THE CIRCUIT COURT OF BOONE COUNTY
THIRTEENTH JUDICIAL CIRCUIT OF MISSOURI

THE STATE OF MISSOURI ex rel. ERIC S. SCHMITT, *Plaintiff*, v. COLUMBIA PUBLIC SCHOOLS, and all others similarly situated; BOARD OF EDUCATION FOR THE SCHOOL DISTRICT OF COLUMBIA, and all others similarly situated; HELEN WADE, DELLA STREATY-WILHOIT, CHRIS HORN, KATHERINE SASSER, DAVID SEAMON, JEANNE SNODGRASS, AND BLAKE WILLOUGHBY; in their official capacities as Board Members for the Board of Education for Columbia Public Schools, and all others similarly situated; BRIAN YEARWOOD, in his official capacity as Superintendent for Columbia Public Schools, and all others similarly situated; *Defendants*.	No. 21BA-CV02754

PLAINTIFF STATE OF MISSOURI'S MOTION FOR CERTIFICATION OF DEFENDANT CLASS AND MEMORANDUM IN SUPPORT

INTRODUCTION

Many Missouri public school districts have imposed unnecessary, unlawful, and harmful mask mandates on the children who attend their schools. The school districts' mask mandates are arbitrary, capricious, and unlawful. They are also all subject to § 67.265, RSMo—a law the General Assembly passed to ensure that local officials justify their health orders to the democratically accountable elements of local government and their constituents.

Missouri moves to certify a defendant class of public school districts and their officials who have or will impose mandatory masking policies ("mask mandates") on their students. Specifically, Missouri seeks to certify a defendant class defined as follows:

> All Missouri public school districts and Missouri public school district officials—including the boards of education, the members of the boards of education in their official capacities, and the superintendents of the schools in their official capacities—that have adopted, or will in the future adopt, any mandatory masking or face-covering policy that requires any public school students from pre-K to grade 12 to wear masks or face coverings while on school property and/or participating in school activities (the "Proposed Defendant Class" or "Proposed Class").

See Pet. ¶¶ 24, 26, 78–93.

This class is numerous, covering at least fifty—and likely many more—school districts across the state, as well as hundreds of school officials. There are many common legal issues among the class, including: Does § 67.265 apply to school districts and their masking orders? Do school districts' masking orders constitute "public health orders" under § 67.265.1? Do school district's masking orders automatically expire after 30 days under § 67.265.1(1)? Are school districts' masking orders subject to termination by vote of the school board under § 67.265.2, and subject to reporting requirements under § 67.265.4? And there are many common factual issues, such as: what does the scientific evidence say about the risks COVID-19 presents to schoolchildren, about transmission of COVID-19 in schools, and about the effectiveness of requiring students to wear cloth masks all day at school? The answers to these many common

issues of law and fact do not depend on factual circumstances in each school district, but rather apply on a class-wide basis. Thus, this is precisely the type of lawsuit in which certification of a defendant class is appropriate.

ANALYSIS

Missouri seeks certification of the Proposed Defendant Class for each of the three counts in its petition: (1) that the Proposed Defendant Class's mask mandates are arbitrary and capricious under § 536.150, RSMo (Count I); (2) that the Proposed Defendant Class's mask mandates are subject to § 67.265 (Count II); and (3) that the Proposed Defendant Class's mask mandates are unlawful under § 536.150 (Count III). Certification is proper on all three counts under well-established standards of Missouri law.

"A class action is designed to promote judicial economy by permitting the litigation of the common questions of law and fact of numerous individuals in a single proceeding." *Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 (Mo. banc 2004). Rule 52.08 states that class representatives "may sue or *be sued*," Mo. Sup. Ct. R. 52.08(a) (emphasis added), and so the plain language of the rule authorizes defendant classes. *See CIGNA HealthCare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849, 853 (7th Cir. 2002) (discussing the analogous language of Federal Rule of Civil Procedure 23); *see also State ex rel. Ashcroft v. Kan. City Firefighters Local No. 42*, 672 S.W.2d 99, 121 (Mo. App. 1984) (discussing defendant classes). There are three basic criteria for class certification.

First, "it is first necessary to determine whether the class exists and is capable of legal definition." *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 861 (Mo. banc 2008) (quoting *Viet. Veterans Against the War v. Benecke*, 63 F.R.D. 675, 679 (W.D. Mo. 1974)).

Second, the class must fulfill the requirements of Rule 52.08(a). Rule 52.08(a) has four criteria—namely, that "(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Mo. Sup. Ct. R. 52.08(a).

Third, a legally defined class that meets the requirements of Rule 52.08(a) must then fall within one of the categories of maintainable classes listed in Rule 52.08(b). Here, the Proposed Defendant Class can be maintained under Rule 52.08(b)(1) or (b)(3). *See* Mo. Sup. Ct. R. 52.08(b)(1), (b)(3). In conducting all these analyses, "courts must not forget that the underlying question in any class action certification is whether the class action device provides the most efficient and just method to resolve the controversy at hand, all things considered." *Coca-Cola Co.*, 249 S.W.3d at 860–61.

As the party seeking class certification, Missouri bears the burden of proof. *See*, *e.g.*, *Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 76 (Mo. Ct. App. 2011). "[I]n class certification determination, the court assumes" that the allegations in the petition are true. *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215 (Mo. Ct. App. 2007). "[D]etermination of class certification is based primarily upon the allegations in the petition." *Hope*, 353 S.W.3d at 74. "A trial court has no authority to conduct a preliminary inquiry into the merits of a lawsuit when determining whether [the] lawsuit may be maintained as a class action." *Craft v. Philip Morris Co.*, 190 S.W.3d 368, 376 (Mo. Ct. App. 2005). "[T]he courts should err in close cases in favor of certification because the class can be modified as the case progresses." *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 715 (Mo. banc 2007).

I. The Proposed Defendant Class Is Ascertainable and Clearly Defined.

Missouri law requires an ascertainable class definition at the outset of litigation. *See Dale v. DaimlerChrysler Corp*, 204 S.W.3d 151, 178 (Mo. App. W.D. 2006) ("A class will not be deemed to exist unless the membership can be determined at the outset of the litigation."). For

there to be a precisely defined class, the definition cannot be "overly broad" or "indefinite." *Hope*, 353 S.W.3d at 77. Here, as noted above, Missouri proposes the following class definition: All Missouri public school districts and Missouri public school district officials—including the boards of education, the members of the boards of education in their official capacities, and the superintendents of the schools, in their official capacities—that have adopted, or will in the future adopt, any mandatory masking or face-covering policy that requires any public school students from pre-K to grade 12 to wear masks or face coverings while on school property and/or participating in school activities. This class is clearly defined and ascertainable.

First, the Proposed Defendant Class is not overly broad. "A class definition that encompasses more than a relatively small number of … putative members is overly broad and improper." *Coca-Cola Co.*, 249 S.W.3d at 861. That is certainly not the case here. The Proposed Defendant Class covers school districts, and their officials, that have imposed a mask mandate on their pre-K-12 students, or will do so in the future. The definition is carefully drawn to include only those school districts that are imposing policies that Missouri has alleged are arbitrary, capricious, unlawful, and are subject to § 67.265. *See* Pet. ¶ 84. Thus, the Proposed Defendant Class is precisely drawn to include all, and only, those school districts and officials against whom Missouri has asserted claims.

Second, the Proposed Defendant Class is not indefinite. "The primary concern underlying the requirement of a class capable of definition is that the proposed class not be amorphous, vague, or indeterminate." *Coca-Cola Co.*, 249 S.W.3d at 861 (quoting *Craft*, 190 S.W.3d at 387 (quoting another source)). "The class definition must be sufficiently definite so that it is administratively feasible to identify members of the class," though it "need not be so ascertainable from the definition that every potential member can be identified at the commencement of the action." *Id.*

at 862 (quoting *Craft*, 190 S.W.3d at 387–88 (quoting another source)). "A sufficiently definite class exists to justify class certification, 'if its members can be ascertained by reference to objective criteria.'" *Dale*, 204 S.W.3d at 178 (quoting *Wallace v. Chi. Housing Auth.*, 224 F.R.D. 420, 425 (N.D. Ill. 2004) (quoting another source)).

Again, the Proposed Defendant Class meets this requirement. The elements of the defendant class—that they be public schools and their officials who have instituted or will institute mandatory masking policies for any students in grades pre-K to 12—all turn on objective criteria. None of these criteria turns on "on an *individual's* subjective preference." *Coca-Cola Co.*, 249 S.W.3d at 863 (emphasis added). Due to the public notice requirements of Missouri law, *see* § 610.020.1, whether a school district has adopted or will adopt a mask mandate is a matter of public record. And if a school district ignores the public meeting requirements, its adoption of a mask mandate also ensures its inclusion in the class by objective criteria. And so this aspect of the class is objectively determined.

The Proposed Defendant Class therefore is ascertainable and clearly defined.

II. The Proposed Defendant Class Meets the Rule 52.08(a) Prerequisites for Certification.

Because the Proposed Defendant Class is ascertainable, the next question is whether it meets the four requirements set forth in Rule 52.08(a). It does.

A. The Proposed Defendant Class is so numerous that joinder is impracticable.

"Rule 52.08(a) does not require that joinder of all the members of a class be impossible, only that it be impracticable. Joinder of all members is 'impracticable' for purposes of the rule when it would be inefficient, costly, time-consuming and probably confusing." *Dale*, 204 S.W.3d at 167. While an exact number of class members is unnecessary, Missouri must provide "some evidence [of class size] or *reasonable, good faith estimate* of the number of purported class

members." *Id.* Courts have certified classes of "100 or even [fewer]" class members—including classes containing as few as eighteen or nineteen members. *See id.* at 168 (gathering examples).

The Proposed Defendant Class easily satisfies this numerosity requirement. There are more than 500 school districts in Missouri. *See* Pet. ¶ 80. Of those, more than fifty—and probably many more—have already imposed mask mandates on their students or are poised to do so. *See* Pet. ¶ 81. The members of the class are geographically disbursed as well. For example, there are at least fifteen public school districts that fall within the Proposed Defendant Class in St. Louis County, *see* Pet. ¶ 82; Columbia Public Schools, the representative defendant, is located in mid-Missouri; and there are schools in Jackson County and near Springfield also within the Proposed Class, *see* Pet. ¶ 83. In addition, the class includes the numerous officials in charge of setting and enforcing policy in the school districts that form an essential part of the class. *See* Pet. ¶¶ 24, 26, 89 (including the members of the boards of education and superintendent in their official capacities). When these are included as well, the class includes many hundreds of members. All told, the numbers of the proposed class far exceed the threshold at which joinder because inefficient, time-consuming, costly, and confusing—*i.e.*, impracticable.

B. There are common questions of law and fact common to the Proposed Defendant Class.

"To classify an issue as common or individual, a court looks to the nature of the evidence required to show the allegations of the petition. If the same evidence on a given question will suffice for each class member, then it is common; if the evidence on the question varies from member to member, then it is an individual issue." *Hope*, 353 S.W.3d at 81 (internal citations omitted). "[W]hat really matters in class certification is not the raising of common questions, but the ability of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Elsea v. U.S. Eng'g Co.*, 463 S.W.3d 409, 419 (Mo. Ct. App. 2015) (quoting

Smith v. Mo. Highway & Transp. Comm'n, 372 S.W.3d 90, 94 (Mo. Ct. App. 2012)). And while "the common question may be one of fact *or* law and need not be one of each," *id.* at 418, there are common questions of law *and* fact in this case. *See* Pet. ¶ 85 (listing a number of them).

First, Count II and Count III raise legal questions that apply to each member of the Proposed Defendant Class. Count II alleges that public school districts' mask mandates are subject to § 67.265. That claim presents multiple legal questions that apply to all class members—*i.e.*, to all members of the Proposed Defendant Class. For example, one is whether § 67.265 applies to school districts. S*ee* Pet. ¶ 85. Another is whether school district mask mandates are "public health orders" under the law. *See* Pet. ¶ 110. A third is whether mask mandates restrict access to schools. *See* Pet. ¶ 112. Count III alleges that imposing the mask mandates on schoolchildren is unlawful because school districts lack any statutory authority to impose the requirement, *see* Pet. ¶¶ 124–25, and because mask mandates are not appropriate disease control measures based on the best scientific evidence, *see* Pet. ¶ 127. Again, those are legal questions that apply to school districts generally; answering them for one school district answers them for another. Resolution of those legal questions will resolve them for each member of the Proposed Defendant Class. They are therefore common legal questions.

Second, there are numerous common factual issues, *see* Pet. ¶ 85, because the proof establishing that masking schoolchildren is arbitrary and capricious, *see* § 563.150.1, involves a long series of common factual questions. That is because the evidence of the arbitrary and capricious nature of masking schoolchildren, in the main, does not turn on local conditions. Rather, it turns on properties of COVID-19 and the harms that masks inflict on children as a general matter. For example, the fact that COVID-19 imposes lesser risks to children applies generally, not just the children that go to a particular school district. *See* Pet. ¶ 100 (citing Dr. Makary's

statement discussing findings from his report); Pet. ¶ 101(a) (discussing studies showing COVID-19 is unlikely to result in serious harm to children); *see also* Pet. ¶¶ 30–42. So, too, does the fact that children are inefficient transmitters of the COVID-19 virus. *See* Pet. ¶¶ 43–52. Resolution of that fact does not require individualized analysis of each class member. There are also common factual issues involving the efficacy of natural immunity (immunity from past infection) and masks. *See* Pet. ¶¶ 53–60, 101(b)–(c). Again, determining how effective natural immunity and masks are in protecting schoolchildren against COVID-19 does not turn on local conditions at a particular school district; they are matters of common resolution. And issues involving the harms masking inflicts on children—and general issues that arise from mask mandates—are questions that do not depend on particular evidence from each particular school district. *See* Pet. ¶¶ 61–62, 101(h)–(j). Thus, there are many factual questions that are common to the Proposed Defendant Class as well.

C. Columbia Public Schools' defenses are typical of the Proposed Defendant Class.

"Under Rule 52.08(a)(3), the claims of the representative parties must be typical of the class claims. Typicality means that the class members share the same interest" and the same defense. *Hale*, 231 S.W.3d at 223; *see also Sherman ex rel. Sherman v. Twp. High Sch. Dist. 214*, 540 F. Supp. 2d 985, 992 (N.D. Ill. 2008) ("Under Rule 23(a), typicality is satisfied where the claims or *defenses* of the representative parties arise from the same event or practice or course of conduct giving rise to the claims or *defenses* of the class.") (emphasis added). Demonstrating typicality is fairly easy "so long as class members have [defenses] similar to the named" defendant. *Hale*, 231 S.W.3d at 223 (quoting *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995)). "If the [defense] arises from the same event or course of conduct as the class claims, and

gives rise to the same legal or remedial theory, factual variations in the individual claims will not normally preclude class certification." *Id.*

That is the case here. *See* Pet. ¶¶ 86, 88. Each class member is faced with similar legal and factual arguments all stemming from the same general conduct—mandatory masking policies for students that they contend are important to protect against COVID-19 and to prevent the disease's spread. Logically, then, each class member will have similar defenses as the named defendants (collectively, "Columbia Public Schools"), the putative representative.

Count I, for example, turns on whether § 67.265 applies to school districts as a class. *See* Pet. ¶ 85. Any defenses to that claim will logically be the same for Columbia Public Schools, as class representative, as for other school districts in the Proposed Defendant Class. Similarly, the issue whether mask mandates are arbitrary and capricious raises factual issues common to every school district. *See* Pet. ¶¶ 100–01 (alleging some of the studies and issues that Missouri claims makes masking schoolchildren arbitrary and capricious); *see also supra*. And so the defenses Columbia Public Schools is likely to raise are the same as defenses any school district in the Proposed Defendant Class will raise—for example, contending that the cloth masks typically worn by students supposedly work to prevent disease spread. Such defenses, to be sure, may not "be identical or perfectly coextensive," but they are "substantially similar," and that is enough for typicality. *Sherman*, 540 F. Supp. 2d at 991.

D. Columbia Public Schools will fairly and adequately protect the interests of the Proposed Defendant Class.

Determining whether a class representative will fairly and adequately protect the interests of the class requires determining if there are any conflicts of interests between the class representative and the class. *See*, *e.g.*, *Dale*, 204 S.W.3d at 172–73. There is no reason to believe that Columbia Public Schools has a conflict of interest with any member of the Proposed

Defendant Class. Since each member of the class and Columbia Public Schools seek to impose mandatory masking policies on their public-school students, it is logical to conclude they all have similar interests in this stake. Moreover, Columbia Public Schools is represented by experienced and effective counsel with impressive qualifications,[1] and so there is no reason to believe that counsel is not "qualified" or "experienced." *Sherman*, 540 F. Supp. at 992.

Thus, Columbia Public Schools will fairly and adequately protect the interests of the Proposed Defendant Class. *See* Pet. ¶ 93.

III. The Proposed Defendant Class Is Maintainable Under Rule 52.08(b).

Finally, the Proposed Defendant Class is maintainable under both Rule 52.08(b)(1) and (b)(3), and so certification is appropriate.

A. The Proposed Defendant Class is maintainable under Rule 52.08(b)(1) because separate actions against members of the Proposed Defendant Class would result in inconsistent adjudications establishing incompatible standards of conduct for public schools in Missouri.

Rule 52.08(b)(1)(A) provides that a class is maintainable when "the prosecution of separate actions … against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." *See* Pet. ¶ 91 (containing that allegation).

This case meets the requirement. *See, e.g., Sherman ex rel. Sherman v. Township High School District 214*, 540 F. Supp. 2d 985 (N.D. Ill. 2008). In *Sherman*, plaintiffs moved to certify

[1] The qualifications of the attorneys from Mickes O'Toole, LLC, who have entered on behalf of the named defendants—Ms. Natalie A. Hoernschemeyer and Mr. Grant D. Wiens—are available online, and they reflect a high degree of professionalism and experience. *See Natalie A. Hoernschemeyer*, MICKES O'TOOLE: ATTORNEYS AT LAW, https://www.mickesotoole.com/attorneys/hoernschemeyer/ (experience and qualifications of Ms. Hoernschmemeyer); *Grant D. Wiens*, MICKES O'TOOLE: ATTORNEYS AT LAW, https://www.mickesotoole.com/attorneys/wiens/ (experience and qualifications of Mr. Wiens) (visited Sept. 15, 2021).

a defendant class of school districts to enjoin them from implementing a state statute requiring a moment of silence in school. 540 F. Supp. 2d at 989, 991. The court concluded that the class "fits squarely into the circumstances articulated in Rule 23(b)(1)(A)." *Id.* at 993. As the court and parties agreed, the court's ruling "should be effectuated statewide," yet there was no mechanism to ensure that would be the case in the absence of class-wide litigation. *See id.* (noting that "no statewide executive with authority for enforcing the Act has agreed to exercise that authority"). As a result, there was a high risk of "inconsistent adjudications that would establish incompatible standard for defendants" that made certification "appropriate under Rule 23(b)(1)(A)." *Id.*

Likewise, the rulings Missouri seeks here—that § 67.265 applies to school districts and that mandatory masking policies for schoolchildren are arbitrary, capricious, and unlawful—should be instituted statewide. Since those conclusions do not depend on individualized factors of a particular school district—especially whether § 67.265 applies to school districts and their masking orders—uniformity is desirable. Furthermore, there is no state entity requiring schools to impose mask mandates. *See*, *e.g.*, Marsha Heller, *Gov. Parson Speaks Out Against Mask Mandates*, KFVS12 (July 26, 2021), https://bit.ly/3CgaLop; Jack Suntrup, *Parson Says People Should 'Take Responsibility' to Control Virus, Resists Mask Mandate*, ST. LOUIS POST-DISPATCH (Nov. 12, 2020), https://bit.ly/2YQVSue. So there is no way to resolve the issue with a single suit against a single state official or entity. *See Sherman*, 540 F. Supp. 2d at 993 (noting a similar "power vacuum" in finding a class of school districts maintainable under Rule 23(b)(1)(A)).

Absent class certification, multiple, different lawsuits over mask mandates in public schools would ensue throughout the State. That would create a high risk that different members of the Proposed Defendant Class will be subject to different rules. Neighboring school districts could be subject, or not subject, to § 67.265, or have the ability, or lack the ability, to impose mask

mandates on their students, based on possible conflicting outcomes in different courts. Preventing such "inconsistent or varying adjudications" is the *raison d'etre* for Rule 52.08(b)(1)(A), and why the Proposed Defendant Class is maintainable under that rule.

B. The Proposed Defendant Class is maintainable under Rule 52.08(b)(3) because common questions of law and fact predominate over individual questions and a class action is a superior method for fairly and efficiently adjudicating the controversy.

The Proposed Defendant Class is also maintainable under Rule 52.08(b)(3) because "questions of law or fact common to the members of the class predominate over any questions affecting only individual member, and … a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Mo. Sup. Ct. R. 52.08(b)(3).

1. Predominance.

To start, common questions predominate over individual ones. "The 'predominance' requirement does not demand that every single issue in the case be common to all the class members, but only that there are substantial common issues which 'predominate' over the individual issues. The predominant issue need not be dispositive of the controversy or even be determinative of the liability issues involved." *State ex rel. Am. Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 488 (Mo. banc 2003) (quotations omitted). Predominance does not mean individual issues must be absent from the litigation. "A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions." *Id.* (quotations omitted). Thus, "[t]he predominance of common issues is not defeated simply because individual questions may remain after the common issues are resolved, such as questions of damages or individual defenses." *Hale*, 231 S.W.3d at 228 (quoting *Craft*, 190 S.W.3d at 383 (quoting another source)). Ultimately, "[t]he common-question-predominance requirement 'tests whether proposed classes are sufficiently cohesive to warrant

adjudication by representation.'" *Dale*, 204 S.W.3d at 175 (quoting *Craft*, 190 S.W.3d at 382 (quoting another source)).

While "[t]his is a more demanding inquiry than the commonality inquiry under Rule 52.08(a)(2)," *Craft*, 190 S.W.3d at 381, it is an inquiry that is easily met for the Proposed Defendant Class. As Missouri noted in discussing commonalty, common legal questions drive this case. Count II, which requests a declaration that § 67.265 applies to school districts and their mask mandates, turns on legal determinations about the scope of the law that apply to the entire class—for example, whether school districts are political subdivisions under § 67.265, whether the mask mandates are public health orders under the law, and whether the mandates restrict access to schools. *See* Pet. ¶¶ 85, 106, 110, 112. Count III considers the lawfulness of mask mandates for school districts writ large. *See* Pet. ¶¶ 125–27. Those common legal issues predominate over any individuals ones—such as legal defenses—that members of the class could raise.

Likewise, the issue of whether masking schoolchildren is arbitrary and capricious rests predominantly on factual determinations that are common to the class. *See* Pet. ¶ 85. For one, the issue turns on characteristics of the virus that causes COVID-19—how it affects schoolchildren and how effectively the virus transmits in school settings. *See* Pet. ¶¶ 85, 101(a). Furthermore, this issue turns on common questions relating to the efficacy of masks, especially the cloth masks typically worn by schoolchildren. *See* Pet. ¶¶ 85, 101(c), (e). It also turns on harms that masking inflicts on schoolchildren in terms of their health and educational and social development. *See* Pet. ¶¶ 85, 101(f)–(j).

All of those questions turn, not on facts specific to each school district, but on generally applicable conclusions based on scientific evidence gleaned from research and analysis. *See* Pet. ¶¶ 30–66 (discussing the scientific evidence showing that masking schoolchildren makes no

sense); Pet. ¶¶ 100–01 (discussing and citing some of those findings). There is no reason to believe that COVID-19 operates differently among any of the class members; there is no reason to believe that the efficacy of masks in preventing the spread of COVID-19 changes from class member to class member; and there is no reason to believe that schoolchildren react differently to wearing masks because they go to different public schools. Indeed, since Columbia Public Schools' mask mandate is similar to the CDC's recommendation, *compare* Pet. Ex. A, *with* CDC, *Guidance for COVID-19 Prevention in K-12 Schools* (last updated Aug. 5, 2021), https://bit.ly/3nqTowP, there is every reason to believe that the class members are relying on the same authorities and evidence—and thus making the same errors that render their mask mandates arbitrary and capricious, *see* Pet. ¶ 85. Thus, factual issues involving their mask mandates predominate over individual ones.

Taken together, the common issues involving the Proposed Defendant Class plainly predominate. They are not just overriding issues, they are very likely dispositive. Missouri meets this requirement of Rule 52.08(b)(3).

2. Superiority.

Next, class adjudication must be "superior to other available methods for fair and efficient adjudication of the controversy." *Craft*, 190 S.W.3d at 386. Rule 52.08(b)(3) contains a non-exhaustive "list of factors to be considered in determining whether the superiority requirement is satisfied." *Dale*, 204 S.W.3d at 181. Those factors are:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

Mo. Sup. Ct. R. 52.08(b)(3).

Ultimately, "[t]he superiority requirement requires the trial court to balance, in terms of fairness and efficiency, the merits of a class action in resolving the controversy against those of 'alternative available methods' of adjudication." *Dale*, 204 S.W.3d at 181 (quoting *Georgine v. Amchecm Prods., Inc.*, 83 F.3d 610, 632 (3d Cir. 1996) (quoting another source)). "The balancing must be in keeping with judicial integrity, convenience, and economy." *Id.* And it is done with consideration of "the inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually." *Id.* at 182 (quoting *Haynes v. Logan Furniture Mart, Inc.*, 503 F.3d 1161, 1165 (7th Cir. 1974)).

The Proposed Defendant Class is plainly the superior method of adjudicating the claims Missouri brings based on the four Rule 52.08(b)(3) factors: *First*, there is nothing to suggest that members of the defendant class have a compelling interest in raising particularized issues in their own defense—especially in light of the fact that the defenses they would likely raise are defenses Columbia Public Schools will raise here. *See* MO. SUP. CT. R. 52.08(b)(3)(A). *Second*, there currently is no ongoing litigation—as far as Missouri is aware—against any members of the Proposed Defendant Class involving their mask mandates. *See* 52.08(b)(3)(B). *Third*, there is no reason why it is undesirable to concentrate litigation in this forum—to the contrary, there are significant judicial efficiencies to resolving the many common issues in one place at one time. *See*

52.08(b)(3)(C). *Fourth*, it is hard to discern what possible difficulties there will be in managing the class. *See* 52.08(b)(3)(D).

Thus, all four factors listed in Rule 52.08(b)(3)(A)–(D) point towards class adjudication being the superior method of handling the disputes. That accords with common sense. Individual parents and students would have difficulty mounting a long series of legal challenges in courts across the State against the many public-school district masking policies, and those many lawsuits would raise a risk of many potentially conflicting adjudications. That is, of course, why it is appropriate for Missouri through its Attorney General to bring this challenge. *See Clark*, 106 S.W.3d at 495 (Wolff, J., concurring) ("If there were no other remedy for a great wrong, and public justice and individual rights were likely to suffer for want of a prosecutor capable of pursuing the wrongdoer and redressing the wrong, the courts would struggle hard to find authority for the attorney general to intervene in the name of the people."). Class-wide adjudication is uniquely appropriate as the superior method of adjudication here.

It is also worth noting that Missouri does not seek damages, but only injunctive and declaratory relief. *See* Pet. ¶ 87. There will thus be no "administrative complications in managing the distribution of different damages awards . . . ." *Craft*, 190 S.W.3d at 387. To be sure, such complications are not enough to show that class adjudication is not the superior method of adjudication. *See id.* But the fact that such complications are absent here underlines the efficiency of the class mechanism.

* * *

Thus, common questions predominate over individual ones and a class action is a superior vehicle for resolving Missouri's mask-related claims against the Proposed Defendant Class. The class action is maintainable under Rule 52.08(b)(3).

CONCLUSION

Missouri has requested certification of a class that is ascertainable; that meets the requirements of Rule 52.08(a); and is maintainable under Rule 52.08(b)(1)(A) and/or (b)(3). For these reasons, the State respectfully asks this Court to certify the Proposed Defendant Class, consisting of:

> All Missouri public school districts and Missouri public school district officials—including the boards of education, the members of the boards of education in their official capacities, and the superintendents of the schools, in their official capacities—that have adopted, or will in the future adopt, any mandatory masking or face-covering policy that requires any public school students from pre-K to grade 12 to wear masks or face coverings while on school property and/or participating in school activities.

A proposed order granting the State's requested relief is attached.

Dated: September 17, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 17, 2021, a true and correct copy of the foregoing was filed with the Court's electronic filing system to be served by electronic methods on counsel for all parties entered in the case, and that a true and correct copy was also served by electronic mail and first-class mail upon counsel for Defendants.

/s/ D. John Sauer