IN THE SUPREME COURT OF ALABAMA

ADAM WALDROP,	)	
Appellant,	)	
	)	
v.	)	**Case No. 1200873**
	)	
JEFFERSON COUNTY BOARD OF EDUCATION,	)	
	)	
Appellee.	)	

BRIEF OF AMICUS CURIAE ALABAMA CENTER FOR LAW AND LIBERTY IN SUPPORT OF APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Amicus Curiae defers to Appellant's judgment as to whether oral argument is necessary in this case. Amicus Curiae believes that it has sufficiently presented its case through its brief and therefore will not file the unusual motion for an amicus curiae to participate in oral argument. *See* Rule 29(f), Ala. R. App. P. However, if the Court desires for Amicus Curiae to participate in oral argument, then it will gladly accept the invitation.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Alabama Center for Law and Liberty ("ACLL") is a nonprofit law organization based in Birmingham, Alabama, that advocates for limited government, free markets, and strong families. ACLL has an interest in this case because this case involves the fundamental rights of parents that are protected by the United States Constitution. While ACLL recognizes that COVID-19 is real and does not wish to discourage the government from taking reasonable steps to protect people's lives, it must do so in a way that does not trample fundamental rights. Since resolving this case must necessarily involve wrestling with the issue of what belongs to parents and what belongs to the schools, ACLL desires to provide the Court with an overview of the cases recognizing parental rights and how they apply to this case.

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[1] Appellant has consented to the filing of this brief; Amicus Curiae did not ask for consent from Appellee because the typical amicus practice in Alabama is to file a motion instead of asking for consent. *See* Ala. R. App. P. 29 and comments. Counsel for a party did not author this brief in whole or in part, and no such counsel or party made any monetary contribution to fund the preparation or submission of this brief. No person or entity other than Amicus Curiae and its counsel made a monetary contribution to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

From 1923 through 2000, the United States Supreme Court has recognized in multiple cases that the Fourteenth Amendment protects a parent's right to control the upbringing, education, and care of his or her children. As the Supreme Court recognized in *Meyer v. Nebraska*, 262 U.S. 390 (1923), this right applies even when a child is enrolled in a public school, and it sometimes requires schools to adjust their policies to accommodate the rights of the parents, even in states of emergency. This fundamental right of parents, which is deeply rooted in American history, was based on the common law, which held that parents had the right to provide for, care for, and educate their children. And as a majority of justices of this Court recognized in *Ex parte G.C.*, 924 So. 2d 651 (Ala. 2005), this right is based not only on history but on the fact that God gave parents rights over their children that the State is bound to respect.

The common law held that some parental authority could be delegated to a school, but only the authority of "restraint and correction" so that the school could execute its mission to educate the children. Thus, this division of powers between parental authority and school authority is important to understanding what the Fourteenth Amendment

requires. If a decision in question is more of a healthcare decision than an educational decision, then presumptively, the decision should be up to the parents rather than the school. Because the decision to mask children is more of a healthcare decision than an educational decision, the parents' wishes should prevail.

If the school board can prove that its need to "restrain" the children so that it can accomplish its educational mission outweighs the parents' interests in controlling the healthcare of their children, then, as Chief Justice Parker suggested in a similar context in *G.C.*, the school should be required to prove its case by clear and convincing evidence. Moreover, because the issue of whether masks work is hotly disputed, it would be improper for the Court to take judicial notice that masks work, even if the CDC, ADPH, and Dr. Anthony Fauci believe that they do. Instead, the parties must be given the chance to fight over the evidence. In that fight, Appellee must procure expert witnesses that can prove its case while complying with Rules 702 through 705 of the Alabama Rules of Evidence. If Appellee cannot meet these burdens, then this Court should rule for Appellant.

ARGUMENT

I. The United States Supreme Court and This Court Have Recognized That Parents Have the Legal Right to Control the Upbringing, Education, and Care of Their Children.

A. The United States Supreme Court's Jurisprudence

Beginning in *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923), the United States Supreme Court held that the Fourteenth Amendment's Due Process Clause protected the fundamental rights of parents to control the education of their children. In *Meyer*, a teacher was convicted of breaking a Nebraska criminal law that prohibited teaching a foreign language to students before they entered high school. *Meyer*, 262 U.S. at 396-97. Nebraska attempted to justify this law under the claim that "an emergency exists," *id.* at 397. The nature of the so-called emergency is unknown. However, since the teacher was convicted of teaching German, and because the law was passed during World War I,[2] Nebraska apparently believed that teaching the languages of our enemies could be

[2] The law was enacted in 1919, but the United States did not make peace with Germany, Austria, and Hungary until 1921. *Meyer*, 262 U.S. at 397; *Timeline (1914-1921)*, Stars and Stripes: The American Soldiers' Newspaper of World War I, *available at* https://www.loc.gov/collections/stars-and-stripes/articles-and-essays/a-world-at-war/timeline-1914-1921 (last visited Oct. 6, 2021).

a gateway to children gaining sympathy for the countries that the United States had spilled so much blood to defeat. The Court appeared to believe so, noting that the purpose of the statute was to "foster a homogenous people with American ideals …." *Id.* at 402. Even though the legislature found that an emergency necessitated this law during the bloodiest war the world had seen in modern times, the Supreme Court still took the case to determine "whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment: 'No State shall … deprive any person of life, liberty, or property, without due process of law." *Id.* at 399 (quoting U.S. Const., amend. XIV, § 1).

While the Court did not attempt to "define with exactness the liberty thus guaranteed," the Court held that the Fourteenth Amendment guaranteed the right "generally to enjoy those privileges long recognized at common law essential to the orderly pursuit of happiness by free men." *Id.* Finding that "[m]ere knowledge of the German language cannot reasonably be regarded as harmful," the Court held the teacher's "right to thus teach and the right of parents to engage

him so to instruct their children, we think, are within the liberty of the Amendment." *Id.* at 400.

Two years later, the Court heard a similar case in *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). In *Pierce*, the State of Oregon passed a compulsory education law requiring parents to send their children to public schools with very limited exceptions. *Pierce*, 268 U.S. at 530. The law was challenged by a Catholic society wishing to raise children in parochial schools and by a private military academy. Considering whether this law violated the Fourteenth Amendment, the Court reasoned:

> Under the doctrine of *Meyer v. Nebraska* … we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control…. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public school teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 534-35. Thus, *Meyer* and *Pierce* stand for the proposition that parents have fundamental rights to control the upbringing of their

children because the child is not "the mere creature of the State[.]" *Id.* at 535.

At this point, it is appropriate to note that during the COVID-19 pandemic, the Supreme Court's decision in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), has been used by courts that do not wish to second-guess the decisions of the political branches to dodge the issue. *See, e.g.*, *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J. concurring). However, *Jacobson* is inapposite here for two reasons. First, *Jacobson* asserted a general right to be free from vaccinations during a smallpox outbreak, which the Court reasoned was not specifically guaranteed by the Constitution. *Jacobson*, 197 U.S. at 25-27. In contrast, the Supreme Court has held that the fundamental right of parents to control the upbringing of their children *is* protected by the Constitution. Second, even assuming that *Jacobson* stands for the proposition that the courts should be deferential to the political branches in managing emergencies (which it does not), *Meyer* and *Pierce* were decided after *Jacobson* and should therefore be viewed as an exception to that rule. The Court gave no deference to Nebraska in *Meyer* just because the law was passed in a state of emergency; therefore any purported

emergency in this case does not immunize the State from the scrutiny that *Meyer* and *Pierce* require.

Lest one think that *Meyer* and *Pierce* are weak precedents because they are nearly 100 years old, it should be noted that the Supreme Court has continued to enforce them, even into the twenty-first century. In *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) the Court held that state interest in public education must be balanced with fundamental rights of parents, drawing on the precedents of *Meyer* and *Pierce*. While religious objections also played a part in that case, it was not religious objections only, but also parental rights that led the Court to invoke strict-scrutiny review of the compulsory education law in that case. *See Employment Div. v. Smith*, 494 U.S. 872, 881 (1990) (affirming that the Court invoked strict scrutiny because of the combination of free-exercise and parental-rights violations). And as recently as 2000, the Court held that a statute guaranteeing grandparent visitation over parents' wishes violated "the fundamental rights of parents to make decisions concerning the *care*, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion of O'Conner, J., joined by Rehnquist, C.J., and Ginsburg and Breyer, JJ.); *id.* at 77 (Souter, J., concurring in

judgment) (agreeing with the four-justice plurality that "a parent's interest in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment."). Justice Thomas also concurred in the judgment, reasoning that he would leave the question of whether the Constitution protects this right for another day but, in the meantime, giving strict-scrutiny review to the infringement of that fundamental right—which is more protection than the five concurring justices were willing to give. *Id.* at 80 & n. (Thomas, J., concurring in judgment).

As this Court knows, the Supreme Court refined its substantive-due-process jurisprudence in recent times, holding that the Due Process Clause protects "those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition …." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). But after *Glucksberg*, the Court appeared to continue recognizing the validity of *Meyer* and *Pierce* in *Troxel* because parental rights are in fact deeply rooted in this Nation's history and tradition. As Chancellor James Kent wrote, whom the Supreme Court regards with similar veneration with

Sir William Blackstone and Justice Joseph Story,[3] "What is necessary for the child is left to the discretion of the parent[.]" 2 James Kent, *Commentaries on American Law*, Lecture 29 (1826-30), *available at* https://lonang.com/library/reference/kent-commentaries-american-law/kent-29/ (last visited Nov. 5, 2021).

The American law, as Chancellor Kent discussed it, appears to have been derived from the British common law. Sir William Blackstone wrote that the duties of parents to children "principally consist in three particulars; their maintenance, their protection, and their education." 1 William Blackstone, *Commentaries* *446. As for the care, or maintenance, of children, Blackstone said,

> The duty of parents to provide for the *maintenance* of their children is a principle of natural law; an obligation, says Puffendorf, laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavour, as far as in them lies, that the life which they have bestowed shall be supported

[3] *See, e.g., Bridges v. California*, 314 U.S. 252, 285-86 (1941) (describing Chancellor Kent's *Commentaries on American Law*, along with Blackstone's *Commentaries on the Laws of England* and Story's *Commentaries on the Constitution of the United States*, as "the great Commentaries that so largely influenced the shaping of our law in the late eighteenth and early nineteenth centuries[.]")

> and preserved. And thus the children will have the perfect *right* of receiving maintenance from their parents….
>
> The municipal laws of all well-regulated states have taken care to enforce this duty: though Providence has done it more effectually than any laws, by implanting in the breast of every parent that natural στοργη, or insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish.

Id. at *447 (footnote deleted). Note here that the common law both charged the care of children to their parents and presumed that they were more competent, by means of natural affection, to care for their children than the government was.

Regarding the duty of protecting children, Blackstone wrote less, but it was still compelling:

> From the duty of maintenance we may easily pass to that of protection, which is also a natural duty, but rather permitted than enjoined by any municipal laws: nature, in this respect, working so strongly as to need rather a check than a spur. A parent may by our laws maintain and uphold his children in their lawsuits, without being guilty of the legal crime of maintaining quarrels. A parent may also justify an assault and battery in defence of the persons of his children: nay, where a man's son was beaten by another boy, and the father went near a mile to find him, and there revenged the son's quarrel by beating the other boy, of which beating he afterwards unfortunately died, it was not held to be murder, but manslaughter merely. Such indulgence does the law show to the frailty of human nature, and the workings of parental affection.

Id. at *450 (footnotes omitted). In summary, the common law presumed that the parental instinct to protect their children was so strong that the law did not need to compel parents to protect their children. If anything, the law needed to stop parents from going too far in protecting their children. Blackstone would have laughed at the proposition that schools would take the protection of their children more seriously than the children's parents.

Regarding the authority of schools over children, Blackstone wrote that a parent "may also delegate *part* of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. *that of restraint and correction*, as may be necessary to answer the purposes for which he is employed." *Id.* at *453 (emphasis added). Thus, if parents enrolled their children in schools, they delegated some of their authority to the school, but only the powers of "restraint and correction" in order to accomplish the purpose for which the school was established.

Because the Constitution is supposed to be interpreted against the backdrop of the common law,[4] the parental right recognized by the Supreme Court under the Fourteenth Amendment includes the right of parents to care for their children. As Blackstone explained, while parents delegate some authority to schools, it is a limited delegation for the purpose of "restraint and correction." *Id.* at *453. It is not a wholesale delegation of parental authority to make healthcare decisions that the parents should make.

B. This Court's Jurisprudence

In 2005, a majority of Justices of this Court held that parents have God-given rights over their children in *Ex parte G.C.*, 924 So. 2d 651 (Ala. 2005). In *G.C.*, this Court wrestled with the issue of whether a father had voluntarily relinquished custody of his child to the child's grandparents. As part of this discussion, the Justices had to analyze the nature of parental rights and where they came from. A majority of Justices

[4] *See Schick v. United States*, 195 U.S. 65, 69 (1905) (holding that "the body of the Constitution … must be read in light of the common law" and that "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England.").

concluded that a parent's rights over children came not from the State, but from God.

Justice Stuart, joined by Chief Justice Nabers and Justices Smith and Bolin, wrote,

> Children are a gift from God. They need and deserve the love and support of both their mothers and fathers. *Parents have God-given rights concerning their children, which are and should be protected by state government*. With every right we possess, however, comes responsibility. Rights must by claimed and responsibilities assumed or they may be forfeited.

G.C., 924 So. 2d at 661 (Stuart, J., concurring specially) (emphasis added; footnote omitted).

Justice Bolin, joined by Chief Justice Nabers and Justices Stuart and Smith, agreed that "parents have a God-given right and responsibility to rear their children and that they should be allowed to do so unfettered by state interference," although he likewise stressed the responsibility that comes with that right. *Id.* at 667 (Bolin, J., concurring specially).

Then-Justice Parker dissented, agreeing with the other Justices that parents had God-given rights over their children but arguing that the gravity of this right required a high level of proof that a parent had abandoned their child than what the court afforded. In a strong defense

of God-given rights, Justice Parker argued that God gave the civil government, the church, and the family each their realm of jurisdictional authority, noting that "family government preexists and supports state government, while retaining its own exclusive sphere of authority." *Id.* at 676 (Parker, J., dissenting). Therefore, he concluded:

> [E]ach time a court considers a child-custody dispute it should begin by taking judicial notice of the fact that parents possess the right and responsibility to govern and raise their children; that God, not the state, has given parents these rights and responsibilities, and, consequently, that courts should interfere as little as possible with parental decisionmaking, instead deferring to parental authority whenever it has not been fundamentally compromised by substantial neglect, wrongdoing, or criminal act.

Id. at 677-78. Justice Parker again acknowledged that there are instances where the family's jurisdiction ends and the state's begins, such as in cases of "criminal behavior, substantial neglect, or wrongdoing by parents," but he suggested that the courts should "rule as narrowly as possible so as to intrude as little as possible." *Id.* at 678-89. He went as far as to suggest that because such matters involved the abridgement of God-given rights, they should be abridged only by "clear and convincing

evidence or where [the parent] acts to voluntarily relinquish" those rights. *Id.* at 679.[5]

Thus, while they disagreed about how these principles applied and perhaps how deeply the court should look at foundational principles, five Justices – Chief Justice Nabers, Justice Stuart, Justice Bolin, Justice Smith, and then-Justice Parker – agreed that parents have inalienable God-given rights over their children that the State is bound to respect. While the U.S. Supreme Court's parental-rights jurisprudence is not explicitly rooted in the notion of God-given rights, it is rooted in history, and historically, a bedrock principle of American thought is that "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights …." *The Declaration of Independence* para. 2 (U.S. 1776). Thus, the jurisprudence of the U.S. Supreme Court and Alabama Supreme Court align well, as they both recognize that parents

[5] In context, Justice Parker was talking specifically about the right to custody. *Id.* at 679. However, given the fact that he was imposing a high standard because he was talking about abridgement of God-given parental rights, he would probably apply similar logic to other God-given parental rights as well, such as parental rights to make health-related decisions regarding their children.

have rights over their children that may not be superseded by statewide legislation or, *a fortiori*, a local school board's policy.

C. The Correctness of These Decisions

While ACLL expects that no party is prepared to argue that this Court should not follow the decisions of the United States Supreme Court or disregard *G.G.*, it is worth noting briefly that the conclusions of these courts are correct. While as a threshold matter ACLL agrees with Justice Clarence Thomas that the substantive part of the Fourteenth Amendment is the Privileges or Immunities Clause instead of the Due Process Clause, the Framers of the Fourteenth Amendment believed that "both the States and the Federal Government existed to preserve their citizens' *inalienable* rights, and that these rights were considered 'privileges' or 'immunities' of citizenship." *McDonald v. City of Chicago*, 561 U.S. 742, 815 (2010) (emphasis added). Thus, while the United States Supreme Court may have recognized the inalienable right to control one's children under the wrong clause of the Fourteenth Amendment, even Justice Scalia, as solid of an originalist as he was, "acquiesced to the Court's incorporation of certain guarantees" through the Due Process Clause because "it is both long established and narrowly limited." *Id.* at

791 (Scalia, J., concurring) (cleaned up).[6] Thus, if this Court shares Justice Thomas's concerns about the validity of the Supreme Court's substantive-due-process decisions, this particular right, although recognized under the wrong clause of the Fourteenth Amendment, appears to fit with the intentions of the framers to protect God-given rights.

Moreover, the right of parents to control the upbringing and care of their children is "self-evident," as Thomas Jefferson would say. *The Declaration of Independence* para. 2 (U.S. 1776). However, if for whatever reason a parent's right over their child is not self-evident enough, the Scriptures teach that that God gave parents rights over their children.[7]

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[6] Justice Scalia acknowledged that parental rights were real God-given rights recognized by the Declaration of Independence and the Ninth Amendment but disagreed that they were protected by the Fourteenth. *Troxel*, 530 U.S. at 91 (Scalia, J., dissenting). But if the terms "privileges" and "immunities" were interchangeable with "inalienable" rights as Justice Thomas argued, then the Fourteenth Amendment appears to support the proposition that the Constitution protects inalienable, God-given rights. This appears to be why Justice Thomas concurred with the majority in *Troxel* instead of dissenting with Justice Scalia. *Id.* at 80 (Thomas, J., concurring in judgment).

[7] *See, e.g.*, *Exodus* 20:12 ("Honor your father and your mother, so that your days may be prolonged on the land which the LORD your God gives you."); *Ephesians* 6:4 ("Fathers, do not provoke your children to anger, but bring them up in the discipline and instruction of the Lord.");

Thus, both reason and revelation validate the notions of a majority of the Alabama Supreme Court's Justices in *G.C.*

II. Because This Is More of a Healthcare Decision Than an Educational Decision, This Court Should Rule for the Parents Unless Defendant Can Prove by Clear and Convincing Evidence That Masks Are Necessary to Accomplish Its Educational Mission.

The United States Supreme Court has recognized that people do not "shed their constitutional rights … at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). It is often thought that *Meyer*, *Pierce*, and *Yoder* protect the right of parents to pull their children out of public schools and put them in private schools or home schools. While that was certainly true in *Pierce* and *Yoder*, *Meyer* held that the right of parents to direct the upbringing of their children meant that a public school could not forbid its students from learning German. *Meyer*, 262 U.S. at 400. In other words, a parent is not limited solely to making alternative educational arrangements or even utilizing the political process when his or her rights are infringed. While those are

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Colossians 3:20 ("Children, obey your parents in everything, for this is pleasing to the Lord."). Blackstone, as well as many in the founding generation, believed that if the laws of nature were not sufficiently clear from nature itself, then they could be found in the Scriptures. *See* 1 William Blackstone, *Commentaries* *41-43.

certainly valid options, *Meyer* teaches that, to some extent, the school must also adjust its internal operations to respect the parents' wishes. We must also remember that *Meyer* did not excuse the trampling of parental rights even though an emergency existed; therefore the courts may not excuse today's trampling of parental rights because of COVID-19.

The question then becomes to what extent the Constitution requires schools to accommodate parents' wishes. In the sole Eleventh Circuit case that ACLL has been able to find dealing with this issue, that court held, "a reasonable accommodation must be found by balancing the traditional rights of parents in the rearing of their children and the interest of the state in controlling public schools." *Arnold v. Bd. of Educ.*, 880 F.3d 305, 313-14 (11th Cir. 1989). Although this principle is helpful, ACLL notes that (1) state courts are not bound to follow the decisions of lower federal courts,[8] and (2) a simple balancing approach ignores the

[8] *See Johnson v. Williams*, 568 U.S. 289, 305 (2013); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989); *Ex parte State ex rel. Alabama Policy Institute*, 200 So. 3d 495, 529 (Ala. 2015) (holding that "there is a parallelism but not paramountcy [between the two sets of courts,] for both sets of courts are governed by the same reviewing authority of the Supreme Court").

nuance that the common law presumes—that parents have the right to control the care of their children while schools have limited powers of "restraint and correction" delegated to them for the purpose of accomplishing their educational mission. 1 William Blackstone, *supra*, at *446-47, 53. Thus, while a simple balancing analysis at least shows that the parents' interests need to be considered, that simple balancing act may not capture the nuance that the Constitution requires to be given to this case.[9]

Therefore, the first question that must be asked is whether masking children is a matter of (1) caring for children or (2) restraining and controlling them for the purpose of executing the school's educational mission. If we were presented with that dichotomy and given no other options, then clearly, masking children is an attempt to stop the children from getting COVID-19. Since the object of the mandate is to stop

[9] As one commentator has noted in the context of discussing parental rights, "'Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights' and 'do not presume acquiescence in the loss of fundamental rights.'" Rena Lindevaldsen, *Sacrificing Motherhood on the Altar of Political Correctness: Declaring a Legal Stranger to Be a Parent Over the Objections of the Child's Biological Parent*, 21 Regent U. L. Rev. 1, 52 (2008-09) (citations omitted). The Eleventh Circuit's simple balancing act misses this point.

children from getting sick, then this is more of a matter of healthcare than of education. Consequently, it is the parents' right, not the school's, to decide the best way to protect their children from COVID-19.

Of course, one could reasonably argue that if too many children get sick, then it would hinder the school from executing its educational mission. For instance, if children kept missing school, especially at varied times, then it would set the schools back in completing the curriculum on time and therefore prohibit the schools from executing their mission. Thus, schools can have legitimate reasons to enact COVID-19 policies—as long as the object of the policy is the orderly administration of the school's educational mission rather than a pretext of making healthcare-related decisions that should be left to the parents.

Thus, in light of the foregoing, the question for this Court is whether this case is about the proper care of children, which has always been reserved to the parents, or the orderly administration of education. Clearly, this is more about children's healthcare than about education. Therefore, between the two interests at stake, the parents' concerns should be afforded more weight than the school's.

If any kind of "balancing" is required here, as the Eleventh Circuit postulated, it should be the kind of balancing where the analysis begins with the scales already tipped in the parents' favor. Because this involves a matter that the Constitution has reserved to the parents, this Court should apply Chief Justice Parker's advice and require that Defendant show "by clear and convincing evidence" that this is more of an educational decision than a healthcare decision if it wants its mask mandate to be upheld. *G.C.*, 924 So. 2d at 679 (Parker, J., dissenting). Such an approach would be consistent with the general rule that the government, not the citizen, should bear the burden of proof when constitutional rights are infringed. *See, e.g.*, *Fisher v. Univ. of Texas*, 570 U.S. 297, 310 (2013) (noting that under the strict scrutiny test, which usually applies when fundamental rights are infringed, "it is the government that bears the burden" to prove that the infringement is justified).

Furthermore, the Court should not simply take the opinions of the CDC or ADPH as Gospel when they claim that masks are necessary for schools. Perhaps Appellee can prove that they are, but it must procure experts that will meet the requirements of Rules 702-05 of the Alabama

Rules of Evidence. Because the evidence in this case is so hotly disputed, simply citing to the works of the CDC, ADPH, and Dr. Anthony Fauci will not meet the requirements of judicial notice under Alabama Rule of Evidence 201(b). To Appellee's credit, relying on the guidance of these sources shows that Appellee is making a reasonable attempt to protect the children. However, while Defendants' intentions appear to be noble, the Fourteenth Amendment cares more about constitutional rights than it does about intentions. Relying on CDC and ADPH advice therefore is not good enough: Appellee should show by clear and convincing evidence that masking children is a necessary means of restraint to accomplish its educational mission.

It is also worth noting that the parents not only have the right to make healthcare decisions for their children, but also that their concerns are well within the realm of reason. If a child has an underlying medical condition, such as moderate to severe asthma, then a mask may be more detrimental to the child's health than the risk of getting COVID, which seems to not hurt children as badly as it does adults. Furthermore, if masks are actually effective in preventing children from catching

COVID, then the masked students should have nothing to fear from the unmasked students.

The exception, of course, would be if a child was coughing, sneezing, or had similar symptoms, in which case the mask undoubtedly could help catch the larger droplets. But nothing in this suit suggests that Appellee lacks the authority to send students home who are exhibiting symptoms of illness, especially if those symptoms resemble COVID-19. Such a student needs some level of restraint (i.e. being restrained from coming to school) in order to not disrupt the education of the classroom. That fits within the scope of school authority that the common law and the Fourteenth Amendment presume. A sick child undoubtedly may be sent home and kept home until he or she is better. But masking children who are not sick is not an educational decision but a prophylactic healthcare decision. The Constitution leaves that decision the parents, not the schools. Just as the Court found in *Meyer* that mere knowledge of the German language is not harmful in and of itself, this Court must recognize that the mere act of remaining unmasked is not harmful in and of itself either.

CONCLUSION

For these reason, ACLL respectfully requests that this Court:

(1) Note that the Constitution leaves matters of children's welfare to the parents;

(2) Require Appellee to prove by clear and convincing evidence, properly presented by expert testimony, that masks are a necessary form of "restraint or correction" for the purpose of accomplishing its educational mission; and

(4) If the Court cannot reach the merits at this stage, at least note in *dicta* that the Constitution's guarantee of parental rights is at stake and that school boards should prove that masks are necessary by clear and convincing evidence to overcome the presumption of validity to the parents' decisions.

Respectfully submitted this 19th day of November, 2021,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 28(a)(12) and 29(c), Ala. R. App. P., I hereby certify that this brief complies with the font and word limits as required by Rule 32(d), Ala. R. App. P. This brief was written in 14-point Century Schoolbook font, and the text is fully justified. Not counting the portions exempted by Rules 28(j)(1) and Rule 29(c), this brief contains 5,501 words.

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2021, I filed the foregoing with the Clerk of Court using the Alabama Judicial System electronic filing system, which will send notification of such filing to the following parties of record who are registered for electronic filing:

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I also certify that I mailed two hard copies of the foregoing, one to counsel for each party, to the same via first-class mail on the same day.

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