that conclusion as a matter of statutory interpretation, not constitutional law. Indeed, the opinion flatly rejects the notion that the Constitution requires what plaintiff calls "strict harm avoidance." *See id.* at 29 (noting that quarantines and military conscription restrict freedom of choice).

In any event, the Mask Mandate includes a medical exemption, requiring compliance by only those "over age two *and able to medically tolerate a face-covering*." N.Y. Comp. Codes R. & Regs. tit. 10, § 2.60 (emphasis added). Plaintiff's real complaint concerns *who* should decide whether the exemption applies.

In that regard, she argues that she has a fundamental right to act on the good-faith medical judgment of her own physician. She cites several cases in which the Supreme Court has held that the lack of an adequate medical exemption to an abortion restriction places an undue burden on a woman's fundamental right to the

procedure. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006); *Stenberg v. Carhart*, 530 U.S. 914, 937, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000). Those cases assume that the woman's physician will decide medical necessity. An earlier case, *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), was more explicit:

> [M]edical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.

Id. at 192. Based on that reasoning, the Supreme Court struck down regulations requiring hospital committee approval and the concurrence of two consulting physicians before an abortion. *See id.* at 196-200.

The context in which those cases arose makes them inapposite for two reasons. First, it has long been understood that the right to independent medical judgment is part and parcel of the fundamental right to terminate a pregnancy. *See Singleton v. Wulff*, 428 U.S. 106, 117, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) (allowing physicians to challenge abortion restrictions because "the constitutionally protected abortion decision is one in which the physician is intimately involved."). It does not follow that there is a standalone fundamental right to have one's

own physician determine the need for compliance with every public health measure.[23]

Second, a treating physician is obliged to consider the health of his or her patient above all else. That is entirely appropriate for a decision as intimate and personal as terminating a pregnancy. But the Mask Mandate is directed at a matter of *public* health. That is, the state must weigh the health concerns of an individual against the threat to the health of everyone else present in the classroom or other public place. A personal physician is ill-equipped to balance those competing concerns.

2. Right to Refuse Medical Treatment

Plaintiff next invokes the right to refuse unwanted medical treatment. There is no question that the right is fundamental. *See Washington v. Glucksberg*, 521 U.S. 702, 722 n.17, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772

23. Plaintiff argues that the Supreme Court expanded the right to non-abortion cases in *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977), in which it noted that a New York law requiring notification to the state of all prescriptions of Schedule II drugs did not deprive anyone "of the right to decide independently, with the advice of his physician, to acquire and to use needed medication." *Id.* at 603. At the same time, however, it acknowledged that a state could validly limit dosages and refills and could even ban certain drugs outright. And in another case, it held that physicians could be prosecuted under the federal Controlled Substances Act for prescribing drugs outside "the usual course of professional practice." *United States v. Moore*, 423 U.S. 122, 138, 96 S. Ct. 335, 46 L. Ed. 2d 333 (1975).

(1997) ("[In *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990)], we concluded that the right to refuse unwanted medical treatment was so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment.").

Once again, however, context matters. *Glucksberg* involved an individual's right to physician-assisted suicide; *Cruzan*, the right to refuse life-prolonging hydration and nutrition. While the Mask Mandate was obviously intended as a health measure, it no more requires a "medical treatment" than laws requiring shoes in public places, *see Neinast v. Bd. of Trustees of Columbus Metro. Library*, 346 F.3d 585, 593-94 (6th Cir. 2003), or helmets while riding a motorcycle, *see Picou v. Gillum*, 874 F.2d 1519, 1522 (11th Cir. 1989).

In a true "right to refuse treatment" case, the state's interest in preserving life and the individual's right to bodily integrity implicate a single person. Like the abortion context, it is completely distinguishable from the Mask Mandate's attempt to balance the competing interests of the individual and public health.

3. Parents' Right to Make Educational Decisions

Plaintiff next argues that "the state has no valid reason to intervene" in her wish to follow the medical advice of her daughter's physician. Pls.' Mem. of Law at 28. It is true that the presumption that parents will act in their children's best interests gives them a fundamental right to make many decisions on their behalf. *See Troxel v.*

Granville, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). Thus, a state cannot require a parent to send their child to public school, *see Runyon v. McCrary*, 427 U.S. 160, 176-77, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976) (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925)), or forbid private schools from teaching certain subjects, *see id.* (citing *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)).

It should, however, be obvious by now that even fundamental rights are not absolute. In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972), the Supreme Court stressed that *Pierce* and *Meyer* lend "no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society." *Runyon*, 427 U.S. at 177.

More recently, the Second Circuit held that "*Meyer, Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught." *Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003). "[R]ecognition of such a fundamental right," it explained, "requiring a public school to establish that a course of instruction objected to by a parent was narrowly tailored to meet a compelling state interest before the school could employ it with respect to the parent's child—would make it difficult or impossible for any school authority to administer school curricula responsive to the overall educational needs of the community and its children." *Id.*

What is true for curricular requirements is just as true for other educational regulations like the Mask Mandate. No one is forcing plaintiff to send her child to public school or to live in New York State, but once she made those decisions, she must comply with their rules. Her authority stops, so to speak, at the schoolhouse door. And for good reason. Like a physician with a patient, a parent may justifiably be expected to act in the child's best interest. But it is that very motivation—laudable in itself—that might lead the parent to misjudge what is best for the health of the community as a whole. That is precisely why we, as a society, have entrusted public institutions to make such decisions.

In sum, the Court concludes that the Mask Mandate does not impinge upon any fundamental right. Therefore, strict scrutiny is not the standard by which plaintiffs' constitutional claims must be evaluated. Nor do plaintiff's claims call for intermediate scrutiny. As with the handful of all the other cases that have passed upon the constitutionality of mask mandates, it will evaluate the mandate under rational basis review, noting in passing that it easily passes the more deferential *Jacobson* test that it has "a real or substantial relation" to public health. 197 U.S. at 31.

D. Substantive Due Process and Rational Basis Review

The Supreme Court has emphasized that application of rational basis review "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, 113 S. Ct. 2637, 125 L.

Ed. 2d 257 (1993) (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)). Laws subject to rational basis review are "accorded a strong presumption of validity." *Id.* at 319. Indeed, the government need not actually articulate its rationale; rather, government action passes muster "if there is any reasonably conceivable state of facts that could provide a rational basis." *Id.* at 320 (quoting *Beach Comm'ns*, 508 U.S. at 313). It is the burden of the party challenging a law to "negat[e] every conceivable basis which might support it." *Id.* (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973)).

Notably, even before *Maniscalco* there was a significant body of post-pandemic caselaw upholding vaccination mandates based upon rational basis review analysis. *See, e.g., Klaassen v. Trustees of Indiana Univ.*, No. 1:21-CV-238 DRL, 2021 U.S. Dist. LEXIS 133300, 2021 WL 3073926 (N.D. Ind. July 18, 2021), *aff'd*, 7 F.4th 592 (7th Cir. 2021); *Norris v. Stanley*, No. 1:21-CV-756, 2021 U.S. Dist. LEXIS 168444, 2021 WL 3891615 (W.D. Mich. Aug. 31, 2021); *Children's Health Def., Inc. v. Rutgers State Univ. of New Jersey*, No. CV2115333ZNQTJB, 2021 U.S. Dist. LEXIS 184242, 2021 WL 4398743 (D.N.J. Sept. 27, 2021) (collecting cases); *see also Phillips v. City of New York*, 775 F.3d 538, 540 (2d Cir. 2015) (upholding school vaccine mandate for "various vaccine-preventable illnesses" prior to pandemic). None has held otherwise.

Plaintiff has submitted documents to support her argument that masks are inimical to a child's health. But this evidence is thin compared to the contrary documents

that defendants have submitted, which clearly satisfy the rational basis review standard.

This is not to say that the Mask Mandate is not without flaws. The degree of difficulty the Court had to endure to understand its reach and application has also made it difficult for the defendant school district (and presumably others throughout the state) to grapple with the application of the current prolix array of the regulation, recommendations and requirements, guidelines and guidance. Nonetheless, as recently articulated by Judge Cogan in *Maniscalco*:

> [W]here good faith arguments can be made on both sides of the many issues raised by the pandemic, it is up to local government, not the courts, to balance the competing public health and business interests.

2021 U.S. Dist. LEXIS 184971, 2021 WL 4344267 at *4; (internal quotations and citation omitted). The same principle applies here.

E. Other Laws

Plaintiff also contends that the Mask Mandate is preempted by various federal laws, including Section 564 of the Food, Drug, and Cosmetic Act (the "FCDA"), and the Nuremberg Code. Pls.' Mem. of Law at 15. These arguments are without merit.

First, Section 564 does not include a private right of action. It "confers powers and responsibilities to

the Secretary of Health and Human Services in an emergency," not "an opportunity to sue the government." *See Bridges v. Houston Methodist Hosp.*, No. CV H-21-1774, 543 F. Supp. 3d 525, 2021 U.S. Dist. LEXIS 110382, 2021 WL 2399994, at *2 (S.D. Tex. June 12, 2021). Nor is a private right of action separately supplied by the Supremacy Clause: It is "not the source of any federal rights and certainly does not create a cause of action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 325, 135 S. Ct. 1378, 191 L. Ed. 2d 471 (2015).

Citing the Nuremberg Code, plaintiff argues that the Mask Mandate violates the international norm that one cannot be coerced into medical experimentation without consent. The Mask Mandate is not an experiment or clinical trial; it is a school safety measure.[24] *See Bridges*, 2021 U.S. Dist. LEXIS 110382, 2021 WL 2399994, at *2. Recasting it as an unlawful human experiment is an irrational leap of logic.

IV. The State Claims

Although plaintiff is not entitled to preliminary injunctive relief based on her constitutional claims, the Court nonetheless had concerns for her daughter's health. Accordingly, based on some passing allegations in the Complaint, representations made at oral argument by plaintiff's counsel, and a subsequently submitted affidavit from Sarah's mother, the Court deemed the Complaint

24. The Complaint regrettably equates the Mask Mandate to the Nazi experiments. Plaintiff's counsel is admonished to avoid such irrational and incendiary language. *See* Fed. R. Civ. P. 11.

amended to assert two state claims: (1) for failure of the school district to afford her a "medical tolerance" exemption; (2) for failure of the school district to comply with the ADA.[25]

Plaintiff's affidavit details her failed efforts "to work with my daughter's school district to accommodate her medical need for an exemption from the mask requirement." Doe Aff. at § 2. It lays out a litany of problems Sarah has had to endure while she tried to comply with the School District's mask mandate last year. Principally, she could not "breathe with the mask on for prolonged periods," and had to use her asthma pump "many times" as "she struggle[d] to breathe." *Id.* at § 9. After school began, and the State's Mask Mandate became the law, Sarah's condition "got worse." She had become "dangerously underweight by the end of last year," her "anxiety and fear about not being able to breathe again returned and she was unable to keep any weight on." *Id.* at § 16.

After school began, and the school district denied her requests for relief, she got worse: "Her hair has started to fall out, and her attacks and migraines" returned. *Id.* at § 17. On September 27, 2021 "Sarah started having

25. The Court views the requirement that the School District must comply with the ADA as adopting the federal statute as state law, thereby raising a state claim. *See, e.g., Sensing v. Outback Steakhouse of Fla., LLC*, 575 F.3d 145 (1st Cir. 2009) (Massachusetts state civil rights act incorporates federal analysis). But since the ADA is a standalone federal statute, the Court also granted the plaintiff leave to amend her Complaint to directly invoke the Court's federal jurisdiction. This has yet to be done.

a lot of difficulty breathing" but "[t]he teachers and administrators were rude to her and dismissive, acting annoyed and saying things like 'I don't want to deal with this today.'" *Id.* §§ 18-19. When she got home her mother "was afraid she would wind up in the hospital again." *Id.* at § 20.

Her doctor had recommended a medical exemption, which the school district had not honored. Her mother stated in the affidavit that "[e]ven if we could just do a shield or mesh mask, I think her situation would improve." *Id.* at § 23.

The affidavit concludes by "pray[ing] for some relief from this Court" because "[m]y daughter's physical, emotional, and psychological health are suffering harm every day and I do not know what to do." *Id.* at § 24.

Primarily on the strength of this affidavit, the Court ordered a factual hearing to determine whether preliminary injunctive relief might be warranted on the state law claims. It believed it had the power to do this since it had ongoing federal jurisdiction over the litigation. *See* 28 U.S.C. § 1331. It did express concern, however, whether it should exercise supplemental jurisdiction over purely state law claims, which would seem to be the province of Article 78 review. *See Maniscalco* 2021 U.S. Dist. LEXIS 184971, 2021 WL 4344267, at *5-6. The Second Circuit has opined that, conceptually, district courts may have supplemental jurisdiction over an Article 78 claim, but that there are usually good reasons to decline exercising that jurisdiction. *See Carver v. Nassau Cty. Interim Fin. Auth.*, 730 F.3d 150, 155 (2d Cir. 2013) (citing

City of Chicago v. Int'l College of Surgeons, 522 U.S. 156, 164-68, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997)).

The Court nonetheless ordered the factual hearing but recognized that it might have to grapple with the question of jurisdiction if it concluded that plaintiff's medical condition warranted preliminary injunctive relief. However, the parties have advised the Court that they are engaging in settlement negotiations and have requested an adjournment of the hearing pending the conclusion of their negotiations. *See* Oct. 18, 2021 Mot. To Adj. Conf. Accordingly, the Court has adjourned the hearing to November 3, 2021. Presumably, the school district will consider the current health of Sarah and revisit the issue of whether she should be given either a medical exemption or some relief under the ADA.[26]

V. Coda

These are difficult times for school districts to comprehend and apply the morass of the Commissioner's regulation, the Commissioner's "determination," the CDC's recommendations and requirements, and all the guidelines and guidance affecting the application of the Mask Mandate. The School District is to be complimented for its willingness to give it another go in Sarah's case.

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26. To the extent that the School District asserted at oral argument that it relied on the CDC Guidance that children with asthma can wear masks, it should also be mindful that the CDC recommended that those with asthma "[d]iscuss with [their] healthcare provider if [they] have any concerns about wearing a mask." *Guidance for Wearing Masks: Help Slow the Spread of COVID-19*.

It obviously understands that medical conditions are not static and that an open-minded approach is in everyone's best interest. It also obviously realizes that serious concerns over the health and welfare of its student population in the face of the pandemic should be sensitively handled by the School District's administrators to obviate the need for its students' parents to initiate costly and protracted litigation.

Finally, the Court notes that the Mask Mandate is set to expire on November 25, 2021. The State will have the opportunity to assess the wisdom of transforming its current complex mix of its regulation, recommendations, guidance and guidelines into a simpler, more manageable format. Now that all school district personnel will likely be required to be vaccinated after the final decision in *Maniscalco* is rendered, it may also consider whether the current rigidity of its immutable "one size fits all" regulation is still warranted, or whether a more malleable approach, such as that adopted by Massachusetts or the other states in the second bucket, which recognize the statistical variations of diverse communities, might be more appropriate.[27]

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27. Currently, anyone over the age of 12 can get the vaccine. Approval for 5-to-11-year-olds to be vaccinated could come as early as November. *See Sharon LaFraniere & Noah Weiland, Pfizer Requests Nod to Vaccinate Children* 5 to 11, N.Y. Times, Oct. 8, 2021, at A1. Indeed, Dr. Anthony Fauci, Chief Medical Advisor to the President, noted that "it's entirely possible if not very likely that vaccines will be available for children from 5 to 11 within the first week or two of November." Humeyra Pamuk, *Fauci says vaccines for kids between 5-11 likely available in November*, Reuters (Oct. 24, 2021) https://www.reuters.com/business/healthcare-pharmaceuticals/fauci-says-vaccines-kids-between-5-11-likely-available-november-2021-10-24/.

The Court, of course, recognizes that it is not its province to usurp the function of the legislature, nor to base its decision on its own personal views. Its function is simply to apply the law of the land, which it has endeavored to do. But given the imponderables and the country's divisiveness over the issue of mask mandates for children it has decided to veer from the conventional format of the traditional legal opinion—to which it generally subscribes—in order to educate the public about the current state of reputable scientific studies and the various ways our states have addressed the problem. *See* Richard Posner, *Reflections on Judging* 11 (2013); *see also* Frederic Block, *Disrobed: An Inside Look at the Life and Work of a Federal Trial Judge* 1-4 (2012).

VI. Conclusion

For the all the foregoing reasons, plaintiff's motion for a preliminary injunction on her constitutional claims is denied, but the issuance of preliminary injunctive relief on her state law claims will be held in abeyance pending the resolution of the parties' settlement negotiations.

SO ORDERED.

/s/ Frederic Block
FREDERIC BLOCK
Senior United States District Judge

Brooklyn, New York
October 26, 2021