UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

VICKI DEMBIEC, DAVID DUNCAN, NICHOLAS NITTI, JOSHUA STONE, and DANIELLE WILDSTEIN, Plaintiffs, v. SCOTCH PLAINS-FANWOOD REGIONAL SCHOOL DISTRICT; SCOTCH PLAINS-FANWOOD BOARD OF EDUCATION; and DR. JOAN MAST, in her Official Capacity as Superintendent of Schools, Defendants.	Civil Action No. 20-cv-20188

BRIEF IN SUPPORT OF CROSS-MOTION TO DISMISS COMPLAINT AND IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

DOUGLAS M. SILVESTRO, ESQ.
The Busch Law Group LLC
450 Main Street
Metuchen, NJ 08840
(732) 243-9588
dsilvestro@buschlawgroup.com

DAVID B. RUBIN, ESQ.
David B. Rubin, P.C..
450 Main Street
P. O. Box 4579
Metuchen, New Jersey 08840
(732) 767-0440
rubinlaw@att.net

Co-Counsel for Defendants

David B. Rubin, Esq.
Douglas M. Silvestro, Esq.
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Appendix

Memorandum of Decision on Injunction, *CT Freedom Alliance, LLC, et al. v. State of Connecticut Department of Education, et al.*, Docket No. HHD-CV-20-6131803-S (Superior Court of Connecticut, November 2, 2020)

Introduction

The United States is presently facing a public health crisis of staggering proportions. Roughly 291,000 Americans died in battle over the entire four years of World War II.[1] In less than a year, over 340,400 Americans already have been killed by COVID-19, 17,722 in New Jersey alone[2], with casualties continuing to mount daily. "[T]he COVID-19 pandemic remains extraordinarily serious and deadly. And at least until vaccines are readily available, the situation may get worse in many parts of the United States." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 at *8 (November 25, 2020)(Kavanaugh, J. concurring).

As state and local governments across the country imposed restrictions on businesses and communal activities to slow the spread of this deadly disease, litigation proliferated in the courts challenging many of these measures. Most of these cases alleged unconstitutional interference with the plaintiffs' ability to operate their businesses, to conduct religious services or to gather together for other lawful activities. In other words, freedom *from* government restriction.

The lawsuit presently before this Court is different. Plaintiffs here do not seek freedom from government restriction to conduct their own lawful activities. To the contrary, they seek to restrict the

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[1] https://census.gov/history/pdf/wwi-casualties112018.pdf at 2.

[2] https://www.cdc.gov/nchs/nvss/vsrr/COVID19/index.htm (figures current as of January 19, 2021).

freedom of another party, the Scotch Plains-Fanwood Regional School District ("Scotch Plains-Fanwood" or "the District"), by directing what services it must provide the public, and how.

Plaintiffs contend that the District has infringed their children's fundamental constitutional right to a public education by instructing them remotely instead of in-person. They ask this Court to define what constitutes a minimally appropriate education for a New Jersey public school student, and to declare that in-person instruction is the only conceivable way to provide it.

As we will show, plaintiffs' claims on their face are barred by the *Burford* and *Pullman* abstention doctrines. Even if they were properly before the Court, plaintiffs have failed to demonstrate the criteria for issuance of a preliminary injunction, mainly because the fundamental constitutional right they rely on does not exist, and the measures under challenge here easily survive the highly deferential rational basis test.

Statement of Facts[3]

Scotch Plains-Fanwood serves approximately 5,500 students in Preschool to 12th grade from the Township of Scotch Plains and the Borough of Fanwood. The District has five elementary schools, two middle schools and one comprehensive high school.[4] Dr. Joan Mast is Superintendent of Schools.

[3] This recitation is drawn from the accompanying declaration of the Superintendent of Schools, Dr. Joan Mast.

[4] *See* https://www.spfk12.org/domain/42, last accessed on January 16, 2021.

On March 16, 2020,[5] Governor Murphy issued Executive Order 104, calling for schools to halt in-person instruction to slow the spread of COVID-19. On April 14th, he signed into law P.L. 2020, c. 27, codified at *N.J.S.A.* 18A:7F-9, authorizing inclusion of a "program of virtual or remote instruction" in New Jersey's minimum requirement of 180 school days per year if it "meets such criteria as may be established by the [Commissioner of Education.]" That legislation further provided:

> The commissioner shall define virtual and remote instruction and establish guidance for its use. The guidance shall provide school districts with information on:
>
> (1) providing instruction to students who may not have access to a computer or to sufficient broadband, or to any technology required for virtual or remote instruction;
>
> (2) the required length of a virtual or remote instruction day;
>
> (3) the impact of virtual or remote instruction on the school lunch and school breakfast programs;
>
> (4) the impact of virtual or remote instruction on the schedule for administering State assessments; and
>
> (5) such other topics as the commissioner deems necessary.

N.J.S.A. 18A:7F-9(d).

On June 26th, the State Department of Education ("the Department") issued a 104-page guidance document entitled, *The Road Back, Restart and Recovery Plan for Education*, requiring all schools to re-open for in-person instruction in September 2020 subject to numerous health and safety requirements. The "Road Back" plan stipulated that "schools and

[5] Unless otherwise indicated, all events occurred in 2020.

districts must implement policies that allow for social distancing within the classroom to the maximum extent practicable," which was to "be achieved by ensuring students are seated at least six feet apart." Districts also would be obligated to ensure that "all instructional and non-instructional rooms (e.g. bathrooms, common areas, and auditoriums) in school and district facilities comply with social distancing standards to the maximum extent practicable." Mast Dec., ¶¶ 12-13.

Dr. Mast describes in her declaration the frenzied planning and preparation that ensued over the next two months as the Department continued to issue new guidance to local districts. For example, after directing districts to plan for a return of all students in the fall, on July 24th the Department announced that it was allowing parents to choose remote instruction for the upcoming school year if they were uncomfortable sending their children back to school in-person. This required the District to redo its planning to accommodate both in-person and virtual learning, with school starting just over a month away. Mast Dec., ¶¶ 14-16.

On July 26th, the District sent a letter to the community detailing the results of its restart survey and outlining the ongoing local reopening planning process. On July 29th, the Department released still more guidelines about screening, personal protective equipment, and the appropriate response to symptomatic students in schools. Mast Dec., ¶ 17.

On August 2nd, the District sent another letter to the community, updating its plans for the reopening of school. In order to address

the safety mandates and recommendations of "The Road Back," the District proposed a hybrid model of instruction whereby students would be assigned to different cohorts attending school on different days to comply with the State's requirements for student separation and capacity limits. Student cohorts who were not in-person on a given day would be provided with instruction virtually. Mast Dec., ¶ 19.

The State issued still more guidance on August 3rd, including a checklist that districts were required to satisfy prior to reopening in September. The checklist required, among other things, that districts "[e]nsure that students are seated at least six feet apart within the classroom," and "that indoor facilities have adequate ventilation, including by: maintaining operational heating and ventilation systems where appropriate; ensuring that recirculated air has a fresh air component; opening windows if A/C is not provided; and maintaining filters for A/C units according to manufacturer recommendations." Mast Dec., ¶ 20.

On August 7th, the District released a 58-page reopening guidance document and a 5-page FAQ, as well as a parent survey asking whether they planned to opt for the hybrid or all-virtual instructional models. Virtual meetings were held on August 11th and 12th to inform parents of the details of the District's restart plan that had been developed as of that time. Mast Dec., ¶¶ 21-22.

On August 13th, less than a month before school was scheduled to begin, Governor Murphy issued Executive Order 175, allowing districts to delay the re-opening of school if certain safety protocols could not be met. District superintendents were also required to certify

whether their respective districts were compliant with the State's extensive COVID-19 protocols, including that students and staff would be "socially distant" by at least six feet from each other throughout the school day. As of that date, Dr. Mast was unable to certify that the District would meet those requirements by September. Mast Dec., ¶ 23.

With the disease continuing to spread through Scotch Plains, Fanwood and the surrounding communities, Dr. Mast worked with the Board of Education on additional steps to ensure that school facilities could safely accommodate in-person instruction at the earliest possible point. A letter was sent to the school community on August 14th, advising that the District would remain all-virtual at the opening of school in September and would undertake a complete review of its facilities to ensure safety. The Executive County Superintendent of Schools approved the re-opening plan and copies of the District's August 7th Restart Plan were posted on the District's website, along with additional updates on August 18th. Mast Dec., ¶¶ 24-27.

Another letter to the community was sent on August 23rd, this time detailing the specific steps the District would undertake to review and update its facilities, as well as the reasoning behind the decision to remain all-virtual for the time being. The letter also included a detailed timeline of events and actions taken by the Board and administration to date related to the ongoing pandemic, and an FAQ regarding the reopening plan. A virtual town hall meeting was conducted on August 25th to discuss the virtual-only instruction and

reopening plans of the District. All members of the public were invited to attend and participate in the meeting. Mast Dec., ¶¶ 28-29.

At its August 27th public meeting, the Board retained the services of EI Associates, a mechanical engineering firm, to conduct a review of the District's HVAC systems to improve the air quality of all of the District's schools. At another meeting on September 10th, the Board engaged Environmental Safety Management Corporation (ESMC) to inspect all of the District's schools and to collect data on HVAC flow measurements throughout the classrooms. The same day, the District released another FAQ to the public regarding the updated Restart and Reopening plan. Mast Dec., ¶¶ 30-31.

Initial facilities reports by EI Associates and ESMC were presented to the Board at another public meeting on September 30th. According to the reports, some of the classrooms and other common spaces in each of the District's schools had poor airflow, which could greatly increase the likelihood that the virus could spread amongst students and staff assigned to those rooms. The reports indicated that each of the schools required either maintenance or structural changes to ensure the safe return of students and staff. Mast Dec., ¶ 34

A letter was sent to the District community on October 8th summarizing the findings of the facility review reports and providing an update on the proposed phase-in of hybrid instruction. District schools remained closed to in-person education while the school facilities were professionally reviewed and necessary upgrades were made. The same day, the District issued a new survey for parents to determine how many students would be selecting in-person, hybrid

learning or choosing virtual-only instruction. Of those who responded to the survey, approximately 75% of families indicated a desire to send their students for in-person, hybrid instruction. Mast Dec., ¶¶ 35-37.

On October 22nd, another letter was sent to the District community providing further details about the recommendations contained in the facility review reports, summarizing the progress to date and confirming the new schedule for the implementation of in-person, hybrid instruction for the various grade levels in the District.

Students of all grades (PreK-12) who were placed in self-contained special education classes through their Individual Education Plans (IEPs) began receiving in-person instruction on September 21st. In-person instruction for students with one-to-one aides according to their IEPs began on October 7th. Students in self-contained programs and those with individual aides in grades PreK-8 were given the option of in-person instruction five days per week on those dates due in part to their programs' small class sizes but also because these students are the most educationally vulnerable population in the District.

Students in self-contained programs and students with individual aides in grades 9-12 were given hybrid instruction as of those dates, with the option of increasing the amount of in-person instruction from two to four days per week as of November 9th. In-person education for all other Preschool students beginning on October 22nd, for Kindergarten and 1st Grade students on October 26th, and for 2nd through 5th grade students on November 9th all utilizing the hybrid, alternating cohort model. Students in grades 6 through 12 were

scheduled to begin hybrid instruction on November 16th. Mast Dec. ¶¶ 38-39.

On November 15th, after consulting with local health officials and the District's School Physician, Dr. Susan Kaye, regarding the increasing number of COVID-19 cases in Scotch Plains and the surrounding areas, Dr. Mast made the determination that a return to virtual instruction for all District students was required to ensure the health and safety of the students, staff and community. All of the informed health professionals with whom Dr. Mast spoke at the time agreed that the number of positive COVID-19 cases would only continue to increase during, and as a result of the upcoming holidays. Accordingly, she concluded that the District should not continue with the phasing-in of in-person instruction and that all students currently attending school in-person should return to virtual instruction and that most students would remain virtual until mid-January 2021. Mast Dec., ¶ 41.

At another public Board meeting on November 19th, Dr. Kaye gave a presentation regarding the District's status with respect to the ongoing pandemic and the local community, along with related updates by the Board's administration and committees. Beginning on December 15th in-person, hybrid instruction did begin for some of the District's special education students in PreK through Grade 8, as they were the most educationally vulnerable population in the District. Beginning on December 15th, in-person instruction was provided again for students in grades PreK-8 who were either placed in self-contained special education programs or who had one-to-one aides according to their

IEPs. In-person instruction for these students continued until the District's Winter Break began on December 23rd. Mast Dec., ¶¶ 42-44.

At a subsequent public meeting of December 17th, the Board and Dr. Mast reaffirmed their intent to reopen the schools for hybrid, in-person instruction in mid-January 2021. At that meeting, Richard Lynch of ESMC gave a presentation on the status of the District's facilities. Mast Dec., ¶ 45.

On December 22nd, plaintiffs filed their complaint in this matter. The same day, the State issued updated guidance regarding the reopening of schools for in-person instruction, including a color-coded "COVID-19 Regional Risk Matrix" informing schools when they should consider in-person or virtual instruction. Regions identified as "yellow" were deemed "Moderate Risk" and districts in those regions were advised to "consider a mixture of remote and/or hybrid learning approaches, and/or fully remote learning." Regions identified as "orange" were deemed "High Risk" and districts there were advised to "[c]onsider implementing fully remote learning." Regions identified as "red" were deemed "Very High Risk" and districts there were recommended not only to consider, but to actually implement "fully remote learning." Mast Dec., ¶ 46.

For at least the past three months, Scotch Plains-Fanwood has been located in a region identified as "orange" or "High Risk." As directed, the District considered whether to implement fully remote learning and ultimately chose to go that route on a temporary basis. On December 23rd, Dr. Mast sent a letter to the school community confirming what had been discussed at the Board meeting the week

before; that the District would be returning to a hybrid, in-person instruction schedule in mid-January 2021. Mast Dec., ¶ 47-49.

As promised, the District resumed hybrid instruction for students in grades K-6 on January 14, 2021, and for students in grades 7-12 on January 19, 2021.

Argument

Point I

The Complaint Should Be Dismissed On Grounds of Abstention.

The New Jersey Constitution entitles all school-age children to a "thorough and efficient" free public education. *See N.J. Const. of 1947*, art. VIII, § 4, para. 1 ("The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years."). What constitutes a "thorough and efficient" education for students attending New Jersey' nearly 600 separate school districts has been the focus of nearly 50 years of litigation before the New Jersey Supreme Court starting with *Robinson v. Cahill*, 62 N.J. 473, 515, 303 A.2d 273 (1973) and continuing through more than 20 decisions in *Abbott v. Burke*. *See*, most recently, *Abbott v. Burke*, 241 N.J. 249, 227 A.3d 850 (April 6, 2020).

Along the way, the New Jersey Supreme Court staked out the parameters of a minimally sufficient public education under the "thorough and efficient" clause:

> At its core, a constitutionally adequate education has been defined as an education that will prepare public school children for a meaningful role in society, one that will enable them to compete effectively in the economy and to

> contribute and to participate as citizens and members of their communities. *See* [*Abbott v. Burke*, 100 N.J. 269, 280-81 495 A.2d 376 (1985)] noting that the Constitution requires "that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market" (citing [*Robinson v. Cahill*, 62 N.J. 473, 515, 303 A.2d 273 (1973)]; *Landis v. Ashworth*, 57 N.J.L. 509, 512, 31 A.1017 (Sup.Ct. 1895)(stating that a constitutionally adequate education must be "capable of affording to every child such instruction as is necessary to fit it for the ordinary duties of citizenship").

Abbott v. Burke, 149 N.J. 145, 166-67, 693 A.2d 417 (1997). In furtherance of that mandate, the Legislature and the Department have spent decades defining and redefining the specific components of a "thorough and efficient" education.

New Jersey education law, in its present form, requires the Commissioner of Education to "develop and establish . . . efficiency standards which define the types of programs, services, activities, and materials necessary to achieve a thorough and efficient education." *N.J.S.A.* 18A:7F-46(a). The State Board of Education has, in turn, approved "New Jersey Student Learning Standards," defined as

> standards adopted by the State Board of Education on May 1, 1996, and as thereafter revised by the State Board, and the Common Core State Standards adopted by the State Board on June 16, 2010, and as thereafter revised by the State Board, that describe the knowledge and skills all New Jersey students are expected to acquire by benchmark grades in the following areas: English language arts; 9 mathematics; science; social studies; visual and performing arts; comprehensive health and physical education; world languages; technology; and 21st career life and careers. *The standards are established for the provision of a thorough and efficient education pursuant to N.J.S.A. 18A:7F-46* and as a basis for the evaluation of school districts in accordance with N.J.A.C. 6A:30.

N.J.A.C. 6A:8-1.3 (emphasis added).

Clearly, New Jersey has a paramount interest in determining for itself the components of a baseline education for its school-age children, and exhaustive efforts have been devoted to a definition sufficient to withstand constitutional scrutiny. There is nothing in the current standards to suggest that some period of remote instruction would deprive students of a "thorough and efficient" education. And as noted above, the Legislature, the Department's Road Back manual, and the State's color-coded matrix explicitly contemplate remote instruction in certain circumstances.

The New Jersey courts have not weighed in on whether remote instruction infringes students' constitutional right to a minimally sufficient education. Instead of exhausting a readily available state-level administrative remedy with judicial review to advance their cause, however, plaintiffs instead ask a federal court to superimpose its own definition.

For the following reasons, defendants move to dismiss the complaint under Rule 12(b)(1) on grounds of *Burford* abstention. Alternatively, we seek postponement of any adjudication of this matter under Rule 12(b)(6) on grounds of *Pullman* abstention until plaintiffs exhaust their available state-level administrative and judicial remedies.[6]

[6] While there is some dispute as to whether a *Burford* abstention argument should be raised under Rule 12(b)(1) or Rule 12(b)(6), *see M.D. v. Perry*, 799 F.Supp.2d 812, 715 n.3 (S.D. Tex. 2011), courts have often "favor[ed] Rule 12(b)(1) when evaluating *Burford* abstention." *Id. Pullman* abstention is analyzed under Rule 12(b)(6). *See Trump for President v. Bookvar*, 2020 WL 4920952 at *5-6 (W.D. Pa. August 23, 2020).

Burford Abstention

In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the Supreme Court held that federal courts should abstain from exercising their jurisdiction when it appears appropriate to give a state court the opportunity to determine important questions of state law which may avoid the need to address a federal constitutional issue. *Chiropractic America. v. Lavecchia*, 180 F.3d 99, 104 (3d Cir. 1989)(citing *Burford*, 319 U.S. at 333, n. 29). This doctrine, known as *Burford* abstention provides:

> Where timely and adequate state court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar'; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'

New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989)(quoting *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 814 (1976)).

> The *Burford* abstention doctrine applies where a case involves both difficult, complex questions of state law and administration of a state law by a scheme of state administrative agencies. When this is the case, involvement by the federal courts may cause confusion, and disrupt the state's efforts to establish a coherent, uniform policy to solve a complex local problem. The danger which *Burford* abstention avoids is the prospect of a case being decided differently depending on whether it was heard by state officials and judges or by federal judges. In such a situation, a federal court could potentially undermine the state's administrative process.

F.D.I.. v. Sweeney, 136 F.2d 216, 219 (1st Cir. 1998). *See also Motor Club of Am. V. Weatherford*, 841 F.Supp. 610, 623 (D.N.J. 1994).

i. Timely and Adequate State Court Review is Available

The first step in the *Burford* abstention analysis is whether "timely and adequate state-court review" is available. *Chiropractic America*, 180 F.3d at 104 (citing *Riley v. Simmons*, 45 F.3d 764, 771 (3d Cir. 1995)). "Only if a district court determines that such review is available, should it turn to the other [abstention factors]." *Id.*

The Commissioner of Education has *quasi*-judicial power to adjudicate all "controversies and disputes arising under the school laws," *N.J.S.A.* 18A:6-9, and Department regulations afford the opportunity for emergent relief in appropriate cases. *See N.J.A.C.* 6A:3-1.6 ("Emergent relief or stay"). If an appeal is filed, the Commissioner may address the issue or may submit the matter to the Office of Administrative Law ("OAL") for an initial decision with the Commissioner having the final say. *N.J.A.C.* 6A:3-1.11. Any party dissatisfied with the Commissioner's determination may appeal as a matter of right to the Appellate Division of the Superior Court. *N.J. Ct. R.* 2:2-3(a)(2).

Further, under Rule 2:9-2, the usual briefing and oral argument schedule "may be accelerated on the court's own motion or on the motion of any party," and under Rule 2:9-7, "[o]n or after the filing with the Appellate Division of a notice of appeal or of a notice of motion for leave to appeal from a state administrative agency or officer, a motion for ad interim relief or for a stay of the decision, action or rule under review shall be made in the first instance to the agency whose order is appealed from and, if denied, to the Appellate Division." Additionally, pursuant to Rule 2:5-5(b), the Appellate Division may permit supplementation of the record on appeal, including the

ability to present live witnesses before a designated Superior Court judge.

Plainly, there is timely and adequate state court review available to any party who claims that a public school student is not receiving a minimally constitutional public education.

ii. Abstention Under Both Burford Prongs is Proper

In *New Orleans Public Service*, the Supreme Court developed a three-factor test to employ when analyzing the second prong of *Burford* abstention. Under this test, a court must determine: (1) "whether the particular regulatory scheme involves a matter of substantial public concern; (2) 'whether it is 'the sort of complex, technical regulatory scheme to which the *Burford* abstention doctrine is usually applied,' *Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 534 (3d Cir. 1988); and (3) whether federal review of a party's claims would interfere with the state's efforts to establish and maintain a coherent regulatory policy." *Chiropractic America*, 180 F.3d at 105 (citing *New Orleans Pub. Serv.*, 491 U.S. at 361)).

Chiropractic America involved regulations aimed at reducing the cost of automobile insurance in New Jersey. *Id.* The administration of public education is certainly of no less importance than controlling the cost of automobile insurance. The regulatory scheme involves a matter of substantial public concern which transcends any dispute as to a particular student's education. Federal review of this case would interfere with the State's efforts to establish and maintain a coherent regulatory policy in an area "that has been typically left to the states to regulate." *Chiropractic America*, 180 F.3d at 107. For this reason, plaintiffs'

concerns should first be addressed by the Commissioner through the administrative process, not by a federal court judge.

Pullman Abstention

When a federal court is presented with both a federal constitutional issue and an unsettled issue of state law whose resolution might narrow or eliminate the federal constitutional question, abstention may be justified under principles of comity in order to avoid "needless friction with state policies." *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496, 500 (1941). *See also Chez Sea III Corp. v. Township of Union*, 945 F.2d 628, 630-31 (3d Cir. 1991. This doctrine is known as *Pullman* abstention.

The first step in the *Pullman* analysis is to determine whether three special circumstances exist:

> (1) Uncertain issues of state law underlying the federal constitutional claims brought in federal court;
>
> (2) State law issues amenable to a state court interpretation that would obviate the need for, or substantially narrow, the scope of adjudication of the constitutional claims;
>
> (3) A federal court's erroneous construction of state law would be disruptive of important state policies.

D'Iorio v. County of Delaware, 592 F.2d 681, 686 (3d Cir. 1978), *overruled on other grounds*, *Kershner v. Mazurkiewicz*, 670 F.2d 440, 448 (3d Cir. 1982)(in banc). If the district court finds that all three of the "special circumstances" are present, it must then make a discretionary determination as to whether abstention is appropriate based on the weight of these criteria and other relevant factors. *Id.*

This case undoubtedly presents issues of state law underlying a federal constitutional claim. The New Jersey Legislature, the New

Jersey Supreme Court and the Department have pegged the "thorough and efficient" education guaranteed by the State Constitution as the minimum level of opportunity to which every school-age child is entitled. Plaintiffs contend that in-person instruction is a necessary component of a "thorough and efficient" education, but there are no New Jersey court decisions, legislative enactments or administrative regulations explicitly addressing the question.

Were plaintiffs to avail themselves of the administrative remedy readily available to them before the Commissioner, there would be an opportunity for State education officials and, ultimately, the New Jersey courts, to determine whether defendants' actions deny plaintiffs' children a "thorough and efficient" education. That determination would obviate the need for federal review or, at least, narrow or more precisely frame the issues to be decided.

Finally, there is high likelihood that an erroneous interpretation by this Court of what constitutes a "thorough and efficient" education would disrupt important state policies. Plaintiffs have not suggested there is anything unique about Scotch Plains-Fanwood insofar as the definition of a "thorough and efficient" education is concerned. So, a holding by this Court that in-person instruction is a necessary component would preempt a highly complex state regulatory structure affecting all school districts in New Jersey.

For all these reasons, the *Burford* and *Pullman* abstention doctrines require that this case be dismissed or, at the very least, stayed until plaintiffs exhaust their state-level remedies.

Point II

Plaintiffs Have Not Established The Criteria For A Preliminary Injunction.

On an application for a preliminary injunction, the moving party must generally show (1) a reasonable probability of eventual success in the litigation and (2) that the movant will be irreparably injured if relief is not granted. While the burden rests upon the moving party to make these two requisite showings, the district court should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest. *In re Arthur Treacher's Franchise Litigation*, 689 F.2d 1137, 1143 (3d Cir. 1982).

Injunctive relief is an extraordinary remedy, which should be granted only in limited circumstances. *Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988). The moving party "'must demonstrate *both* a likelihood of success on the merits, and the probability of irreparable harm if relief is not granted.'" *Frank's GMC Truck Center*, 847 F.2d at 102 (quoting *Morton v. Beyer*, 822 F.2d 364, 367 (3d Cir. 1987)). A preliminary injunction cannot be granted where "either or both of these prerequisites are absent." *Id.* (quoting *In Re Arthur Treacher's Franchise Litigation*, 689 F.2d at 1143)).

Likelihood of Success

A. Substantive Due Process

Plaintiffs contend that there is a fundamental federal right to a public education. ("The Due Process Clause protects a fundamental

right to a basic level of literacy.") Pl. Brf. at 15. That argument is foreclosed by Supreme Court and Third Circuit precedent. The Supreme Court, in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35 1973), held that there is no fundamental constitutional right to a public education. The Third Circuit has so interpreted *Rodriguez* in numerous decisions, *see, e.g., Bowers v. National Collegiate Athletic Ass'n*, 475 F.3d 524, 553 (3d Cir. 2007)(holding "there is no fundamental right to public education," citing *Rodriguez*),[7] and the Judges of our District Court have uniformly reached the same conclusion. *See, e.g.,* now-Chief Judge Wolfson's observation in *M.G. v. Crisfield*, 547 F.Supp.2d 399, 408 (D.N.J. 2008), that "there is no fundamental right to education protected under the federal constitution,"

Plaintiffs fail to mention *Rodriguez*, much less distinguish it. Instead, they rely entirely on two irrelevant decisions. The first is *Washington v. Glucksberg*, 521 U.S. 702 (1997). *Glucksberg* involved the constitutionality of a statute banning assisted suicide and had nothing to do with the right to a public education. The closest the Court came to any mention of education at all was in a passage listing examples of some "liberty" interests protected by the Due Process Clause:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S.

[7] *See also Brian B. ex rel. Lois B. v. Com. of Pennslvania Dept. of Educ.*, 230 F.3d 582, 586 (3d Cir. 2000); *Philadelphia Police and Fire Ass'n for Handicapped Children, Inc. v. City of Philadelphia*, 874 F.2d 156, 165 (3d Cir. 1989); *Shaffer v. Board of School Directors of Albert Gallatin Area School Dist.*, 687 F.2d 718, 720-21 (3d Cir. 1982).

> 1, 87 S.Ct. 1817, 18 L.Ed. 1010 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *to direct the education and upbringing of one's children, Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).

521 U.S. at 720 (emphasis added).

Glucksberg does outline the analytical framework for substantive due process claims generally. But even if public education as a fundamental right were an open question in this Circuit (which there isn't), *Glucksberg* would require plaintiffs to establish that it is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." 521 U.S. at 720-21. Plaintiffs also would be required to provide a "careful description of the asserted fundamental interest." *Id.* Plaintiffs have not done so, and history is not on their side. *See, e.g.*, Robert N. Gross, *Public v. Private: The Early History of Social Choice in America*, at 2 (2018)(explaining that public education did not become common in the United States until the mid-19th century).

Another reason for rejecting public education as a fundamental constitutional right is that substantive due process rights generally protect individuals from overly intrusive government action. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003)(same-sex sexual relations); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)(abortion); *Griswold v. Connecticut*, 381 U.S. 479 (contraception). Substantive due process "refers to certain actions that the government may not engage in" and "[g]enerally speaking . . . protects an individual's fundamental rights to liberty and bodily

autonomy." *C.R. v. Eugene School Dist. 4J*, 835 F.3d 1142, 1154 (9th Cir. 2016)(citations and quotation marks omitted).

As the Supreme Court observed in *Glucksberg*, those liberties undoubtedly include parents' right to choose a public or private education for their children. *See Meyer, supra; Pierce, supra.* But "once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the last, substantially diminished." *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005). By contrast to rights against government interference, plaintiffs' substantive due process claim here would impose an affirmative obligation on the government to educate their children – and to educate them in a particular way.

This cuts against the grain of well-established precedents holding that the manner of providing public education is "generally committed to the control of state and local authorities." *Id.* Plaintiffs' proposed constitutional right would unsettle "local autonomy" over public education, which the Supreme Court has recognized as "a vital national tradition." *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995)(citation omitted). *See also Horne v. Flores*, 557 U.S. 433, 448 (2009).

The other case plaintiffs rely on for their purported fundamental right is the majority opinion of a split Sixth Circuit panel in *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020), *vacated en banc without decision*, 958 F.3d 1216 (6th Cir. 2020), the first and only federal appellate decision to find even *some* substantive due process

entitlement to a public education. *Gary B.* is of no help to plaintiffs, for several reasons. To begin with, it isn't even precedential in the Sixth Circuit because it was vacated by the *en banc* court. Even if it were controlling there, the panel was not addressing remote instruction but the deprivation of students' opportunity to achieve a minimal level of literacy. More importantly, the New Jersey District Court is bound by the Third Circuit's understanding of *Rodriguez* which flatly rejects education as a fundamental education right.

Even if there were no binding Third Circuit precedent and this Court were free to adopt the reasoning of *Gary B.* (which it isn't), that case is distinguishable from what's presented here. The plaintiffs in *Gary B.* alleged that "the conditions in their schools are so bad – due to the absence of qualified teachers, crumbling facilities, and insufficient materials – that those schools fail to provide access to literacy." 957 F.3d at 624. No such claim can be made here as instruction has been provided with competent teachers and an up-to-date, challenging curriculum, albeit through the unconventional remote format.

Furthermore, assuming for argument's sake some minimal amount of public education is a fundamental constitutional right, plaintiffs have offered no evidence or argument to support their position that a temporary period of remote instruction violates that right, and there is authority to the contrary. *See, e.g., Vidovic v. Mentor City Sch. Dist.*, 921 F. Supp.2d 775, 793 (N.D. Ohio)(online instruction rather

than in-person instruction not necessarily a violation of a child's right to an education).

Similar reasoning motivated a Rhode Island federal court, in *A.C. v. Raimondo*, 2020 WL 6042105 (D.R.I. October 13, 2020), to reject a claim of a fundamental constitutional right to civics education, distinguishing *Gary B.* thusly:

> {T]here is a difference. The examples cited by the court in *Gary B.* to illustrate why literacy is imperative for citizen participation in a functioning democracy — voting, taxes, jury duty, even reading road signs — are all indeed "inaccessible without a basic level of literacy" — but they are not wholly inaccessible without civics education. *See* 957 F.3d at 652-53; see also *id.* at 649 recognizing "every meaningful interaction between a citizen and the state is predicated on a minimum level of literacy, meaning that access to literacy is necessary to access our political process"). So, while it is clearly desirable — and even essential . . . for citizens to have a deeper grasp of our civic responsibilities and governing mechanisms and American history, this is not something the U.S. Constitution contemplates or mandates.

A.C., *supra*, at *17. So too, here, plaintiffs have offered no evidence that remote instruction, with all its limitations, is incapable of equipping students with the "minimum level of literacy" at issue in *Gary B.*

Another U.S. Supreme Court precedent completely ignored by plaintiffs is *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11 (1905), the seminal case routinely looked to by federal courts analyzing government curtailment of constitutional freedoms during a public health crisis, including the COVID-19 pandemic. *See, e.g., South Bay United Pentecostal Church v. Newsom,* 140 S.Ct. 1613 (May 29, 2020)(Roberts, C.J., concurring in denial of application for injunctive relief); *Brach v. Newsom*, 2020 WL 6036764 at *2-3 (C.D.

Cal. August 21, 2020); *Hernandez v. Grisham*, 2020 WL 7481741 at *49-50 (D.N.M. December 18, 2020; *In re Abbott*, 956 F.3d 696, 704 (5th Cir 2020); *Elim Romanian Pentecostal Church v. Pritzker*, 2020 WL 3249062 at *5 (7th Cir. June 16, 2020).

Jacobson, and decisions relying on it over the years, recognize government officials' authority to restrict the exercise of federal rights in the face of a *bona fide* health crisis, and the deference to be accorded their decisions about what measures are reasonably necessary to protect the public. As Chief Justice Roberts put it in *South Bay*, the Constitution "principally entrusts the safety and the health of the people to the politically accountable officials of the States." 140 S.Ct. at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief).

"*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency." *Abbott, supra*, 956 F.3d at 786 (emphasis in original). As long as there is no "plain, palpable invasion of rights secured by the fundamental law," the judicial inquiry is limited to whether the measure in question has a "real or substantial relation" to a legitimate public health objective, *Jacobson*, 197 U.S. at 31 -- essentially what our courts now call the rational basis test. As we will show, plaintiffs have not offered sufficient evidence or argument to overturn defendants' actions on that basis either.

Under the rational basis test, a challenged government action "need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for

correction, that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955). It cannot seriously be disputed that school districts have a legitimate interest in protecting the lives of their students and staff, and that remote instruction is intended to advance that interest.

Plaintiffs heavily rely on scientific "evidence" ostensibly proving that returning to school is so safe, and remote instruction so harmful, that anything less than full-time in-person instruction cannot be justified even under the deferential rational basis test. We say "evidence" because what plaintiffs have presented has been largely discredited in the scientific and medical community.

The cornerstone of plaintiffs' application is the expert opinion of Dr. Knut Wittkowski, whom they hold out as a dispassionate scholar with ties to The Rockefeller University, merely rendering an objective scientific opinion. In reality, he is anything but. The Court need look no further than an article he cites in his own declaration to conclude that he is an outspoken advocate opposing all government measures to slow the spread of COVID-19. *See Stand Up for Your Rights, says Bio-Statistician Knut M. Wittkowski*, American Institute for Economic Research, April 6, 2020, https://www.aier.org/article/stand-up-for-your-rights-says-bio-statistican-knut-m-wittkowski/ ("*Stand Up for Your Rights*").

Since early in the pandemic, Dr. Wittkowski has been a vigorous proponent of keeping schools open, not just because they were safe but "to keep . . . kids mingling to spread the virus to get herd immunity

as fast as possible[.]" *Stand Up for Your Rights*. This stands in stark contrast to his claim, in his declaration that "[t]here is no evidence that students transmit COVID-19 to teachers or adults in a school setting or elsewhere in the community." Wittkowski Dec., ¶ 9.

Dr. Wittkowski also opposes "[m]itigation strategies such as mask wearing[,]" *id.*, ¶ 11, and recently testified to that effect in an unsuccessful challenge to Connecticut's requirement of mask-wearing in school. As the judge in that case summarized Dr. Wittkowski's testimony, he "believes that letting the disease spread will get rid of it the fastest. Indeed, his view is 'let it accelerate' – while protecting the vulnerable as much as we can." *See* Memorandum of Decision on Injunction, *CT Freedom Alliance, LLC, et al. v. State of Connecticut Department of Education, et al.*, Docket No. HHD-CV-20-6131803-S at 5 (Superior Court of Connecticut, November 2, 2020)(Moukawasher, J.).[8]

Dr. Wittkowski's opinions are so extreme and controversial that The Rockefeller University was prompted to issue a public statement distancing itself from his work: "The opinions that have been expressed by Knut Wittkowski, discouraging social distancing in order to hasten the development of herd immunity to the novel coronavirus, do not represent the views of The Rockefeller University, its leadership, or its faculty. Wittkowski was previously employed by Rockefeller as a biostatistician. He has never held the title of professor at Rockefeller." *See* https://www.rockefeller.edu/news/27872-

[8] A copy of the court's decision is appended to this brief.

rockefeller-university-releases-statement-concerning-dr-knut-wittkowski/.

Even assuming plaintiffs presented some credible scientific or medical evidence to support their position (which they haven't), defendants are under no obligation to rebut it in this forum because, under the rational basis test, their actions are "not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.'" *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 128 (6th Cir. 2020)(quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). "Second-guessing by a court is not allowed." *Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004). *See also New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)("The judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . .")

Nevertheless, for completeness of the record, we have provided the Court with the declaration of Scotch Plains-Fanwood's school physician, Dr. Susan Kaye, who squarely refutes Dr. Wittkowski's assertions. Dr. Kaye explains that neither New Jersey nor "the Northeast" have "reached herd immunity," as Dr. Wittkowski claims, Kaye Dec., ¶¶ 10-11. According to data reported to the New Jersey Department of Health and listed on the State's COVID-10 Dashboard as of January 15, 2021, there have been at least 111 COVID-19 outbreaks directly associated with the spread of the virus in schools within the

State, resulting in at least 564 cases of infection. Kaye Dec., ¶ 13. See https://COVID19.nj.gov/forms/datadashboard.

According to the NJ COVID-19 Dashboard, as of January 15, 2021, Union County has a lab confirmed positive rate of 7,585 per 100,000 residents, the third highest rate in the State. Just since Dr. Wittkowski signed his declaration on December 15, 2020, New Jersey recorded an additional 144,392 confirmed cases of COVID-19 and 2,255 confirmed deaths as of January 15, 2021. Kaye Dec., ¶ 15.

In the opinion of Dr. Kay and the majority of medical professionals at the Federal, State and local level, the use of virtual instruction and closing of schools has been a necessary part of strategy to prevent and slow the spread of the virus. Kaye Dec., ¶ 6. The District has relied heavily on the New Jersey Department of Health COVID-19 Public Health Recommendations for Local Health Departments for K-12 Schools, last updated December 22nd, in making decisions regarding whether and when to re-open schools for in-person instruction. Kaye Dec., ¶ 7. Plaintiffs have offered no medical, scientific or other evidence to refute the COVID-19 statistics reported by the State of New Jersey or the guidance issued by the New Jersey Department of Health. Kaye Dec., ¶ 8.

Plaintiffs also rely on studies that have little to do with New Jersey and, least in part, are mischaracterized. For example, plaintiffs mention a June 2020 French study supposedly finding that "infected children did not spread the virus to other children or to teachers or staff." Pl. Brf. at 14. But that's not what the study says. At most, it opined that the disease may be spread at a lower

rate among elementary students, but older children in middle and high school spread it the same as adults.

Plaintiffs point to other school districts in Clark, Mountainside, Lakewood, Hoboken and Holmdel, allegedly providing in-person instruction as evidence that Scotch Plains is acting irrationally. New Jersey has roughly 584 operating school districts, not counting charter schools and other non-traditional schools. Plaintiffs refer to only several, which they have selectively cherry-picked. Of those examples, only two, Clark and Mountainside, are located with Scotch Plain-Fanwood in Union County and are not necessarily reflective of Union County's 23 school districts.

Undermining plaintiffs' position even further, their descriptions of instruction in place at the districts they cite as comparable are based on inaccurate or outdated information. As Superintendent Mast explains:

Mountainside

> The Mountainside School District is a K-8 district that is comprised of only two (2) school buildings. Mountainside's high school students attend the Governor Livingston High School, which is part of the Berkley Heights Public School District. Despite plaintiffs' statements to the contrary, Mountainside has not had its students in school every day this school year, and has utilized all-virtual instruction for both of its schools as recently as the week of January 4 through January 8, 2021. Additionally, Governor Livingston High School has implemented a combination of hybrid and all-virtual instruction for its students throughout the 2020-2021 school year and is projected to remain all-virtual until at least January 25, 2021, at which time they will implement a hybrid schedule.

Clark

> The Clark School District has also been on all-virtual instruction for its students since the beginning of January 2021 and will remain so through at least January 22, 2021.

> Clark's decision to close its schools and keep them closed for at least the majority of this month was based on "the rising number of [COVID-19] cases" and "the strong recommendation of our Local Health Officer."
>
> Hoboken
>
> The Hoboken School District has closed its schools and implemented all-virtual instruction several times so far this school year, including during the first week of school and the weeks following the Thanksgiving and Winter breaks. Hoboken was the only school district in all of Hudson County to offer a five-day, in-person model for students, but even they could not maintain this model continuously during the current school year.
>
> Holmdel
>
> Holmdel, a district consisting of only four school buildings, was closed and fully-virtual for extended period of times this school year. According to a letter from Dr. Lee Seitz, Holmdel's Interim Superintendent of Schools, dated December 4, 2020, Holmdel had at that time thirty-two students and staff members who had tested positive for the virus, requiring the district to remain fully-virtual through at least the middle of that month. Prior to closing schools completely following the Thanksgiving break, Holmdel had only implemented a hybrid schedule for students, not the five-day schedule cited by Plaintiffs. Holmdel has implemented the five-days of in-person instruction option for its students for less than a month.

Mast Dec., ¶¶ 51-55.

This is not a case where students are being deprived of all meaningful education. Scotch Plains-Fanwood is offering all the students in this case an education, albeit remotely. The District's decisions regarding in-person and remote instruction have been made thoughtfully and transparently, with numerous opportunities for public input. Plaintiffs are asking the Court to override a highly nuanced deliberative process and determine for itself what format of instruction the District must provide. That is not the business of the federal courts. *See Fields v. Palmdale Sch. Dist.*, *supra*, 427 F.3d at

1206, observing that the *manner* of providing public education is "generally committed to the control of state and local authorities[,]" and *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995), respecting the tradition of "local autonomy" in public education.

B. Equal Protection

Plaintiffs contend that remote instruction violates students' rights under the Equal Protection Clause because students in nearby school districts are receiving "regular and consistent in-class instruction of five partial days (or five full days) per week since September 2020[.]" Pl. Brf.at 18-19. For the following reasons, plaintiff's Equal Protection claim is without merit.

The Equal Protection Clause of the Fourteenth Amendment guarantees that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. It "keeps governmental decision makers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

Classifications that do not implicate fundamental rights or a suspect class are permissible so long as they are rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Under rational basis review, a classification is valid "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Commc'ns, Inc., supra*, 508 U.S. at 313.

We have shown that there is no federal constitutional right to a public education, much less an in-person one, and that defendants'

actions survive rational basis analysis. The complaint does not allege that defendants discriminated against its own students based on a suspect classification.

Plaintiffs contend that Equal Protection requires defendants to provide an educational experience on par with other school districts. No authority is cited for this proposition, which is hardly surprising as there is none. And the underlying premise – that Equal Protection entitles citizens of one community to the same level of public services as citizens in the town next door – has been rejected by the courts.

In *Robinson v. Cahill*, the New Jersey Supreme Court considered whether the disparate quality of education from one district to another gave rise to an Equal Protection violation under the Federal and State Constitutions. In rejecting that claim, Chief Justice Weintraub explained,

> [i]t must be evident that the rudimentary scheme of local government is implicated by the proposition that the equal protection clause dictates statewide uniformity. . . . This is so unless it can be said that the equal protection clause holds education to be a thing apart from other essential services which also depend upon local legislative decision with respect to the dollar amount to be invested.

Robinson, 62 N.J. at 482. "The equal protection proposition potentially implicates the basic tenet of local government that there be local authority with concomitant fiscal responsibility." *Id.* at 500.

Local governments provide all manner of public services including police protection, recreational programs, garbage collection and other functions. Some of these activities are subsidized by the state or

federal government, some aren't. In large part, the level of those services reflect what citizens and taxpayers in those localities are prepared to support. The same holds true for education, subject to all school districts' obligation to provide the "thorough and efficient" education required by the State Constitution. If plaintiffs' theory held water, citizens who live in a town where potholes abound would have a viable Equal Protection claim if roads in the town next door are impeccably maintained. That simply is not the law.

State Constitution

Plaintiffs ask this Court to find that remote instruction inherently violates the "Thorough and Efficient" clause of the New Jersey Constitution. No legal authority is cited for this position. The most plaintiffs offer is that remote instruction isn't as effective as in person instruction.

For the same reasons we already have presented above, it is not the role of the federal courts to define what a "thorough and efficient" education is for New Jersey public school students. That is the purview of the New Jersey Legislature and State educational officials, with the New Jersey Supreme Court as the ultimate arbiter. And even there were a right to in-person instruction under the State Constitution, that right could be curtailed as necessary to prevent sickness and death during a pandemic. *Jacobson, supra*.

Irreparable Harm

Plaintiffs argue that no showing of irreparable harm is necessary when an alleged violation of a constitutional right is involved, citing *Bery v. City of New York*, 97 F.3d 689, 693-94 (2nd Cir. 1996).

That case is distinguishable because it involved deprivation of First Amendment rights which "are commonly considered irreparable injuries for the purposes of a preliminary injunction." *Id.* (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")).

Plaintiffs further argue that "exclusion from school, standing alone, constitutes irreparable harm[,]" Pl. Brf. at 23, relying on two decisions addressing complete exclusion from school because students did not get required vaccinations. *See Lewis v. Sobel*, 710 F.Supp. 506 (S.D.N.Y. 1989); *Caviezel v. Great Neck Public Schools*, 701 F.Supp.2d 414 (E.D.N.Y. 2010). Nothing of the sort occurred here. Plaintiffs' children have not been excluded from school. They have been receiving instruction. There is no dispute that remote learning is not ideal and poses difficult challenges for students, families and school staff, but plaintiffs have not shown irreparable harm.

More importantly for purposes of prospective injunctive relief, Scotch Plains-Fanwood has returned to hybrid instruction for students in grades K-6 on January 14, 2021, and for students in grades 7-12 on January 19, 2021, so plaintiffs' children once again have access to at least some in-person instruction.

Balance of Hardships/Public Interest

Our positions on the relative hardships to the parties and what best serves the public interest have been adequately set forth in the discussion above, and we have nothing further to add.

Conclusion

For the reasons presented above, we submit that the complaint should be dismissed, or at least stayed, on grounds of abstention. Should the Court not be inclined to abstain from hearing the matter, plaintiffs' application for a preliminary injunction should be denied.

Respectfully submitted,

DAVID B. RUBIN, P.C.
Co-Counsel for Defendants

By: /s/David B. Rubin
DAVID B. RUBIN

Dated: January 20, 2021

DOCKET NO.: HHD-CV-20-6131803-S	:	SUPERIOR COURT
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CT FREEDOM ALLIANCE, LLC, ET AL.	:	JUDICIAL DISTRICT OF
	:	HARTFORD AT HARTFORD
v.	:	
STATE OF CONNECTICUT	:	
DEPARTMENT OF EDUCATION, ET AL.	:	NOVEMBER 2, 2020

Memorandum of Decision on Injunction

The Freedom Alliance seeks an emergency order blocking mandatory mask wearing in schools. The court has heard evidence on the request but has determined that no emergency exists.

The Freedom Alliance claims the Connecticut Department of Education has illegally ordered children to wear masks in school. The court has to consider this claim of illegality now only because the Alliance alleges that this "mask order" threatens immediate "severe, irreparable physical and emotional harm" to substantially all of the school children in this state. The Alliance says masks don't work, are the wrong way to fight the disease, and, most important for this matter, are a grave danger to children.

The Alliance tried to prove this claim of urgent danger by presenting two witnesses as experts on the perils of mask wearing. One was a California psychiatrist named Mark McDonald and the other was a biostatistician and epidemiologist from New York called Knut Wittkowski. The state recognized the expertise of the latter but not the former.

The state says that because McDonald's views are too radical he is not an expert the court should recognize. The court hasn't ruled on McDonald's qualifications. It might easily recognize that McDonald has more than common knowledge in his chosen field of psychiatry. But the Alliance presented McDonald as an expert on a lot more than that, and for those purposes the court has determined that even if he were qualified to give those opinions, they cannot be credited.

McDonald testified that in California his existing student patients have been upset by mask wearing. He said he also has new patients who also have emotional troubles from mask wearing.

McDonald was convinced by this experience and by reading a number of articles that masks do two particularly bad things to kids: 1. they block parts of the face that help a child understand what someone is saying, and 2. they block the normal flow of oxygen to the nose and mouth.

From this McDonald asserted that masks for children are a "huge burden as well as harm." He warned of an immediate disaster and a catastrophe in the making. He used the legally talismanic words "imminent" and "irreparable" harm.[1]

He certainly used the right rhetoric, but the trouble with McDonald's claim is that he doesn't have any relevant experience with oxygen deprivation or speech pathology, and the articles he pointed to on those subjects don't support the extreme assertions he made.

[1] To bypass administrative claims and jump to the head of the line in court, the Alliance admits it must: (1) show its members face imminent and irreparable harm, and (2) prove that its legal claims are correct and that it has no other way to undo the harm its members face. *Waterbury Teachers Ass'n. v. Freedom of Information Commission*, 230 Conn. 441, 446 (1994).

First, several of the articles are just opinion pieces critical of mask wearing. They aren't scientific studies. They reflect no research. They suggest no emergency. They are only the thoughts of people who like McDonald are doctors. McDonald could just as easily have recognized that the doctor who directs the Federal Center for Disease Control has a different opinion about masks and so do the doctors who speak for the 67,000 doctors of the American Academy of Pediatrics. They are just opinions, and most doctors disagree with McDonald.

One document does seem at least to echo some of his language. The document is an internet post about a YouTube video purporting to translate from German a video of a doctor supposedly saying masks are an "absolute no-no" for children and are "criminal' because they restrict breathing. The document doesn't say that in her YouTube appearance the doctor cited any scientific evidence. The court let it come in as an exhibit solely to show what McDonald relied on, and—as with the other McDonald documents— it was not admitted as independent evidence in support of the Alliance's claim.

No matter how we look at it, this document is an unlikely foundation for a sweeping court order banning masks in public schools. In technical terms it is unauthenticated, quadruple hearsay. McDonald says that a piece of paper of unknown origin says that a woman says that a German doctor says masks are bad for kids. Courts don't consider things like this because long experience has taught them that second, third, and fourth-hand accounts of things are frequently unreliable. Undoubtedly, we could gather dozens of things like this from the internet—some saying masks are good and some saying masks are bad. But where is the science in that?

Another passionately-worded document supplied by McDonald may get better to the heart of his—and perhaps the Alliance's— claim. It is the "Great Barrington Declaration". The Declaration is roughly in the form of a petition. It has been signed by many doctors and lay people. Its message is clear. While the most vulnerable might want to stay indoors, the rest of the planet should return to normal and let the virus go about its business of infecting people. The virus will spread. But it will gradually burn itself out because it will have too few people without immunity to feed on.

The Great Barrington document reflects the view that the best way to end the epidemic—the best way to achieve "herd immunity"—is by allowing a critical mass of people to become sick and therefore incapable of spreading the disease. The theory assumes that once they have had the disease and have recovered, the infected people can't get the virus again or spread it. Of course, the court is aware that this theory is opposed by the view that it is immoral—that it would likely come at the sacrifice of thousands or even millions of innocent lives among the vulnerable who don't know they are vulnerable and the vulnerable who do know they are vulnerable but have no place to hide.

This is a very dramatic clash of options, but it isn't the court's job to decide if we would be better off in the long term by burning out the virus or by vaccinating it out. The court has to stay with the task in hand. What matters is whether mask wearing spells immediate disaster, catastrophe, and irreparable harm to children. About this, the Great Barrington petition provides no science in support of McDonald's claim that such is the case. It is a very large assertion, and it is almost entirely on a topic irrelevant to this case.

McDonald's other sources even more clearly do not support his thesis. One article went so far as to call mask wearing "disconcerting". Some certainly said masks make things harder for kids. Most of the documents that address COVID-19 stuck to calling mask wearing "unnecessary". And several simply support the idea that facial expressions are particularly important to children.

Among the papers McDonald cited was a March 2020 Singapore study of 158 health care workers using the sealed N95 mask. It was published by the American Headache Society and found that most of the healthcare workers in the study developed a mild headache a couple of days a month from long-term mask use. Similarly, a Turkish study showed that while wearing masks certain surgeons may find some decrease in their oxygen saturation levels and a slight increase in their pulse.

None of what McDonald pointed to provides scientific support for the claim that mask wearing spells immediate disaster, catastrophe, and irreparable harm to children. And that's all that matters here.

The Alliance received even less support from its second witness, Knut Wittkowski, a PhD in computer science with education in biostatistics and epidemiology. Like McDonald, Wittkowski disagrees with the prevailing government view and believes that letting the disease spread will get rid of it the fastest. Indeed, his view is "let it accelerate"—while protecting the vulnerable as much as we can.

Despite the state's suggestions otherwise, Wittkowski is not insensitive for having truthfully pointed out in earlier statements that always "we are all at danger of death." The court is convinced that he is not merely a cynical ultra-Darwinist as the state seemed to imply but a scientist who believes that we should be making provision for the

weaker among us even while we are focused on ensuring progress for the stronger among us. He has said evolution is good, but he didn't mean we should intentionally infect people or intentionally let them die. After all, the disease doesn't need any help from us.

Wittkowski's experience with studies is also genuine. Unlike McDonald, he knows a lot about research because that is what he assists with for a living. He convincingly described what makes a good study versus what makes a weak study. Good scientific studies carry out predetermined experiments rather than involving only unstructured observations. They have control groups—people not given the thing being tested. They involve large enough groups of people so that the study might represent what might happen to most people faced with the same circumstances.

Using these criteria, Wittkowski concluded that the studies that say masks are good protection against disease are too often weak studies while studies that cast doubt on the effectiveness of masks are more often strong studies.

Wittkowski also said that a recent French study—not formally reviewed and approved by other scientists[2]— was important for its observation of lower infection spreading caused by children. The study is exhibit 23 and is on the court's docket along with the plaintiffs' other exhibits. Wittkowski used this study to support a relatively broad assertion that children have been proved to be "not relevant spreaders" of the disease to teachers.

[2] Wittkowski would doubtless recognize that "peer review" is another hallmark of a good study, but perhaps unintentionally he did not include peer reviews in his list of things that make a study of "high quality".

Unfortunately, the study doesn't say that. The study published in an online "preprint" instead "suggests" that COVID-19 spreads at a *lower* rate in primary schools. It notes that for older children—in middle school and high school for instance—the children pass along the disease just as much as adults do.

The study was based on a pretty small sample size. Only three primary school children in three different schools were noted to have had COVID-19 while at school. The study's conclusion hangs entirely on the fact that these three children didn't give the disease to anyone else while at school. As the study itself says, this is interesting, but merits no more than further investigation and careful consideration about school re-openings. The study recommended social distancing, hand washing and —*at least* for older children—mask wearing.

While stimulating, the study not only fails to support Wittkowski's claim that it shows children "are not relevant spreaders" of COVID-19 to adults, it has nothing to do with the Alliance's claim that mask wearing isn't merely unnecessary but instead threatens immediate "severe, irreparable physical and emotional harm" to substantially all of the school children in this state.

For this proposition, Wittkowski provided the Alliance with no support at all. He said he is not an expert on masks. He agreed that masks work. He said that people caring for the vulnerable in particular should wear them.

The state's expert witness agreed with Wittkowski. He said masks work, and that they do protect the vulnerable. His name is Robert Dudley, and he is president of the Connecticut chapter of the American Academy of Pediatrics.

Dudley was the first witness who had anything to do with schools. He is the medical advisor to the 10,000-student New Britain school system. The Alliance challenges his testimony because, unlike McDonald, he is not a psychiatrist. But to the extent McDonald's theme was the ineffectiveness of masks and how they reduce oxygen, Dudley knows as much about this as McDonald. The court will consider his testimony and recognizes that he also has considerable generalist involvement with children's mental health while McDonald has specialist involvement that the court has already acknowledged.

Dudley said there is no emergency. He said he did not believe masks are dangerous to children from a medical point of view. He found this view confirmed by and aligned with what he called the "gold standard" in pediatric guidance, the views of American Academy of Pediatrics that recommends mask wearing for children as a safe means of limiting transmission of the disease. It might have been even more convincing had Dudley or some other state witness gone into the science behind this consensus, but the state chose—as was its right— the narrow path to victory by rebutting the claim of emergency rather than defending the science behind mask wearing.

Dudley said his belief in the absence of emergency was confirmed by communications among 88 school medical planners who have discussed school reopening experiences in Connecticut and have reported no emergencies and also by his direct interaction with New Britain's lead district nurse. He did not doubt that there are individuals who may have troubles, but he said the schools are ready to help them with reasonable accommodations.

Dudley's unruffled view of the mask-wearing landscape aligns with another piece of evidence from the state offered by Stephanie Knutson. Knutson works at the Department of Education. Her job at the department is to provide information to and gather information from school health administrators across the state. Knutson saw no emergency because, if there were one, she said she would be one of the first to know about it. Indeed, for this lawsuit she surveyed school health administrators in districts across the state with 118 of 166 districts responding—that is, 71% of them. She compiled the results in state exhibit F. It shows that of the 390,000 students in the school districts represented 221 students have asked for and received an exemption from mask wearing and 37 have been refused.

The Alliance objected to this exhibit on several grounds. But there is no question that it is an authentic public record under Code of Evidence §9-3 and General Statutes §1-210(a). Furthermore, as a public record it is an exception to the hearsay rule under Code of Evidence §8-3(7) because it was part of Knutson's job to compile health feedback from school districts. Anyway, what the document really is about is explaining why one of the most relevant school health officials in the state says there is no emergency in the public schools requiring a ban on face masks.

The exhibit's broad reach across the districts distinguishes it from other evidence the court hasn't heard—that is individual anecdotal evidence. Doubtless children and parents could have been lined up in considerable numbers to praise or condemn mask wearing, but without many thousands of them testifying we couldn't have gotten a representative sample of the state. We can consider statistics of problems across the state that cut either way, but the Alliance hasn't assembled any that show a broad

sample of problems while the state has shown a broad sample showing few problems. Information that is representative is useful to consider. Information that is anecdotal may represent real individual problems. But the court has already ruled that real individual problems can and must be presented by the state with real individual and reasonable accommodations—not a statewide solution like the one being sought here.

No witness has claimed that the existing statewide solution of mask wearing is without drawbacks. Voices are muffled. Faces are hidden. Breathing is less free. Fear may be instilled in some. Indeed, for some children these drawbacks may have serious repercussions, and the state seeks to address this possibility by allowing exemptions. But the other branches of government—the ones whose job it is to do so—have judged that these mostly minimal burdens on children are outweighed by the certainty that over 213,000 American grandparents, parents, and children are dead from COVID-19 and that it is a good thing to try to reduce the death rate.

After all, the crisis isn't small. In World War II 291,000 Americans were killed in four-years of battle.[3] Covid-19 has killed 213,000 Americans in less than one year of peacetime.[4] One would think some level of action from the government—even something imperfect— might be expected. And, as noted earlier in this case, the United States Supreme Court commands that responsibility for choosing the level of that action is—in "especially broad" terms—vested in the other branches of government, not in the judiciary.[5]

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[3] https://census.gov/history/pdf/wwi-casualties112018.pdf (at page 2).
[4] https://www.cdc.gov/nchs/nvss/vsrr/COVID19/index.htm
[5] *S. Bay United Pentecostal Church v. Newsom* 140 S. Ct. 1613, 1613-14 (2020).

Based on the evidence in this case, the Connecticut Department of Education has not exceeded this especially broad power. Nothing the Connecticut government has done about school mask wearing has been shown as irrational and dangerous rather than, like all human action, in some ways imperfect. Indeed, it aligns with ordinary expectations.

A year ago you could have stopped anyone on the street and they would have told you that masks, gloves, hand washing, and distance are all ways to reduce the spread of disease. The court could have taken judicial notice of it without even hearing evidence. That is a far cry from what is in front of the court now—a claim that mask wearing is so dangerous to children that it must be stopped at once because it is a "recipe for medical disaster."

That claim in front of this court has not been proved. There is no emergency danger to children from wearing masks in schools. Indeed, there is very little evidence of harm at all and a wide ranging medical consensus that it is safe.

Therefore, there is no reason for the court to rule immediately on the claim that the department exceeded its authority over mask wearing in the schools. That legal claim will have to take its place among the ordinary proceedings before the court.

The Alliance's motion for an emergency injunction is denied.

BY THE COURT

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Moukawsher, J.