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 A CLASSWIDE PRELIMINARY INJUNCTION ON COUNT II AND MEMORANDUM IN SUPPORT

INTRODUCTION

For well over a year during the COVID-19 pandemic, Missourians endured unprecedented restrictions on their personal, economic, religious, educational, social, and athletic freedoms. These restrictions included business lockdowns, shuttered religious services, closed schools, restrictions on personal interactions, mask mandates, cancellation of proms and sporting events, postponed weddings, and many other limits. Over time, a widespread perception arose that many of those who imposed such restrictions were immunized from public opinion, and were acting without transparency or democratic accountability. Responding to this problem, the Missouri General Assembly enacted § 67.265 of the Missouri Revised Statutes. Overwhelming bipartisan majorities in both the House and Senate voted in favor of the new statute. Section 67.265 requires the most democratically accountable body within each political subdivision—its governing body—to meet and vote publicly to approve the public health orders that impact Missourians' freedom. If the governing body does not do so, those orders automatically expire.

Yet public school districts throughout the State of Missouri—including the named defendants of Columbia Public Schools—have systematically ignored § 67.265, acting as if the statute does not apply to them. In particular, they have treated their mask mandates for pre-K–12 students as exempt from § 67.265. This disregard for the law is completely unfounded. The statute applies to any "political subdivision," § 67.265.1, and "public school districts in Missouri are regularly considered political subdivisions." *S.M.H. v. Schmitt*, 618 S.W.3d 531, 534 (Mo. banc 2021). If public school districts like Columbia Public Schools wish to impose mask mandates on their students, they are required to comply with Missouri law—specifically, the democratic procedures set forth in § 67.265. This Court should enter a classwide preliminary injunction requiring Missouri's school districts to comply with the law, and preventing them from imposing or enforcing masking requirements on students that do not comply with § 67.265.

FACTUAL BACKGROUND

I. COVID-19 Restrictions and the Passage of HB 271.

A year and a half of lockdowns and educational restrictions at schools have caused significant harm to the schoolchildren of the State of Missouri. *See*, *e.g.*, Blythe Bernhard, *Student Test Scores Drop as Predicted During Pandemic Year in Missouri*, ST. LOUIS POST-DISPATCH (Sept. 14, 2021), https://bit.ly/3zcagKe. Those, and similar, restrictions were controversial and often imposed and perpetuated unilaterally, with little input from parents and schoolchildren.

Such problems led the Missouri General Assembly to enact House Bill 271 (2021) by the overwhelming margins of 147-2 in the Missouri House and 29-3 in the Missouri Senate. *See* Journal of the House, May 12, 2021, 2721-2722; Journal of the Senate, May 12, 2021, 1719-1720.[1] That law, codified at § 67.265, RSMo, "requires local leaders to be more transparent in their reasoning and accountable for their decisions when it comes to public health orders." Press Release, Missouri Governor Michael L. Parson, *Governor Parson Signs HB 271 Regarding Local Public Health Orders and Vaccine Passports* (June 15, 2021), https://bit.ly/3iaeMUd. HB 271 contained an emergency clause that made new § 67.265 effective upon its passage and approval. HB 271 § B, 101st Gen. Assemb., Reg. Sess. (Mo. 2021). Thus, § 67.265 became effective on June 15, 2021.

HB 271 subjects any "order" relating to public health—where "order" is defined as "a public health order, ordinance, rule, or regulation issued by a political subdivision, including by a health officer, local public health agency, public health authority, or the political subdivision's executive," § 67.265.1—to termination upon "a simple majority vote" of "[t]he governing bod[y] of the political subdivision issuing" those orders. § 67.265.2. RSMo. It also provides that most

[1] The Court may take judicial notice of the official House and Senate Journals. *Bullington v.* State, 459 S.W.2d 334, 338 (Mo. 1970); *Brown v. Morris*, 290 S.W.2d 160, 163 (Mo. banc 1956).

public health orders automatically expire after 30 days unless first extended by a majority of the governing body. Section 67.265.1(1) places limits on any public health order issued during an "emergency declared pursuant to chapter 44" that "directly or indirectly closes, partially closes, or places restrictions on the opening of or access to any one or more business organizations, churches, schools, or other places of public or private gathering or assembly" or "that prohibits or otherwise limits attendance at any public or private gatherings." § 67.265.1(1). Such orders expire no later than thirty days after issuance, unless "the political subdivision's governing body" first extends the order by a majority vote or approves a "similar" one. § 67.265.1(1). Thus, the law requires approval from the democratic branches of Missouri's political subdivision as a condition of allowing executives of local political subdivisions to restrict the freedom of local individuals, including students, in the name of public health.

In addition, § 67.265.4 requires the political subdivision's officers to make a formal report to the subdivision's governing body concerning the justification for any such public health order, at or before the time it is issued: "Prior to or concurrent with the issuance or extension of any order under subdivisions (1) and (2) of subsection 1 of this section, the health officer, local public health agency, public health authority, or executive shall provide a report to the governing body containing information supporting the need for such order." § 67.265.4, RSMo. And § 67.265.5 prohibits any political subdivision from adopting orders that "directly or indirectly" have the same effect of an unlawful order: "No political subdivision of this state shall make or modify any orders that have the effect, directly or indirectly, of a prohibited order under this section." § 67.265.5.

There is an emergency declaration in place concerning the State's healthcare system and recovery efforts from COVID-19. *See* Executive Order No. 21-09 (Aug. 27, 2021). Such an

emergency declaration regarding COVID-19 was also in place prior to August 27, 2021, including on August 13, 2021. *See* Executive Order No. 21-07 (Mar. 26, 2021).

II. Columbia Public Schools' Mask Mandate.

Columbia Public Schools (CPS)—like many school districts across Missouri—has ordered all individuals, including students, to wear masks when indoors at school. And, like many school districts across the State, CPS has failed to comply with § 67.265, RSMo.

On or about June 29, 2021, CPS generated its "2021-22 Coronavirus Plan." Ex. A to Affidavit of Michael Talent, attached ("Coronavirus Plan"). The Coronavirus Plan indicates that it was "[c]reated June 29, 2021," and "[u]dated September 3, 2021," with no other updates listed. *Id.* at 2. The Coronavirus Plan does not adopt a masking policy, but it provides that the Superintendent may adopt a masking policy: "The Superintendent will make decisions about mask requirements in consultation with the Incident Command Team, the Columbia/Boone County Health Department, health and medical professionals and neighboring school district superintendents." *Id.* at 29.

The Coronavirus Plan also imposes different isolation and quarantine requirements on students depending on whether they were masked during their interactions with individuals who test positive for COVID-19. Ex. A, at 23-24. Specifically, the Plan states that "Quarantine is **NOT** required for individuals who consistently and correctly wear a mask, are 3 feet or more from a positive individual less than 15 minutes, cumulative time, within a 24-hour period and have no symptoms." *Id.* at 23. But it states that "Quarantine **IS** required for individuals who are less than 6 feet from a positive individual for more than 15 minutes, cumulative time, within a 24-hour period, without a mask." *Id.* at 24. Quarantine requires a seven-to-ten day period out of school and requires mask-wearing, even outdoors, through 14 days. *Id.*

On August 13, 2021, CPS issued a "Coronavirus Updates for Families," which imposed a mask mandate on students attending CPS schools. Ex. B to Talent Aff. (the "Mask Mandate"). The document indicates that it provides "Updates for August 13, 2021." *Id.* at 1. It addresses the masking policy for "19,000 students and nearly 3,000 employees" in "42 buildings across our school district." *Id.* It provides that "we will begin the school year with a *requirement* that all scholars and adults, regardless of vaccination status, wear masks when indoors and on buses." *Id.* (emphasis added) ("scholars" refers to public school students). The Mask Mandate states that "[m]asking indoors in all Columbia Public Schools buildings will begin on Monday, August 16." *Id.* It states that "Scholars and CPS employees will be required to wear a mask when indoors and on school buses." *Id.* at 2 (emphasis in original). And it states that "Visitors to our campuses will be required to wear a mask when indoors at all times." *Id.* (emphasis in original).

In addition, CPS's Mask Mandate imposes different isolation and quarantine requirements based on mask-wearing that are similar to those set forth in the Coronavirus Plan. It states that "Quarantine is **NOT** required for individuals who consistently and correctly wear a mask and are 3 feet or more from a positive individual for less than 15 minutes of cumulative time within a 24-hour period and have no symptoms." *Id.* at 2. But it states that "Contact tracing is done for those not wearing a mask, within 3 feet of a positive individual, indoors, for a cumulative time of 15 minutes or more within a 24-hour period." *Id.* And it emphasizes that "Vaccination status *and mask-wearing* are primary considerations in contact tracing and quarantine protocols." *Id.* (emphasis added).

Thirty days after August 13, 2021 fell on September 12, 2021. On September 13, 2021—thirty-one days after the August 13 Mask Mandate issued, and seventy-six days after the June 29 Coronavirus Plan was created—the Columbia Public Schools school board conducted a school

board meeting. The public agenda for the meeting stated that the meeting would consider whether to "approve the Administration's issuance of Columbia Public Schools' 2021-2022 Coronavirus Plan: CPS's Safe Return to In-Person Instruction and Continuity of Services Plan (as updated on August 16, 2021, by the Administration's Coronavirus Updates for Families and last updated September 3, 2021) and affirms the Board's extension of this Plan …." Columbia Public Schools, *Agenda: BOE Regular Session 09/13/2021*, https://bit.ly/3zcOar1 (agenda item number 7.D) (Ex. C to Talent Aff.). The agenda linked only to the 2021-22 Coronavirus Plan, not to the Mask Mandate. *See id.* (linking only to the Coronavirus Plan under "Supporting Links"). Likewise, at the board meeting, the Chair introduced the question as whether to approve "the Administration's 2021-2022 Coronavirus Plan." Sept. 13, 2021 Board Meeting Video ("Video"), at 1:45:32-35; Sept. 13, 2021 Meeting Transcript ("Tr."), at 80:7-11.[2] The motion for a vote moved "to approve the Administration's issuance of Columbia Public Schools' 2021-2022 Coronavirus Plan: CPS's Safe Return to In-Person Instruction and Continuity of Services Plan (as updated on August 16, 2021, by the Administration's Coronavirus Updates for Families and last updated September 3, 2021) and affirms the Board's extension of this Plan …." Video, at 1:45:38-1:46:05; Tr. 80:12-19. When describing what the Board was voting on, the Superintendent described the contents of

[2] The full video of the meeting is available on the school board's website at this link: https://www.cpsk12.org/site/default.aspx?PageType=3&ModuleInstanceID=17311&ViewID=94B66785-F3F0-41A8-8414-1E55691D3E9E&RenderLoc=0&FlexDataID=64959&PageID=12619. This link is accessible by going to the Columbia Public Schools website (cpsk12.org) and clicking from the Home Page to Departments to CPS-TV. It is cited herein as "Video." The Court may take judicial notice of the video record of this proceeding. *See, e.g., Wrenn v. City of Kansas City*, 908 S.W.2d 747, 750 n.5 (Mo. App. W.D. 1995) (taking judicial notice of "the audiotaped recording of the … hearing before the Board," because "the facts to be noticed appear with such certainty that controversy is unlikely, and because the proceeding is clearly interconnected with this one"). For the Court's convenience, the State has prepared a certified transcript of the meeting, which is attached to the Talent Declaration as Ex. D.

the Coronavirus Plan, not the Mask Mandate, and he referred to it as "this 34-page document, which is very comprehensive." Video, at 1:46:27-1:48:04; *see* Tr. 81:24-25. The public meeting then displayed the "2021-22 Coronavirus Plan" for public view, not the Mask Mandate. Video, at 1:47:59. After public discussion, the Board voted to approve this Coronavirus Plan, and moved on to the next agenda item. Video, at 2:18:15-33; Tr. 101:17-102:10. Thus, the August 13, 2021 "Coronavirus Update for Families"—*i.e.*, the Mask Mandate—was not voted upon at the Sept. 13 school board meeting.

III. School Districts Across Missouri Adopt Similar Masking Mandates.

Like Columbia Public Schools, school districts across the State have adopted similar mask mandates for pre-K-to-12 public school students, and they have done so without ratification by their governing bodies. Indeed, the public records demonstrate school districts' widespread disregard for the requirements of § 67.265. *See* Affidavit of Maddie Green, attached, ¶¶ 2-21. A non-exhaustive review of school district masking policies identified at least 20 school districts—collectively serving hundreds of thousands of schoolchildren—that have imposed mask mandates on schoolchildren more than 30 days ago, with no evidence of any vote by their governing body to extend them within the 30-day period required by § 67.265.1(1). *See id.* Likewise, there is no indication that school districts imposing mask mandates on students have complied with other provisions of the statute, such as the contemporaneous-report requirement of § 67.265.4. Moreover, this disregard for the statute is not geographically localized, but extends to school districts all across the State. *Id.* Columbia Public Schools' conduct, therefore, exemplifies a widespread disregard for the requirements of § 67.265 in school districts across the State.

IV. Proceedings in this Case.

On August 24, 2020, Missouri filed this class action against a defendant class of school districts, represented by Columbia Public Schools, challenging the legality of mask mandates imposed by school districts on students aged pre-K to grade 12. *See* Pet. Missouri's Petition raised three Counts: (1) the claim that such mask mandates for public schoolchildren are arbitrary, capricious, and unreasonable under § 536.150, RSMo; (2) the claim that such mask mandates for public schoolchildren are public health orders subject to the requirements of § 67.265, RSMo; and (3) the claim that such mask mandates for public schoolchildren are unlawful under § 536.150, RSMo. On September 17, 2021, along with this Motion for Classwide Preliminary Injunction, Missouri filed its Motion for Certification of Defendant Class. In these motions, Missouri respectfully requests that this Court (1) certify a defendant class comprising public school districts and officials who have imposed or will impose mandatory masking policies on any pre-K through grade 12 public school districts, and (2) issue a preliminary injunction requiring all members of the defendant class to comply with the requirements of § 67.265 with respect to such mandates.

ARGUMENT

"When considering a motion for a preliminary injunction," Missouri courts "should weigh '[1] the movant's probability of success on the merits, [2] the threat of irreparable harm to the movant absent the injunction, [3] the balance between this harm and the injury that the injunction's issuance would inflict on other interested parties, and [4] the public interest.'" *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996) (quoting *Pottgen v. Missouri State High Sch. Activities Assoc.*, 40 F.3d 926, 928 (8th Cir. 1994)). All these factors favor the State.

I. Missouri Is Likely to Succeed on Count II Because Columbia Public Schools and Other School Districts Are Subject to the Requirements of § 67.265, RSMo.

"The likelihood of success on the merits is 'the most important of the [preliminary-injunction] factors." *Craig v. Simon*, 980 F.3d 614, 617 (8th Cir. 2020) (per curiam) (quoting

Shrink Mo. Gov't PAC v. Adams, 151 F.3d 763, 764 (8th Cir. 1998)). Here, Missouri is likely to succeed on Count II, because the plain language of § 67.265 and all relevant principles of statutory interpretation demonstrate that the school districts and their mask mandates are subject to the requirements of that statute.

In Count II, "Missouri seeks a declaration that the Mask Mandate is subject to the requirements of § 67.265, RSMo." Pet. ¶ 105. As discussed above, § 67.265 applies to public health "orders" issued by "political subdivisions," and it provides that such orders may be terminated upon simple majority vote of the governing body, and that many such orders expire automatically after 30 days unless extended by the governing body. § 67.265.1(1), .2. In addition, the statute requires a report to the governing body before such an order may be issued, and it prevents political subdivisions from adopting orders that "directly or indirectly" have the effect of a prohibited order. § 67.265.4, .5. By their plain terms, these provisions apply here.

A. School district mask mandates are "orders" under Section 67.265.1.

First, the Mask Mandate—and other mask mandates like it issued by other school districts—is an "order" within the meaning of § 67.265. Section 67.265.1 provides: "For purposes of this section, the term **"order"** shall mean a public health order, ordinance, rule, or regulation issued by a political subdivision, including by a health officer, local public health agency, public health authority, or the political subdivision's executive, as such term is defined in section 67.750, in response to an actual or perceived threat to public health for the purpose of preventing the spread of a contagious disease." § 67.265.1, RSMo (bold in original). The Mask Mandate satisfies the "plain and ordinary meaning" of this definition. *Cox v. Dir. of Revenue*, 98 S.W.3d 548, 550 (Mo. banc 2003) ("This Court ascertains the legislature's intent by considering the plain and ordinary meaning of the words in the statute. Absent a definition in the statute, the plain and ordinary

meaning is derived from the dictionary."); *see also, e.g., Dickemann v. Costco Wholesale Corp*., 550 S.W.3d 65, 68 (Mo. banc 2018) ("Absent express definition, statutory language is given its plain and ordinary meaning, as typically found in the dictionary.") (quoting *State v. Brookside Nursing Ctr., Inc*., 50 S.W.3d 273, 276 (Mo. banc 2001)); *State ex rel. Nixon v. Karpierz*, 105 S.W.3d 487, 490 n.10 (Mo. banc 2003) ("The plain and ordinary meaning of statutory language is generally derived from the dictionary where no definition is provided.").

1. A school mask mandate is a "public health order" and "rule."

First, a school masking order like the Mask Mandate is a "public health order" and a "public health rule." *Id.* (emphasis added). The word "order" means "a rule or regulation made by a competent authority," or "an authoritative mandate usu. from a superior to a subordinate: injunction, instruction." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1588 (2002). The word "rule" means "a prescribed, suggested, or self-imposed guide for conduct or action: a regulation or principle." *Id.* at 1986. School mask mandates such as CPS's Mask Mandate plainly qualify under either of these definitions. By providing that students, school district employees, and visitors "will be <u>required</u> to wear a mask when indoors and on school buses," Ex. B, at 2, the Mask Mandate clearly provides "an authoritative mandate" and "instruction," and it "prescribe[s]" a "guide for conduct or action." *Id.* A mask mandate that orders people to wear masks is an "order" and a "rule" in plain and ordinary English.

2. School district mandates are "issued by a political subdivision."

Second, a mask mandate issued by a public school district is "issued by a political subdivision." § 67.265.1, RSMo. The Supreme Court of Missouri and the Court of Appeals have repeatedly held that school districts are "political subdivisions." *See, e.g.*, *S.M.H. v. Schmitt*, 618 S.W.3d 531, 534 (Mo. banc 2021) ("[P]ublic school districts in Missouri are regularly considered

political subdivisions"); *P.L.S. ex rel. Shelton v. Koster*, 360 S.W.3d 805, 818 (Mo. Ct. App. 2011) ("[S]chool districts are local political subdivisions"); *State ex rel. Sch. Dist. of City of Indep. v. Jones*, 653 S.W.2d 178, 189 (Mo. banc 1983) (holding that "school districts" are "political subdivisions"); *Hughes v. Civ. Serv. Comm'n of City of St. Louis*, 537 S.W.2d 814, 815 (Mo. App. 1976) ("School districts are political subdivisions of the state"); *Consol. Sch. Dist. No. 1 of Jackson Cty. v. Bond*, 500 S.W.2d 18, 22 (Mo. App. 1973) (holding that a school district was a "political subdivision" subject to audit by the State Auditor, and acknowledging "the general understanding of the term 'political subdivision' as including a school district"); *see also, e.g.,* MO. CONST. art. X, § 15 (providing that the phrase "other political subdivisions" includes "school … districts").

To be sure, the definition of "order" in § 67.265.1 contains a cross-reference to § 67.750, which includes a definition of "political subdivision" that includes some but not all school districts. *See* § 67.750(8). But that cross-reference to § 67.750 qualifies only to the definition of "executive," not the definition of "political subdivision." Specifically, § 67.265.1 refers to any "public health order … issued by a political subdivision, including by a health officer, local public health agency, public health authority, or the political subdivision's ***executive***, ***as such term is defined in section 67.750***…." § 67.265.1, RSMo (emphasis added). Based on plain English and well-established principles of interpretation, the phrase "as such term is defined in section 67.750" refers to the word that immediately precedes it, *i.e.*, "executive"—not the phrase that "political subdivision," which is separated from it by 18 words and five substantive terms. *See id.* Under well-established principles of interpretation, the so-called "last-antecedent" rule provides that a modifying phrase "generally refers to the nearest reasonable antecedent." ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 144 (2021); *see also id.* at 144-46 (providing examples). As the Supreme Court of Missouri has held, "the long recognized

'last antecedent rule' … instructs that: 'relative and qualifying words, phrases, or clauses are to be applied to the words or phrase *immediately preceding* and are not to be construed as extending to or including others more remote.'" *Rothschild v. State Tax Comm'n of Missouri*, 762 S.W.2d 35, 37 (Mo. banc 1988) (emphasis added) (quoting *Citizens Bank & Trust v. Dir. of Revenue*, 639 S.W.2d 833, 835 (Mo. 1982)). "This rule is the legal expression of a commonsense principle of grammar," which provides that the modifying word or phrase "should be placed as near as the construction allows to the noun or noun phrase to which it refers." SCALIA & GARNER, at 144.

Moreover, this is clearly not a situation where "there is a straightforward, parallel construction that involves all nouns or verbs in a series," *id.* at 147 (the so-called "series-qualifier canon"), for two reasons. First, the phrase "political subdivision" does not appear on the same list as "executive." § 67.265.1. Second, the trailing qualifier (*i.e.*, "as such term is defined in section 67.750") clearly does not refer to "all" items on the list before it (*i.e.*¸"health officer," "local public health agency," and "public health authority"), because none of those items is defined in section 67.750. *See* § 67.750(1)-(9) (defining none of the terms in the list, other than "executive"). The "series qualifier" canon does not permit a trailing qualifier to apply to only two of five items listed in series—it applies to "all," or none. *See* SCALIA & GARNER, at 147-48 (providing that the canon applies when there is a "construction that involves *all* nouns or verbs in a series") (emphasis added). So that canon is plainly inapplicable here.

In short, the Legislature could have written "political subdivision, as defined in § 67.750," but it did not. Instead, it wrote "executive, as such term is defined in section 67.750." The Court may not add words that the statute does not contain. *See, e.g.*, *Macon Cty. Emergency Servs. Bd. v. Macon Cty. Comm'n*, 485 S.W.3d 353, 355 (Mo. banc 2016) (holding that the Court "will not add words to a statute under the auspice of statutory construction"); *Cosby v. Treasurer of State*,

579 S.W.3d 202, 205-06 (Mo. banc 2019) ("[T]his Court refrains from adding words to the statute."); *Hill v. Ashcroft*, 526 S.W.3d 299, 309 (Mo. App. 2017) ("[C]ourts do not engraft language onto a statute that the legislature did not provide."). Accordingly, the ordinary and well-established meaning of "political subdivision" applies in § 67.265—by which "public school districts in Missouri are regularly considered political subdivisions." *S.M.H.*, 618 S.W.3d at 534.

Furthermore, applying the artificially narrow definition of "political subdivision" in § 67.750 would make no sense in this context. Section 67.750 explicitly states that its specific set of definitions apply only to terms "[a]s used in sections 67.750 to 67.799 and sections 67.1700 to 67.1769," *id.*, which does *not* include § 67.265. Those statutory sections to which the more limited definition applies—*i.e.*, §§ 67.750 to 67.799, and 67.1700 to 67.1769—address park and recreational systems, which the vast majority of school districts do not maintain. *See id.* Because those provisions do not apply to most school districts, which do not maintain recreation systems, the narrower definition of "political subdivision" in § 67.750(8), which includes only those school districts to which those provisions are relevant, is appropriate in that unique context. By contrast, applying an artificially narrow definition of "political subdivision" to exclude some but not all school districts would make no sense in this context. As the Supreme Court recently stated, "[t]he context in which a word is used determines which of the word's ordinary meanings the legislature intended. So, to determine a statute's plain and ordinary meaning, the Court looks to a word's usage in the context of the entire statute and other statutes *in pari materia*." *Gross v. Parson*, 624 S.W.3d 877, 885 (Mo. 2021) (citations omitted). Section 67.750's artificially narrow definition of "political subdivision" would subject a few school districts to the democratic accountability provisions of § 67.265, while exempting most others, which is illogical and unreasonable. *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010) (holding that Missouri courts avoid a

statutory interpretation that "would lead to an absurd or illogical result"). In short, courts "do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense." *Johnson v. United States*, 559 U.S. 133, 139–40 (2010) (quoting *Gonzales v. Oregon*, 546 U.S. 243, 282 (2006) (Scalia, J., dissenting). The Court should not force the artificial definition of "political subdivision" in § 67.750 into this context—a bill addressing statewide problems—where it "plainly do[es] not fit." *Id.*

3. School mask mandates intend to prevent the spread of a contagious disease.

Third, the Mask Mandate and others like it were clearly issued "in response to an actual or perceived threat to public health for the purpose of preventing the spread of contagious disease." § 67.265.1, RSMo. They are plainly intended to combat the spread of COVID-19, which is a contagious disease that threatens the public health. Indeed, the Mask Mandate's first page states that "Columbia Public Schools has spent the last several weeks closely monitoring transmission in our community and consulting with medical and health professionals" regarding COVID-19; it expresses particular concern about "high community transmission of the COVID-19 Delta variant"; and it imposes a "requirement that all scholars and adults, regardless of vaccination status, wear masks when indoors and on buses" in order "[t]o keep our scholars safe." Ex. A, at 1. These stated concerns, moreover, are typically of those adopted by school districts statewide.

In sum, because the Mask Mandate, and others like it, meets the definition of "order" in § 67.265.1, it is subject to all the individual provisions of § 67.265, as discussed further below.

B. The Mask Mandate places restrictions on access to schools under § 67.265.1(1).

Section 67.265.1(1) provides that certain kinds of public health "orders" issued by political subdivisions automatically expire after 30 days unless the governing body of the political subdivision first votes to extend them. As relevant here, subdivision 1(1) of the statute provides:

"Any order issued during and related to an emergency declared pursuant to chapter 44 that directly or indirectly … places restrictions on … access to any one or more … schools" is time-limited in two ways: (1) it "shall not remain in effect for longer than thirty calendar days in a one hundred eighty-day period," and (2) it "shall automatically expire at the end of the thirty days … unless so authorized by a simple majority vote of the political subdivision's governing body to extend such order or approve a similar order." § 67.265.1(1), RSMo. The Mask Mandate satisfies this definition, as do similar mask mandates adopted by school districts across the State.

First, the Mask Mandate is an "order," as discussed in detail above. *Supra*, Part I.A. Second, the Mask Mandate was "issued during and related to an emergency declared pursuant to chapter 44," § 67.2651(1), because an emergency declaration with respect to COVID-19 was in effect on August 13, 2021, when the Mask Mandate issued—and has been in effect continuously since 2020. *See* Executive Order No. 21-07 (Mar. 26, 2021). The Mask Mandate "relate[s] to" that emergency, § 67.265.1(1), because it addresses the spread of COVID-19. Ex. A, at 1.

Furthermore, the Mask Mandate "places restrictions on … access to any one or more … schools." § 67.265.1(1). To "restrict" means "to set bounds or limits to," as "to check free activity, motion, progress, or departure of," WEBSTER'S THIRD, at 1937; and "access" means "permission, liberty, or ability to enter, approach, communicate with, or pass to and from," *id.* at 11. The Mask Mandate "sets bounds or limits to" and "checks free activity" of public school students, employees, and visitors in their "liberty" and "ability to enter" public-school buildings in Columbia, by prohibiting any persons from entering schools without masks. *See* Ex. B, at 2. And it applies to all 42 buildings of the Columbia Public Schools. Ex. B, at 1. Thus, the Mandate "places restrictions on … access" to schools—indeed, that is its whole point. And the very same analysis applies to mask mandates adopted by school districts across the State. *See* Green Aff., Exs. A-BB.

Because the Mask Mandate constitutes an "order" that "places restrictions on access to schools," the Mandate "shall automatically expire at the end of thirty days" after it was "issued." § 67.265.1(1), RSMo. Here, the Mask Mandate issued on August 13, 2021. *See* Ex. B, at 1 (entitled "Updates for August 13, 2021"). Thirty days after August 13, 2021 was September 12, 2021. Thus, the Mask Mandate automatically expired on September 12, 2021, and it is no longer in effect, by operation of Missouri law.

To be sure, the statute permits the political subdivision's governing body to "extend" an order that has not yet expired by simple majority vote. § 67.265.1(1), RSMo. But the Columbia School Board's vote on September 13, 2021, did not have this effect, for two reasons. First, as discussed in detail above, the school board's vote addressed only the 2021-22 Coronavirus Plan, Ex. A, which did not establish any mask mandate, but merely delegated to the Superintendent the authority to adopt a masking policy. *See supra*, Statement of Facts. Accordingly, it did not "extend" the Mask Mandate, because there was no "simple majority vote" on the Mask Mandate at all. *See id.*

Second, even if the School Board had voted on the Mandate as part of the "Coronavirus Plan," on September 13, it would have been too late. By its plain terms, the statute does not authorize the governing body to "extend" a non-existent order that has already "expired." § 67.265.1(1), RSMo. To "expire" means to come to a formal and complete end. *See, e.g.*, WEBSTER'S THIRD, at 801 (defining "expire" as "to come to an end: cease"); BLACK'S LAW DICTIONARY, at 619 (defining "expiration" as "a coming to an end; esp., a formal termination on a closing date"). Once something has "expired," it cannot be "extended." § 67.265.1(1), RSMo. The plain and ordinary meaning of the word "extend" presupposes the existence of something to

extend, as all dictionary definitions confirm. *See, e.g.,* WEBSTER'S THIRD at 804 (defining "extend" as "to cause to be longer: lengthen, prolong, protract"); *id.* at 804-05 (defining "extension" as "an increase in length of time: increased or continued duration; *specif*: an agreement on or concession of additional time (as for meeting an overdue debt of fulfilling a legal formality"); BLACK'S LAW DICTIONARY, at 622 (defining "extension" as "the continuation of the same contract for a specified period"); *Extend*, MERRIAM-WEBSTER.COM, *at* https://www.merriam-webster.com/dictionary/extend (defining "extend" as "to cause to be longer: prolong," and "to increase the scope, meaning, or application of: broaden"). In ordinary English, one cannot "lengthen," "prolong," or "increase the scope … of" something that has already been brought to a formal and complete termination. *Id.* "Extend" does not mean "to bring back into existence." One cannot "extend" an order that has "automatically expire[d]" after 30 days. § 67.265.1(1), RSMo.

Thus, even if the Mask Mandate is considered merely as an amendment to the Coronavirus Plan, the Board's vote did not validly extend the Coronavirus Plan. For the very same reasons that the Mask Mandate is an "order" subject to § 67.265, the Coronavirus Plan (which restricts access to public school buildings in many ways, *see* Ex. A to Talent Aff.), is also an "order" subject to § 67.265—especially if it is considered to include the Mask Mandate. Because the Coronavirus Plan is dated June 29, 2021, it expired within 30 days on July 29, 2021—46 days before the September 13 board meeting. *See id.* at 1. Thus, even if the Board purported to vote on the Mask Mandate as an amendment to the Coronavirus Plan, that vote would have been ineffective, because the Coronavirus Plan had already expired six weeks before.

In sum, because the Mask Mandate restricts access to schools and was not extended by the school district's governing body within the 30-day period required by the statute, it has expired by

operation of law and is no longer in effect. The same is true of similar mask mandates across the State that were adopted more than 30 days ago and were never approved within 30 days by a vote of the local governing body. *See* Green Aff., Exs. A-BB.

C. School mask mandates are subject to subsections 2, 4, 5, and 6 of section 67.265.

In addition, the Mask Mandate—and similar mask mandates adopted by school districts across the State—is subject to the requirements of subsections 2, 4, 5, and 6 of § 67.265.

1. School mask mandates are subject to § 67.265.2.

First, subsection 2 provides that "[t]he governing bodies of the political subdivisions issuing orders under this section shall at all times have the authority to terminate an order issued or extended under this section upon a simple majority vote of the body." § 67.265.2, RSMo. Here, the Mask Mandate and similar masking policies imposed on public-school students by school districts across the State are "orders issued under this section." *See supra* Part I.A. Thus, they are subject to termination at any time by a simple majority vote of the school board.

2. School mask mandates are subject to § 67.265.4.

Second, subsection 4 provides that, "[p]rior to or concurrent with the issuance or extension of any order under subdivisions (1) and (2) of subsection 1 of this section, the health officer, local public health agency, public health authority, or executive shall provide a report to the governing body containing information supporting the need for such order." § 67.265.4, RSMo. Here, the the Mask Mandate and similar masking policies imposed on public-school students by school districts across the State are "order[s] under subdivision (1) … of subsection 1 of this section," *id.*, because they place restrictions on access to schools. *See supra* Part I.B. Thus, the school districts cannot implement them unless, at or before the time they are implemented, the local school board receives "a report to the governing body containing information supporting the need for such

order." § 67.265.4, RSMo. Here, there is no indication that the Superintendent delivered any such report to the school board before imposing the August 13 Mask Mandate, and so the Mask Mandate is unlawful for this independent reason as well—as are similar mask mandates for which the school board received no such contemporaneous report.

3. School mask mandates are subject to § 67.265.5.

Third, subsection 5 provides that "[n]o political subdivision of this state shall make or modify any orders that have the effect, directly or indirectly, of a prohibited order under this section." § 67.265.5, RSMo. To "prohibit" means "to forbid by authority or command: enjoin, interdict," or "to prevent from doing or accomplishing something: effectively stop." WEBSTER'S THIRD, at 1813. As discussed above, § 67.265 provides that (1) orders restricting access to schools automatically "expire" after 30 days, § 67.265.1(1); (2) that orders may be "terminate[d]" by simple majority vote of the governing body, § 67.265.2; and (3) that no order may be implemented without a report detailing its justification to the governing body, § 67.265.4. Thus, the statute "forbid[s] by authority or command," "enjoin[s]," "prevent[s]," and "effectively stop[s]" political subdivisions from entering or enforcing such unlawful orders. WEBSTER'S THIRD, at 1813. Thus, orders that have expired without extension, have been terminated by majority vote, or were adopted without a report to the governing body are "prohibited orders" under the plain and ordinary meaning of § 67.265.5. In other words, an order that is unlawful because it does not or did not comply with § 67.265 is a "prohibited order."

Section 67.265.5 prevents school districts from implementing the same policy reflected in an expired, terminated, or otherwise unlawful mask mandate through indirect means. It provides: "No political subdivision of this state shall make or modify any orders that have the effect, directly or indirectly, of a *prohibited order* under this section." § 67.265.5, RSMo. Thus, once a mandatory

masking policy has been lawfully terminated or expired, any policy that has the "indirect" effect of reinstating a mandatory masking policy at schools is also unlawful under § 67.265.5, RSMo. The General Assembly thus prohibited political subdivisions from evading the restrictions of § 67.265 through indirect or backdoor methods.

This provision has proven prescient, as certain Missouri school districts, with the cooperation of local health authorities, have taken to imposing masking policies "indirectly" by imposing much more burdensome isolation and quarantine requirements on schools without mandatory masking policies than on those with mandatory masking policies. These isolation and quarantine requirements effectively present schools with a Hobson's choice: either impose a mask mandate on students, or risk widespread classroom shutdowns and forced return to remote learning in the event of a positive test for COVID-19. As noted above, Columbia Public Schools has adopted such differential isolation and quarantine requirements, imposing significantly more stringent quarantine standards based in large part on whether the students were masked—even though virtually all students use cloth masks, which have little practical use in preventing the spread of COVID-19. *See* Ex. A, at 23-24; Ex. B, at 2. Indeed, the Mask Mandate states that masking is a "primary consideration" in determining whether students who have been exposed to persons who have tested positive must quarantine and be subject to remote learning. Ex. B, at 2.

The school districts in St. Louis County provide an even more extreme example of this "indirect" tactic. There, after the St. Louis County Council voted to terminate a county-wide mask mandate and a judge blocked its enforcement, school-district administrators worked quietly with local health authority to impose "Isolation and Quarantine" requirements for K-12 schools that impose much more burdensome requirements on schools without mandatory masking policies than those with mandatory masking policies. On or around August 9, 2021, a document entitled "St.

Louis County Department of Health Isolation and Quarantine Requirements for K-12 School Settings" circulated among schools in St. Louis County. *See* Ex. E to Talent Declaration. That document provided dramatically different, and much more burdensome, isolation and quarantine requirements on "schools that have not implemented a universal masking policy" than on "schools that have implemented a universal masking policy." *Id.* at 1, 2-3. And the question whether the school had implemented "a universal masking policy," *i.e.*, a mask mandate for all students, including those as young as age 5, was the sole factor determining which set of isolation and quarantine requirements applied. *Id.* Thus, schools that did not adopt a "universal masking policy" would face disruptive classroom closures and the prospect of widespread returns to remote learning—which has been catastrophic for students in previous years. *See id.* In other words, in the face of a court order preventing mask mandates in schools, school-district administrators implemented the same policy "indirectly" by imposing much more burdensome isolation and quarantine requirements on schools that did not "voluntarily" impose mask mandates on students. Indirect evasions like these also violate the plain meaning of § 67.265.5.

4. School mask mandates are subject to § 67.265.6.

Finally, the statute also provides that neither DHSS nor local health authorities have the authority to compel political subdivisions to violate the statute. Section 67.265.6 states: "No rule or regulation issued by the department of health and senior services shall authorize a local health official, health officer, local public health agency, or public health authority to create or enforce any order, ordinance, rule, or regulation described in section 192.300 or this section that is inconsistent with the provisions of this section." § 67.265.6, RSMo. Thus, school districts cannot claim that DHSS or local public health authorities have compelled or induced them to adopt mask mandates that would otherwise violate the statute—the statute itself deprives them of any such

authority. If there is a conflict between the statute and the instructions of DHSS or a local health authority, the statute governs. *Id.*

* * * * *

For all these reasons, Missouri is likely to succeed on its claim in Count II that CPS's mask mandate for schoolchildren—and similar policies adopted by school districts throughout the State—is subject to the requirements of § 67.265, RSMo.

II. The Remaining *Gabbert* Factors Overwhelmingly Favor a Preliminary Injunction.

Given Missouri's likelihood of success on the merits, the remaining three *Gabbert* factors, which address the balancing of harms and the public interest, overwhelmingly favor entering a preliminary injunction here. As noted above, those remaining factors are: "[2] the threat of irreparable harm to the movant absent the injunction, [3] the balance between this harm and the injury that the injunction's issuance would inflict on other interested parties, and [4] the public interest.'" *Gabbert*, 925 S.W.2d at 839.

A. The State will suffer irreparable harm without a preliminary injunction.

First, "the threat of irreparable harm to the movant absent the injunction," *id.*, is very great. It is black-letter law that the State has a strong interest in ensuring that its statutes are followed and enforced, and suffers irreparable injury when it cannot do so. "Any time" the State is prevented "from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). When the State is blocked from implementing its statutes, "the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its law." *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419

(5th Cir. 2013); *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). By disregarding the requirements of § 67.265, CPS and other public school districts across the State are preventing the State from implementing its statutory policies, enacted by overwhelming majorities of its General Assembly.

In addition, the Attorney General, acting on behalf of the State, seeks to enforce the Legislature's statutory purposes and represents the interests of parents and schoolchildren who are subject to unlawful masking policies by CPS and other school districts. *See* § 27.060, RSMo; *see State ex rel. Hawley v. Pilot Travel Centers, LLC*, 558 S.W.3d 22, 30 (Mo. banc 2018) ("The attorney general has the authority 'to seek enforcement of the legislature's statutory purposes.'") (quoting *Fogle v. State*, 295 S.W.3d 504, 510 (Mo. App. 2009)); *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 607 (1982) (holding that the State has a *parens patriae* interest in preventing an injury to a "substantial segment of its population," especially where "the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers"). The unlawful masking policies are restricting the personal liberty and freedom of hundreds of thousands of schoolchildren across the State, and they do so in violation of Missouri law. "The United States Supreme Court has held being subject to an unconstitutional statute, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Rebman v. Parson*, 576 S.W.3d 605, 612 (Mo. banc 2019) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). The same is true of being subject to an unlawful mask mandate—an unconstitutional restriction on personal freedom constitutes *per se* irreparable injury to the parents and schoolchildren of Missouri.[3]

[3] To be clear, nothing in this motion would prevent parents or schoolchildren from *voluntarily* deciding to wear masks at school and during school activities, which is a decision that lies within their own judgment and responsibility. But under Missouri law, once a mask mandate has expired

B. Defendants will suffer no cognizable harm from complying with Missouri law.

By contrast, an injunction that merely requires the school districts to comply with § 67.265 in their student-masking policies—which is all that the State requests here—will impose no cognizable injury on the school districts. *See Gabbert*, 925 S.W.2d at 839 (directing the court to balance the irreparable harm to plaintiffs against "the injury that the injunction's issuance would inflict on other interested parties"). Defendants have no valid interest in enforcing any mandate on Missouri citizens that violates duly enacted state law. *See, e.g., Make Liberty Win v. Ziegler*, 478 F.Supp.3d 805, 812 n.6 (W.D. Mo. 2020) (holding that "a governmental entity 'has no legitimate interest in enforcing an unconstitutional ordinance'") (quoting *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006)). Indeed, for a school district to impose a mask mandate on its students that violates state law is not just unlawful—it is unconstitutional, because it exceeds the constitutional authority of the political subdivision. *See State ex rel. Hazelwood Yellow Ribbon Comm. v. Klos*, 35 S.W.3d 457, 469 (Mo. App. 2000). Complying with the law is not an irreparable injury.

Moreover, § 67.265 does not prohibit Defendants from making reasonable efforts to protect students and implement countermeasures against the COVID-19 pandemic. In fact, it does not even directly prohibit mask mandates. Instead, it requires review and approval of public health orders by the most democratically accountable authority in the political subdivision—its governing body. *See* § 67.265.1(1), .2. The elected school boards, not unelected officials who are insulated from the voters, must ultimately assume responsibility for masking policies and other COVID-19 mitigation measures adopted by the school districts. *See id.* As Governor Parson noted in his press

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or been lawfully terminated, the school district cannot continue to *command* the parents and schoolchildren to do so—it must respect their freedom to make such decisions for themselves.

release regarding the enactment of § 67.265, the statute promotes transparency and democratic accountability for public health orders. *See* Press Release, Missouri Governor Michael L. Parson, *Governor Parson Signs HB 271 Regarding Local Public Health Orders and Vaccine Passports* (June 15, 2021), https://bit.ly/3iaeMUd. Defendants can claim no plausible irreparable injury from complying with a statute that merely requires transparency and democratic accountability from those who restrict the personal freedom of hundreds of thousands of Missouri schoolchildren.

C. The public interest strongly favors compliance with § 67.265.

For similar reasons, the public interest strongly favors enjoining the school districts to comply with § 67.265. As a duly enacted state statute, § 67.265 "is in itself a declaration of public interest and policy." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937). This point applies with particular force here, because § 67.265 was enacted by nearly unanimous bipartisan majorities in both the Missouri House and the Missouri Senate. This democratic enactment—whose purpose and effect is to promote further democratic engagement and public accountability at the local level—gives the people a more direct say in decisions of political subdivisions that directly impact their lives. The public interest strongly favors such democratic accountability. Further, as noted above, "[t]he loss of [constitutional] freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. For these reasons, the public interest favors invalidating the Defendants unlawful action and enjoining them from enforcing the invalid, defunct, and unconstitutional Mask Mandate.

CONCLUSION

For the reasons stated, Plaintiff State of Missouri ex rel. Eric S. Schmitt respectfully requests that this Court enter a preliminary injunction against all members of the Defendant class, and all those acting in concert with them, and enjoin them:

1. To comply with all provisions § 67.265 in any decision to issue, extend, expire, or terminate 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;

2. Not to enforce 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 if that policy has expired without being extended by a majority vote of the governing body within 30 days of the policy's issuance, as provided in § 67.265.1(1);

3. Not to enforce 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 if that policy has been terminated by a simple majority vote of the governing body at any time, as provided in § 67.265.2;

4. Not to enforce 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 if the person(s) issuing or extending that policy did not provide a report to the governing boding containing information supporting the need for such order prior to or concurrent with the issuance or extension of the order, as provided in § 67.265.4;

5. Not to take any action that has the effect, directly or indirectly, of imposing 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 that has expired under § 67.265.1(1) or been terminated under § 67.265.2, including but not limited to not imposing more restrictive isolation and/or quarantine standards on public schools based on whether students are masked, as provided in § 67.265.5;

6. Not to take any action to enforce the Columbia Public Schools' "Coronavirus Updates for Families," identified as "Updates as of August 13, 2013," which imposed a mask mandate on students in Columbia Public Schools;

7. To prominently display a copy of this preliminary injunction on the website(s) and school building(s) maintained by each school district in the Defendant Class; and

8. Granting such other and further relief as may be necessary and just.

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