No. _____

IN THE
SUPREME COURT OF ILLINOIS

JULIEANNE AUSTIN, as the Parent or Legal Guardian of T.L. and L.A., *et al.*,[1]	)	Petition for Leave to Appeal from the Appellate Court of Illinois, Fourth Judicial District, Nos. 4-22-0090, 4-22-0092, 4-22-0093, 4-22-0094 (cons.)
Plaintiffs-Respondents,	)	
v.	)	There Heard on Appeal from the Circuit Court for the Seventh Judicial Circuit, Sangamon County, Illinois
THE BOARD OF EDUCATION OF COMMUNITY UNIT SCHOOL DISTRICT #300, *et al.*,	)	
Defendants,	)	Nos. 2021-CH-500002 2021-CH-500003 2021-CH-500005 2021-CH-500007
(The Board of Education of Community Unit School District 300, *et al.*, Defendants-Petitioners).	)	The Honorable RAYLENE GRISCHOW, Judge Presiding.

PETITION FOR LEAVE TO APPEAL

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

SARAH A. HUNGER
ALEX HEMMER
Deputy Solicitors General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5376 (office)
(312) 909-4218 (cell)
CivilAppeals@ilag.gov (primary)
Jane.Notz@ilag.gov (secondary)

[1] The appendix to this petition contains a list of all plaintiffs-respondents, defendants, and defendants-petitioners. *See* A80-111.

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Cynthia A. Grant
SUPREME COURT CLERK

PRAYER FOR LEAVE TO APPEAL

Since the start of the current school year, the Governor has issued a series of executive orders ("EOs") requiring students and school staff to wear masks inside schools, and, if they test positive for or have been exposed to Covid-19, stay home and participate in remote learning until it is safe for them to return. Additionally, since September 2021, the Governor has required school staff to test for Covid-19 on a weekly basis if they are unvaccinated. These requirements—which have provided safety and stability to students, teachers, and schools for months—allow schools to protect their students and staff while providing an opportunity to return to in-person learning. Indeed, these measures have safely and effectively guided schools through two surges of unprecedented severity without meaningful disruptions to in-person education.

The circuit court here altered this status quo by taking the extraordinary step of entering a temporary restraining order ("TRO") that immediately halted the mask, exclusion, and testing requirements as applied to the named plaintiffs in over 150 school districts across the State. A28. This order, moreover, was based on the flawed premise that section 2 of the Illinois Department of Public Health Act ("IDPH Act"), 20 ILCS 2305/1, *et seq.*, supersedes the Governor's authority to issue EOs under the Illinois Emergency Management Agency Act ("IEMA Act"), 20 ILCS 3305/1, *et seq.* A8-9. But that is directly contradicted by the plain language of section 2 of the IDPH Act, which states: "Nothing in this Section shall supersede . . . response plans and procedures established pursuant to IEMA statutes." 20

ILCS 3302/2(m); *see also, e.g.*, *Fox Fire Tavern, LLC v. Pritzker*, 2020 IL App (2d) 200623 (concluding that the Governor's executive orders imposing restrictions on indoor dining were not subject to section 2 of the IDPH Act).

Worse still, the circuit court's proposed solution—that the Governor put these mitigation measures in place by instead suspending the procedures in section 2 of the IDPH Act, A8-9—is out of step with the appellate court's decision in *Fox Fire Tavern*, which upheld the Governor's indoor dining mitigation measures against a similar challenge alleging that if the Governor sought to depart from the procedures outlined in section 2 of the IDPH Act, he was required to formally suspend them. 2020 IL App (2d) 200623, ¶¶ 38-41. As a result, the circuit court's order has infused confusion into an area of the law that was settled and holds the Governor to a standard not required by statute.

On review, the appellate court declined to remedy these errors and instead erroneously dismissed the appeal as moot. A33-38. According to the appellate court, dismissal was warranted because of an intervening action by the Joint Committee on Administrative Rules ("JCAR") to suspend the extension of an IDPH emergency rule initially promulgated in September 2021, to aid the agency in effectuating the masking, temporary exclusion, and testing measures that the Governor put in place through his EOs ("IDPH Emergency Rule"). A34. But that was wrong: the JCAR action related only to an agency rule and thus had no effect on the larger and more critical question presented by this case, which is whether the Governor has the statutory authority to issue EOs implementing masking,

temporary exclusion, and testing requirements in schools. And as to the only portion of the TRO affected by the JCAR action—whether the IDPH Emergency Rule was validly promulgated—the appellate court incorrectly ruled that the public-interest exception to mootness did not apply. Alternatively, even if the appellate court were correct that the JCAR action resolved the entire controversy such that the appeal was moot, then it was required to vacate the TRO. But as it stands, the appellate court's decision has the effect of upholding the TRO while insulating it from further review on the merits, absent this Court's intervention.

The lack of clarity in the law in this area caused by the circuit and appellate courts has practical effects, too, as school districts, parents, students, and staff across the State struggle to understand what is required of them going forward. In those districts that have (erroneously) elected to rely on the circuit court's TRO to lift these important mitigation measures, students and school personnel will face increased exposure to Covid-19, risking additional transmission within schools and in the broader community, increased hospitalizations and deaths, and staff shortages that could require a transition to fully remote learning or even school closures. And on an individual level in those districts, parents will be forced to choose between having their children continue in-person education in potentially unsafe conditions and removing their children from beneficial, in-person instruction to protect them from Covid-19. Indeed, as explained below, *see infra* Section II.D., some school districts have already announced closures, a return to remote learning,

and other negative impacts on instruction and the health and safety of students and staff due to the TRO.

Given this, Defendants-Petitioners Governor JB Pritzker, Illinois State Board of Education ("ISBE"), Illinois Department of Public Health ("IDPH"), Dr. Ngozi Ezike, in her official capacity as IDPH Director, and Dr. Carmen I. Ayala, in her official capacity as ISBE Superintendent (collectively, "State defendants") petition for leave to appeal, pursuant to Illinois Supreme Court Rule 315, from the appellate court's decision so that this Court may address these matters of great importance to the State and resolve the tension among lower courts as to the relationship between the IDPH Act and the IEMA Act. So long as this and other questions presented by this case remain unresolved, State defendants will face uncertainty about the scope of their authority to protect the public from the ongoing pandemic, and the public will continue receiving mixed messages about the legality of the Governor's EOs and the state agencies' emergency rules. This Court should thus grant this petition, reverse the appellate court's dismissal order, and vacate the circuit court's TRO. Alternatively, if the Court does not grant leave to appeal, State defendants request that this Court exercise its supervisory authority to vacate the TRO, which the appellate court should have done once it determined that the appeal was moot.

STATEMENT REGARDING JUDGMENT AND REHEARING

On February 17, 2022, the appellate court issued an order dismissing the State defendants' interlocutory appeal from the circuit court's TRO as moot. A33-38. No party sought rehearing.

POINTS RELIED UPON IN SEEKING REVIEW

1. The appellate court erred by dismissing the entire interlocutory appeal as moot based on the JCAR action suspending the renewal of the IDPH Emergency Rule, where the main issue in this case—the validity of the Governor's EOs—was not dependent on the JCAR action, and, in any event, where the public-interest exception to mootness would apply to the discrete portion of the TRO that was affected by the JCAR action.

2. The circuit court erred and abused its discretion where it incorrectly decided that plaintiffs had clearly ascertainable rights to individualized hearings under the IDPH Act, were likely to succeed on the merits of their IDPH Act claim, and would suffer irreparable harm absent a TRO, and where the circuit court improperly declined to balance the substantial harms to the public against any purported harms to plaintiffs.

3. Alternatively, if the Court does not grant leave to appeal, this Court should exercise its supervisory authority to vacate the TRO, which the appellate court should have done once it determined that the appeal was moot.

STATEMENT OF FACTS

A. State defendants' response to Covid-19 in schools

On March 9, 2020, Governor Pritzker declared the Covid-19 pandemic a disaster in Illinois under the IEMA Act.[2] Since then, Illinois has continued to face

[2] All of the Governor's EOs and disaster proclamations are available at https://www.illinois.gov/government/executive-orders.html. This court may take

emergency conditions. Although Illinois saw a relative decline in cases in the summer of 2021, cases throughout the State increased in September 2021 and again in December 2021 and January 2022. SR1081-82.[3] During these periods, Covid-19 infections drove the number of available intensive care hospital beds and ventilators to dangerously low levels.[4] School-age children were also affected by these fall and winter surges: between June 19, 2021, and December 18, 2021, the case rate in Illinois reported by IDPH for those under 20 increased from 11 per 100,000 to 556 per 100,000. SR1082.[5] And by January 15, 2022, infections of those under 20 worsened, reaching a record 1,936 per 100,000.[6] The rise of the Delta and Omicron variants, which are more infectious than the original virus, contributed to the increase in cases. SR1081-82.

Governor Pritzker, exercising the emergency powers delegated to him under the IEMA Act, has issued EOs responding to various aspects of the pandemic.

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judicial notice of the information on government websites cited herein, as well as from mainstream internet sources. *See, e.g.*, *People v. Johnson*, 2021 IL 125738, ¶ 54; *Kopnick v. JL Woode Mgmt. Co.*, 2017 IL App (1st) 152054, ¶ 26.

[3] *See also Daily Cases Change Over Time*, https://dph.illinois.gov/covid19.html.

[4] *See Covid-19 Hospital Resource Utilization*, IDPH, https://dph.illinois.gov/covid19/data/hospitalization-utilization.html.

[5] This appeal arises from four separate circuit court actions with four different case numbers. In the appellate court, State defendants submitted four supporting records, one corresponding to each action. The appellate court consolidated the four actions. This petition primarily cites to the *Allen* supporting record, indicated by "SR___." The other supporting records are cited as necessary, as "*Austin* SR___," "*Graves* SR___," and "*Hughes* SR___," respectively.

[6] *See Weekly Age-Specific Case Report Per 100,000*, https://dph.illinois.gov/covid19/data.html.

Relevant here, the Governor issued EO2021-18 on August 4, 2021, which required Illinois schools to implement Covid-19 mitigation strategies, including an indoor masking requirement. SR413-15. On August 26, 2021, the Governor issued EO2021-20, which implemented a masking requirement in additional settings, including public indoor spaces. SR1090. That order also required persons working in specified capacities and locations, including school personnel, to be vaccinated against Covid-19, or provide negative results of an approved Covid-19 test on a weekly basis, to be present on school premises. SR1092-93. Finally, EO2021-20 provided that "State agencies . . . may promulgate emergency rules as necessary to effectuate [EO 2021-20]." SR1093.

On September 3, 2021, the Governor issued EO2021-22, which extended the September 5 deadline in EO2021-20 by two weeks for school personnel to either obtain the first vaccine dose or begin providing Covid-19 test results. SR1103. Unvaccinated school personnel who do not comply with the testing requirement must be excluded from school premises. SR1103.

On September 17, 2021, Governor Pritzker issued EO2021-24, SR1625-28, which required schools to "refuse admittance to the School premises, extracurricular events, or any other events organized by the School" for specified times to students or school personnel who have (a) confirmed cases of Covid-19, (b) probable cases of Covid-19, (c) "close contacts" of confirmed or probable cases of Covid-19, or (d) symptoms consistent with Covid-19. SR1627-28. Students temporarily excluded from school must be offered remote learning. SR1628. EO2021-24 also provided

that "State agencies . . . may promulgate emergency rules as necessary to effectuate [EO 2021-24] and aid in its implementation." SR1628. On September 21, the Governor issued EO2021-25, which amended EO2021-24 to require schools to investigate the occurrence of Covid-19 cases to identify who constitutes a close contact subject to temporary exclusion. SR1630-33. The masking, exclusion, and testing requirements were extended in subsequent EOs and are still in effect. *E.g.*, EO2022-03; EO2022-05.

As set forth in the EOs, these mitigation measures were warranted for many reasons, including that Covid-19 "cases for 5 to 11-year-olds and 12 to 14-year-olds went up dramatically" and "increasing vaccination rates in schools . . . , together with masking and regular testing, is vital to providing in-person instruction in as safe a manner as possible." SR1099-1100; *Austin* SR2424. Furthermore, the Centers for Disease Control and Prevention ("CDC") had recommended masking, temporary exclusion, and vaccination to promote a safe school environment. SR1099-1100, *Austin* SR2420, 2424.

In addition to the Governor's EOs, ISBE and IDPH filed emergency rules on September 17, 2021, regarding the masking, exclusion, and testing requirements. The ISBE Emergency Rule, *see* 45 Ill. Reg. at 11843 *et seq.*, amended portions of Title 23 of the Illinois Administrative Code "to support schools and school districts in implementing [EO2021-22]," and did so on an emergency basis to "provide schools and school districts with sufficient clarity and detail regarding [that] implementation." SR1227.

The IDPH Emergency Rule, *see* 45 Ill. Reg. 12123, amended portions of Title 77 of the Illinois Administrative Code related to managing disease in schools, *id.* at 12144-48. *See* SR1528-32. IDPH explained that it promulgated the rule on an emergency basis because of the "significant public health crisis" caused by Covid-19 and, more specifically, because of the facts laid out in the Governor's EOs and related disaster proclamations. SR1507. Relevant here, the IDPH Emergency Rule clarified that "requiring vaccination, testing, or the wearing of masks, or excluding a Student or School Personnel . . . shall not constitute isolation or quarantine under the [IDPH] Act," and provided that those actions may be taken by schools "without a court order or order by a local health authority." SR1532. It also amended IDPH's regulations defining "quarantine" and "isolation," which are not defined in section 2 of the IDPH Act, to remove "requirements for the use of devices or procedures intended to limit disease transmission" and "exclusion of children from school" from those definitions. SR1523-26. More specifically, the IDPH Emergency Rule deleted the definitions of "Isolation, Modified" and "Quarantine, Modified," which were listed as forms of "isolation" and "quarantine," respectively, and included "requirements for the use of devices or procedures intended to limit disease transmission" and "exclusion of children from school" as forms of modified isolation or quarantine. *Id.*

The ISBE and IDPH Emergency Rules were set to expire on February 13, 2022, because they would have been in effect for 150 days. *See* 5 ILCS 100/5-45(c) (emergency rules are "effective for a period of not longer than 150 days"). Effective

February 14, 2022, IDPH renewed the Emergency Rule for an additional 150 days pursuant to its authority under the Administrative Procedures Act, *see* 5 ILCS 100/5-45(c)(iii) (authorizing IDPH to refile rules within a 24-month period). Ex. B, State Defs.' Resp. to Feb. 15, 2022 Order. On February 15, 2022, JCAR suspended IDPH's extended Emergency Rule (*see* 5 ILCS 100/5-125(a) and (c)), noting questions about how the rule would apply in light of the TRO that is the subject of this petition. Ex. A, State Defs.' Resp. to Feb. 15, 2022 Order. The ISBE Emergency Rule, however, was not taken up by JCAR on February 15, 2022. Instead, on December 17, 2021, ISBE proposed a non-emergency, permanent rule implementing the testing requirement, which is currently undergoing notice-and-comment rulemaking. *See* 45 Ill. Reg. at 15598.

The measures implemented by the Governor, ISBE, and IDPH are consistent with guidance from public health experts. As these experts have stated, a layered approach—which includes masking, vaccinations, weekly testing for unvaccinated school personnel, and temporary exclusion of students and faculty likely exposed to Covid-19—is crucial to stopping the spread of Covid-19 in schools. SR1085; *see* SR917 (mitigation measures "disrupt" the "chain of transmission" in schools). The CDC and American Academy of Pediatrics thus recommend that everyone in K-12 schools wear a mask indoors (regardless of vaccination status) because a significant portion of the student population is not yet vaccinated and because masking is proven to reduce transmission of the virus and protect the unvaccinated. SR1083. Experts also recommend implementing testing requirements in circumstances when

individuals cannot or will not be vaccinated, both to identify individuals who may be positive for Covid-19 and to exclude them from group settings. *See* SR1080, 1084-85. This additional measure is particularly important given that people infected with Covid-19 can be asymptomatic, and even those that become symptomatic can spread the virus before they display any symptoms. *See* SR1080-81.

B. Circuit Court Proceedings

Between September and December 2021, four groups of plaintiffs—three student-plaintiff groups and one staff-plaintiff group—filed actions in the circuit court challenging the validity of such mitigation measures in schools. The first case, *Austin v. Board of Education of Community Unit School District No.* 300, No. 21MR91, was filed in the Circuit Court of Macoupin County on September 7, 2021, by parents of public-school students against a single school district; plaintiffs' complaint was later amended to name more than 140 school districts as defendants.[7] The *Austin* plaintiffs alleged that State defendants and school districts lacked authority to impose the temporary exclusion and masking requirements without following the procedures of section 2 of the IDPH Act because those measures constituted a form of "quarantine" under that statute. SR114-24. They also claimed that the Governor's EOs and IDPH's Emergency Rule were invalid. *Austin* SR124-29.

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[7] The Macoupin County circuit court's online docket, of which this court may take judicial notice, *see Bd. of Educ. of Richland Sch. Dist. No. 88A v. City of Crest Hill*, 2021 IL 126444, ¶ 5, is available at https://bit.ly/3A7du3L.

The second action, *Hughes v. Hillsboro Community School District No. 3*, No. 21MR112, was filed by parents on behalf of their two children in the Circuit Court of Montgomery County on September 16, 2021. *Hughes* SR18.[8] The *Hughes* plaintiffs raised the same claims as the *Austin* plaintiffs, but only as applied to the masking requirement. *Hughes* SR26-27. The third action, *Graves v. Pritzker*, No. 21MR255, was filed in the Circuit Court of Kendall County on October 18, 2021, by parents of public-school students in two school districts. *Graves* SR1, 3-17.[9] The *Graves* plaintiffs raised the same claims as the *Austin* plaintiffs and also asserted a separation of powers claim. *Graves* SR17-27. On November 22, 2021, this Court transferred *Austin*, *Hughes*, and *Graves* to the Circuit Court of Sangamon County and consolidated them with other pending Covid-19 litigation. *Hughes* SR116-18, 171-72. The circuit court later assigned these actions different case numbers. *Hughes* SR171-72.

The final case, *Allen v. Board of Education of North Mac Community Unit School District #34*, No. 2021-CH-500007, was brought by approximately 90 teachers and staff employed at schools across Illinois on December 8, 2021, in the Circuit Court of Sangamon County. SR2-146. The *Allen* plaintiffs alleged that State defendants and 21 local school districts lacked authority to impose the

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[8] The Montgomery County circuit court's online docket in *Hughes* is available at https://bit.ly/33TIOXr.

[9] The Kendall County circuit court's online docket in *Graves* is available at https://www.co.kendall.il.us/offices/circuit-clerk/.

masking and testing requirements on school personnel, absent an individualized court order entered via the procedures in section 2 of the IDPH Act. SR298-308, 311-12. Plaintiffs also claimed that the ISBE and IDPH Emergency Rules were an invalid exercise of emergency rulemaking powers and unenforceable. SR303-08.

Plaintiffs in each of the four cases sought TROs against defendants. The student plaintiffs sought to enjoin State defendants and the school districts from enforcing the masking requirement—and, for the *Austin* and *Graves* plaintiffs, the exclusion requirement—based on the IDPH Act claim. *Austin* SR102-07, 114-21, 483-85, 643-45, 804; *Graves* SR206-07, 211, 215, 229; *Hughes* SR23-24, 175-77, 181-82. The staff plaintiffs sought to enjoin defendants from enforcing the masking and testing requirements, respectively. SR213-70. And plaintiffs in all cases claimed they would suffer irreparable harm without a TRO because they had "a right to insist compliance with" the IDPH Act, and that this right could not be protected with a legal remedy. SR277; *Austin* SR805; *Graves* SR214; *Hughes* SR182.

In response to the TRO motions, State defendants argued that plaintiffs were unlikely to succeed on the merits of their claims and had no clear right in need of protection because the Governor's EOs are authorized by sections 7(8) and 7(12) of the IEMA Act, and section 2(m) of the IDPH Act explicitly states that "[n]othing in this Section shall supersede . . . response plans and procedures established pursuant to IEMA statutes." SR1030-36; *Austin* SR2376-78; *Graves* SR243-44; *Hughes* SR280-83. Regarding the validity of the Emergency Rules, State defendants noted that the Illinois Register expressly listed the reasons for

promulgating them on an emergency basis: the "significant public health crisis" caused by Covid-19. SR1041, SR1040-44; *Austin* SR2382-83; *Graves* SR239-45; *Hughes* SR286-88. Finally, State defendants argued that plaintiffs failed to show that they would suffer irreparable harm or that the balance of hardships weighed in their favor. SR1065-71; *Austin* SR2396-2401; *Graves* SR259-64; *Hughes* SR300-05.

On February 4, 2022, the circuit court entered a TRO that, as to the named parties, prohibits State defendants from enforcing EO2021-18, EO2021-24, or EO2021-25, declares the IDPH and ISBE Emergency Rules "null and void," and prohibits State defendants from implementing the temporary exclusion, testing, and masking requirements without following the individual hearing provisions of section 2 of the IDPH Act. A1, A28. The court extended this relief to all four cases, even though the *Allen* and *Hughes* plaintiffs never challenged the temporary exclusion requirement. *See Allen* SR213-70; *Hughes* SR175-77.

Recognizing that plaintiffs had disclaimed any constitutional claim as the basis for a TRO, *see* A19-20, the circuit court concluded that plaintiffs had raised a fair question as to their "likelihood of success on the merits that the IDPH Act is the controlling law in regard to matters of masking, quarantine, isolation, vaccination or testing policies implemented by the school districts," A25. Without addressing State defendants' arguments that the EOs were lawful under sections 7(8) or 7(12) of the IEMA Act, the court held that the "only way the due process provisions as found [in] the IDPH Act . . . would not apply is if the Governor suspended them" under section 7(1) of the IEMA Act, but he had not done so. A8-9. And despite

section 2(m) of the IDPH Act stating that the section 2 procedures do not supersede plans established under the IEMA Act, the court concluded that sections 2(b)-(e) of the IDPH Act required IDPH to seek consent or court approval of any order of "quarantine," testing, or vaccines. A8, A25.

Turning to the Emergency Rules, the circuit court stated that IDPH's conclusion that Covid-19 was an emergency was "suspect at best" because the virus had been in existence for more than a year before IDPH promulgated the IDPH Emergency Rule and because the Delta variant "has been around since December of 2020." A12. The court opined that IDPH's true purpose was not to respond to a threat to public safety, but rather avoid the IDPH Act's procedural safeguards. A13, A25. As for the ISBE Rule, the court concluded that only IDPH had the authority to "order tests and vaccines," and IDPH could not delegate that authority to ISBE. A11-12. Because the court found the Emergency Rules were not validly promulgated, it applied IDPH's definition of quarantine in effect in rules before the adoption of the emergency rules, and concluded that masking, temporary exclusion from school, and excluding unvaccinated school personnel who refused to test for Covid-19 "fit within the confines of" that definition." A11, A23.[10]

Moreover, the circuit court adopted plaintiffs' assertion that their purported "right to insist compliance with" the IDPH Act constituted irreparable harm. A21-22. As for the balance of hardships, the court recognized that State defendants and

[10] The circuit court also discussed the validity of a joint guidance issued by IDPH and ISBE, but ultimately did not enjoin its enforcement. A14-15, A28-29.

the school districts had offered evidence that "masking, vaccination or testing, and other mitigations are the best chance of controlling the spread of [Covid-19]," but discounted the evidence because such mitigations could be imposed only if plaintiffs first received "due process under the law." A26. The court also believed that it was "not necessary" to "weigh the[ ] potential risks" of hardship to the defendants or public because "such balancing has already been conducted by the Legislature" in passing the IDPH Act, stating that the "Legislature . . . concluded that citizens may be subjected to masking, isolation, quarantine, vaccination or testing" if the procedures of section 2 of the IDPH were followed. A26-27.

The same day, State defendants filed an emergency motion to stay the TRO in the circuit court. SR3257-59. On February 7, the circuit court declined to rule on the motion, stating that it "no longer has jurisdiction" due to the filing of the notice of appeal in the interim. A30; *but see Gen. Motors v. Pappas*, 242 Ill. 2d 163, 173-74 (2011) (notice of appeal does not deprive circuit court of jurisdiction to determine matters collateral to judgment, including stay of judgment).

C. Appellate Court Proceedings

On February 7, 2022, State defendants filed notices of interlocutory appeal in each of the four cases, SR3306-44; *Austin* SR5643; *Graves* SR1937; *Hughes* SR2207, as well as emergency motions to stay the TRO pending resolution of the appeal, Emergency Mot. for Stay filed in *Graves* (No. 4-22-0090), *Austin* (No. 4-22-0092),

Hughes (No. 4-22-0093), and *Allen* (No. 4-22-0094).[11] The next day, the appellate court *sua sponte* consolidated the four appeals. *See* Order Consol. Apps. entered in *Graves* (No. 4-22-0090), *Austin* (No. 4-22-0092), *Hughes* (No. 4-22-0093), and *Allen* (No. 4-22-0094).

On appeal, State defendants submitted three independent grounds for the appellate court to grant their petition under Illinois Supreme Court Rule 307(d) and reverse, vacate, and dissolve the TRO. First, the circuit court wrongly held that plaintiffs were likely to prevail on their claims based on a misreading of the IDPH Act. Mem. Supp. Pet. for Rev. filed in *Allen* at 9-14, *Austin* at 9-14, *Graves* at 9-14, and *Hughes* at 9-14 . In particular, the court concluded that the masking, exclusion, and testing requirements must comply with section 2 of the IDPH Act, even though section 2(m) of that statute plainly states that it does not supersede the Governor's exercise of emergency powers. Mem. Supp. Pet. for Rev. filed in *Allen* at 11-12, *Austin* at 11, *Graves* at 11, and *Hughes* at 11. Compounding this error, the court erroneously ruled that the IDPH and ISBE Emergency Rules—which clarified that the definition of "quarantine" did not apply to these mitigation measures and implemented the school personnel testing requirement, respectively—could not be considered because they were invalid. Mem. Supp. Pet. for Rev. filed in *Allen* at 13, *Austin* at 12, *Graves* at 12, and *Hughes* at 12.

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[11] Filings in the consolidated appellate court action, *Graves v. Pritzker,* No. 4-22-0090, are generally available at https://bit.ly/AustinConsolidated. This petition primarily cites to the *Graves* filings in the appellate court available at that web link. Filings in the individual appeals (before consolidation) are cited as necessary, as "*Allen* ___," "*Austin* ___," "*Graves* ___," and "*Hughes* ___."

Second, the circuit court erred in basing its finding of irreparable harm on plaintiffs' supposed rights under the IDPH Act because that statute does not apply. Mem. Supp. Pet. for Rev. filed in *Allen* at 15, *Austin* at 14, *Graves* at 14, and *Hughes* at 14. In any event, any harms here were not irreparable and, with respect to the staff plaintiffs in *Allen*, could be remedied with damages. Mem. Supp. Pet. for Rev. filed in *Allen* at 15-16, *Austin* at 14, *Graves* at 14, and *Hughes* at 14, and *Allen* at 15-16.

Third, the circuit court abused its direction in refusing to balance the harms, especially because granting a TRO would risk school staff shortages requiring remote learning or school closures, and harm to the public health through increased transmission, hospitalizations, and deaths. Mem. Supp. Pet. for Rev. filed in *Allen* at 16-18, *Austin* at 14-17, *Graves* at 15-16, and *Hughes* at 14-17.

On February 15, after the parties filed memoranda, the appellate court entered an order directing plaintiffs and State defendants to "explain how this appeal is affected by the actions taken February 15, 2022, by the Joint Committee of Administrative Rules (JCAR) blocking extension of the Illinois Department of Public Health's emergency rules." Feb. 15, 2022 Order at 1-2. State defendants explained that JCAR's action did not substantially affect the pending appeals because the primary focus of plaintiffs' challenge was the legality and enforceability of the EOs issued by the Governor, and not the validity of the IDPH Emergency Rule. State Defs.' Resp. to Feb. 15, 2022 Order at 6-8. Indeed, every mitigation measure enjoined by the circuit court—masking in school buildings, temporary

exclusion of students and staff exposed to Covid-19, and the submission of weekly Covid-19 tests by unvaccinated staff working on school premises—was required by the Governor's EOs. *Id.* at 6-7. Because JCAR's action related only to the IDPH renewed Emergency Rule, it did not affect the EOs. *Id.* at 7. Thus, the validity and enforceability of the EOs continued to present a live case or controversy. *Id.* at 8.

State defendants further explained, however, that the portion of the TRO declaring the IDPH Emergency Rule "null and void" was moot because JCAR's action meant that that rule was no longer in effect. *Id.* Nevertheless, State defendants urged the appellate court to address the merits of that portion of the TRO under the public-interest exception to mootness because each of the three factors was satisfied: (1) the question presented by the circuit court's decision was of a public nature, (2) an authoritative determination of the IDPH Emergency Rule's validity would guide public officers in future stages of the pandemic, and (3) this question was likely to recur, as IDPH has the authority to promulgate multiple emergency rules. *Id.* at 8-9. Finally, State defendants alternatively asserted that if the appellate court concluded that no mootness exception applied, it should vacate the portion of the TRO declaring the IDPH Emergency Rule null and void. *Id.* at 10.

Plaintiffs agreed with State defendants that a live question remained as to whether the Governor's EOs were valid. *Austin* Pls.' Resp. at 6-7; *Graves* Pls.' Resp. at 2-4. But they stated that the JCAR action mooted any dispute as to the portion

of the TRO addressing the IDPH Emergency Rule, *id.*, without meaningfully addressing any mootness exception. *See Graves* Pls.' Resp. at 3.

On February 16, the appellate court issued a divided order (2-1) dismissing the appeal as moot because "none of the rules found by the circuit court to be null and void are currently in effect." A34. The court further concluded that the public-interest exception was inapplicable for two reasons. First, while "the public is rightfully interested in the propriety of the circuit court's determination that the emergency rules are 'null and void,' such circumstances do not automatically make the issue one of a public nature as defined by the public-interest exception." A36. Second, "given the changing nature of the COVID-19 pandemic—which affects the State defendants' response to the pandemic—and JCAR's decision on February 15, 2022, it is not clear these same rules would be reinstated." *Id.*

Additionally, the appellate court rejected State defendants' argument that the validity of EOs was not affected by the JCAR action. A37-38. According to the court, the Emergency Rules were "presumably necessary" to EO2021-24 because they were promulgated "immediately" after the Governor issued EO2021-24. A38. The appellate court also noted that "the language of the TRO in no way restrains school districts from acting independently from the executive orders or the IDPH in creating provisions addressing COVID-19." A34. Accordingly, "it does not appear the school districts are temporarily restrained from acting by the court's TRO." *Id.* And having not ruled on State defendants' emergency motions to stay the circuit court's TRO pending the interlocutory appeal before this point, the appellate court

denied the motions as moot in light of its decision to dismiss the appeal as moot. A38.

One Justice concurred in part and dissented in part from the majority's order. Although agreeing with the majority's mootness ruling as to the Emergency Rules, she disagreed with it as to the Governor's EOs. *Id.* In particular, she found the question of the validity of those orders "not moot where defendants asserted the Governor implemented masking, exclusion, and testing through the executive orders pursuant to his authority under the [IEMA Act], and plaintiffs challenge that authority." *Id.* As she explained, "[a]s it stands, the majority's decision leaves open the question of whether the circuit court properly enjoined the enforcement of the executive orders." *Id.*

ARGUMENT

I. The Appellate Court Erred By Concluding That State Defendants' Appeal Was Moot.

To begin, the appellate court erred in two respects by dismissing the entire interlocutory appeal filed by State defendants as moot based on the JCAR action suspending the renewal of the IDPH Emergency Rule. First, the court overlooked that these cases center on the Governor's authority under the Illinois Constitution and IEMA Act to issue EOs requiring Covid-19 mitigations in schools. Because that issue was not affected by the JCAR action, the appeal was not moot. Second, the court erred in concluding that the only portion of the TRO that was affected by the JCAR action—whether the IDPH Emergency Rule was validly promulgated—did not fall under the public-interest exception to the mootness doctrine. As a result of

these missteps, no court has reviewed the substance of the circuit court's TRO which, as explained below, is flawed in several ways. This Court's review is thus warranted not only to correct the improper dismissal based on mootness, but also to ensure that these important questions of Illinois law are resolved by a reviewing court.

An appeal is moot only if no actual controversy exists between the parties, or when it becomes impossible for a court to render effectual relief. *Commonwealth Edison Co. v. Ill. Com. Comm'n*, 2016 IL 118129, ¶ 10. As explained, *see supra* pp. 11-13, plaintiffs primarily challenge the legality and enforceability of the EOs issued by the Governor. The EOs require masking in school buildings, temporary exclusion of students and staff exposed to Covid-19, and the submission of weekly Covid-19 tests by unvaccinated staff working on school premises. The EOs were temporarily enjoined as to certain students and teachers through the circuit court's TRO. *See* A28. Because JCAR's action related only to the extension of the IDPH Emergency Rule, *see* Ex. A, State Defs.' Resp. to Feb. 15, 2022 Order, it did not affect the EOs. Accordingly, as the dissenting justice of the appellate court explained, A38, and the parties agreed below, *supra* at pp. 18-19, the validity, legality, and enforceability of the EOs continues to present a live case or controversy.

The appellate court, however, determined that the JCAR action rendered the entire appeal moot, A34, a notion with which even plaintiffs disagreed, *Austin* Pls.' Resp. at 6-7; *Graves* Pls.' Resp. at 2-4. According to the court, the EOs' validity

hinged on the now-expired IDPH Emergency Rule. A36-37. But this is wrong. As detailed below, *infra* Section II.B., the Governor issued the EOs pursuant to his authority under the IEMA Act and the Illinois Constitution, which is not dependent on the IDPH Act or the IDPH Emergency Rule. In fact, the EOs made clear that the requirements imposed therein were not dependent on the agencies promulgating rules. As one example, EO2021-24 states that agencies, including IDPH, "*may* promulgate emergency rules as necessary to effectuate this Executive Order and aid in its implementation." SR1628 (emphasis added).

Furthermore, the appellate court's suggestion that the Governor authorized state agencies to issue regulations in support of his EOs only after a series of unfavorable circuit court decisions was incorrect. A36. The Governor provided in EO2021-20, issued on August 26, 2021, that "[s]tate agencies, including but not limited to IDPH, . . . may promulgate emergency rules as necessary to effectuate this Executive Order." SR1093. It was not until August 30—four days later—that a circuit court first ruled in favor of plaintiffs on the question of school mitigation measures. *Graves* SR61-63. In other words, the Governor's decision to include that language in the EOs predated the unfavorable court decisions. In any event, neither the Governor nor any other state official was a party to those cases or enjoined by any orders entered by those courts. *E.g.*, *Graves* SR58-84. Therefore, the circuit court decisions cited have no bearing on the question at hand: whether the validity of the Governor's EOs was rendered moot by the JCAR action.

Besides wrongly deeming the entire appeal moot, the appellate court erred by declining to apply the public-interest exception to mootness for the portion of the TRO that was affected by the JCAR action: the validity of the IDPH Emergency Rule. A36. The public-interest exception "permits review of an otherwise moot question when the magnitude or immediacy of the interests involved warrants action by the court." *Commonwealth Edison*, 2016 IL 118129, ¶ 12. This exception applies if three criteria are met: "(1) the question presented is of a public nature; (2) an authoritative determination of the question is desirable for the future guidance of public officers; and (3) the question is likely to recur." *Id.* (internal quotations omitted). All three criteria are met here.

First, the validity of the IDPH Emergency Rule is of a public nature. As this Court has explained, a question presented is of a public nature when it involves a matter of "substantial public importance," *see In re D.L.*, 191 Ill. 2d 1, 8 (2000), and if its resolution affects a "large group" of people, *Holly v. Montes*, 231 Ill. 2d 153, 158 (2008). The question presented by the circuit court's declaration that IDPH's Emergency Rule is null and void is undoubtedly of a public nature, as it affects State defendants' ability to combat Covid-19 in schools and risks spreading Covid-19 among students, school personnel, and their communities. Mem. Supp. Pet. for Rev. filed in *Allen* at 5, 15-18, *Austin* at 4-5, 13-17, *Graves* at 4, 14-16, and *Hughes* at 4-5, 14-16. It also disrupts in-person learning in the middle of the school year, forcing parents and schools to make hard choices about continuing in-person

learning or risking the health of their children, students, personnel, and other community members. *Id.*

The second factor also is met, as an authoritative judicial determination of the Emergency Rule's validity is necessary to guide public officers. To meet this criterion, an authoritative determination must be not only "of value to future litigant[s]" but also necessary "future guidance" for public officers in an area of law "in disarray" or with conflicting precedent. *Commonwealth Edison*, 2016 IL 118129, ¶¶ 15-17 (internal quotations omitted). An authoritative determination of the IDPH Emergency Rule's validity also will guide public officers, as it will clarify whether the Covid-19 pandemic constitutes an "emergency" sufficient to justify emergency rulemaking, as well as the level of deference that courts should afford to an agency's finding that a public health crisis constitutes an emergency. *See* State Defs.' Resp. to Feb. 15, 2022 Order at 8; Mem. Supp. Pet. For Rev. filed in *Allen* at 7, 13, *Austin* at 7, 12, *Graves* at 7, 12, and *Hughes* at 7, 12.

Finally, this question is likely to recur, as IDPH has the authority to reissue emergency rules "when necessary to protect the public's health." 5 ILCS 5-45(c)(iii). Indeed, IDPH already attempted to reissue its Emergency Rule after its expiration on February 13, 2022. Ex. B to State Defs.' Resp. to Feb. 15, 2022 Order. And although JCAR suspended the reissuance, it did so at least in part because of uncertainty over the effect of the TRO entered in this very litigation. *Id.* at Ex. A. Thus, with this litigation resolved, it is likely that IDPH will reissue the rule in aid of its ability to carry out Covid-19 mitigations.

The appellate court's conclusion to the contrary was incorrect. As to the first factor, the court recognized that "the public is rightfully interested in the propriety of the circuit court's determination that the emergency rules are 'null and void,'" but asserted, without explanation, that "such circumstances do not automatically make the issue one of a public nature as defined by the public-interest exception." A36. This statement failed to identify any reason why the question presented would not satisfy this standard, which, as explained, is readily met here.

The appellate court did not address the second factor, but concluded as to the third—whether the issue is likely to recur—that it was "not clear" whether IDPH would reissue this emergency rule, citing "the changing nature of the COVID-19 pandemic" and "JCAR's decision on February 15, 2022" suspending IDPH's renewed emergency rule. A36. But as explained, IDPH has already attempted to extend the same rule at issue here, and was prevented from doing so based on the TRO in this case. *See* Ex. A, State Defs.' Resp. to Feb. 15, 2022 Order. Accordingly, there is reason to believe that IDPH would issue that rule again if the TRO were vacated or if this question were otherwise resolved in its favor. Furthermore, the changing nature of the pandemic may not, unfortunately, obviate the need for IDPH to issue emergency rules in the future similar to the one at issue here. Although State defendants hope that additional surges will not materialize, they must have appropriate guidance on these important questions should the need arise to reissue similar emergency rules.

In sum, the appellate court erred in overlooking that these cases center not on the validity of the IDPH Emergency Rule, but rather on the Governor's independent authority under the IEMA Act and Illinois Constitution to issue EOs requiring Covid-19 mitigations in schools. Because that issue was not affected by the JCAR action, the appeal was not moot. The court compounded its error when concluding that the only portion of the TRO that was affected by the JCAR action did not fall under the public-interest exception to the mootness doctrine. This Court's review is thus warranted not only to correct the improper dismissal based on mootness, but also to ensure that these important questions of Illinois law are resolved.

II. The Circuit Court Erred As A Matter Of Law And Abused Its Discretion In Granting The TRO.

This Court also should grant leave to appeal because the circuit court's TRO was erroneous in several respects. To start, the court improperly concluded that plaintiffs had a right in need of protection and were likely to succeed on the merits of their claims. As explained below, this was based on the legally incorrect premise that the IDPH Act supersedes both the IEMA Act and the EOs issued under it. But the plain text of IDPH Act rejects that premise, stating that it should not be read to supersede the Governor's exercise of his emergency powers under the IEMA Act. 20 ILCS 2305/2(m). Furthermore, the court's follow-on conclusion that the Governor was required to formally suspend provisions of the IDPH Act before imposing mitigation measures under the IEMA Act was rejected by the appellate court. *Fox Fire*, 2020 IL App (2d) 200623, ¶¶ 38-41.

The circuit court's analysis of the discretionary TRO factors—plaintiffs' alleged irreparable harm and the balance of hardships—also was grounded in incorrect legal standards. Among other errors detailed below, it declined to perform the requisite balancing test upon concluding that doing so was "not necessary . . . as such balancing has already been conducted by the Legislature." A26. This, too, conflicts with appellate court precedent in this very context—the validity of the Governor's executive orders—stating that this balancing is indispensable before issuing a TRO. *JL Props. Grp. B, LLC v. Pritzker*, 2021 IL App (3d) 200305, ¶ 60. Because of the great public importance of this case and the need to resolve tension in lower court decisions, this Court should hear this case and vacate the circuit court's TRO.

A. A TRO is an extraordinary remedy designed to preserve the status quo.

Generally, "[a] temporary restraining order is an emergency remedy issued to maintain the status quo while the court is hearing evidence to determine whether a preliminary injunction should issue." *Delgado v. Bd. of Election Comm'rs*, 224 Ill. 2d 481, 483 (2007). When, as here, a circuit court enters a TRO with notice, it is subject to the same standards that apply to a preliminary injunction. *Kable Printing Co. v. Mt. Morris Bookbinders Union*, 63 Ill. 2d 514, 523-24 (1976). Plaintiffs, therefore, were required to demonstrate that: (1) they have a clearly ascertainable right in need of protection; (2) they are likely to succeed on the merits of their claims; (3) they would suffer irreparable injury without the TRO; and (4) they have no adequate remedy at law. *Mohanty v. St. John Heart Clinic, S.C.*,

225 Ill. 2d 52, 62 (2006). In addition, the circuit court must balance "the relative hardships imposed on the parties" if the TRO is granted or denied, *Buzz Barton & Assocs., Inc. v. Giannone*, 108 Ill. 2d 373, 387 (1985) (internal quotations omitted), as well as its effect on the public, *JL Props.*, 2021 IL App (3d) 200305, ¶ 57; *Guns Save Life, Inc. v. Raoul*, 2019 IL App (4th) 190334, ¶ 68.

De novo review applies to plaintiffs' possession of a clearly ascertainable right and likelihood of prevailing on the merits because they present questions of law requiring interpretation of the IDPH Act, IEMA Act, EOs, and Emergency Rules. *See Mohanty*, 225 Ill. 2d at 63 (applying *de novo* review where preliminary injunction's validity depended on legal question). This Court should review the circuit court's determinations as to the other factors, and its ultimate decision to enter a TRO, for an abuse of discretion. *Id.* at 62-63. "It is always an abuse of discretion for a trial court to base a decision on an incorrect view of the law." *A&R Janitorial v. Pepper Constr. Co.*, 2018 IL 123220, ¶ 15.

B. Plaintiffs have no right in need of protection and defendants are likely to succeed on the merits.

For several independent reasons, plaintiffs had no right in need of protection and are unlikely to prevail on the merits of their claims that the IDPH Act governs implementation of the masking, exclusion, and testing requirements. The circuit court's erroneous conclusion to the contrary warrants review by this Court given the importance of these questions to the public interest and the need to resolve tension among decisions of the lower courts. *Compare, e.g.*, A11-13, A16 (masking, temporary exclusion, and testing requirements constitute quarantine orders), *with*

Fox Fire, 2020 IL App (2d) 200623, ¶ 41 (EOs setting "guidelines that restaurants must follow to safely operate" during pandemic were "not tantamount to quarantine orders, isolation orders, or business-closure orders" subject to section 2 of the IDPH Act).

First, the Governor lawfully implemented the masking, exclusion, and testing requirements through the EOs issued pursuant to his emergency powers under the IEMA Act. Section 2 of the IDPH Act does not, as the circuit court held, affect the Governor's exercise of those powers because that statute expressly provides that "[n]othing in [section 2] shall supersede . . . response plans and procedures established pursuant to IEMA statutes." 20 ILCS 2305/2(m). Second, the IDPH Emergency Rule—which was promulgated pursuant to a valid exercise of its emergency rulemaking powers, 5 ILCS 100/5-45—confirms that the mitigation measures are not subject to the IDPH Act because the masking, exclusion, and testing requirements do not constitute forms of "quarantine" under the IDPH Act, 20 ILCS 2305/2(c). Third, the EOs were independently authorized under the Governor's constitutional authority, Ill. Const. art. V, § 8, which includes the power to protect the public through mitigation measures like the masking, exclusion, and testing requirements.

1. The EOs were valid exercises of the Governor's emergency powers under the IEMA Act.

To begin, the TRO should be vacated because the EOs, issued under the IEMA Act, are not superseded by the procedural requirements of section 2 of the IDPH Act. In interpreting the IDPH Act and IEMA Act, a court's goal "is to

ascertain and give effect to the legislature's intent." *Palm v. Holocker*, 2018 IL 123152, ¶ 21. "The most reliable indicator of legislative intent is the language of the statute, given its plain and ordinary meaning." *Id.* "Where statutory language is clear and unambiguous, it will be given effect without resort to other aids of construction." *Id.* "Words and phrases must be interpreted in light of other relevant provisions of the statute and must not be construed in isolation." *Id.* And a court has "an obligation to construe statutes in a manner that will avoid absurd, unreasonable, or unjust results that the legislature could not have intended." *Id.* These principles, moreover, apply in interpreting the EOs, which, like statutes or regulations, have the force and effect of law. *See* 20 ILCS 3305/6(c)(1) (authorizing Governor to "make . . . all lawful necessary orders, rules, and regulations to carry out the provisions of this Act"); *Degrazio v. Civil Serv. Comm'n of City of Chi.*, 31 Ill. 2d 482, 485 (1964) ("administrative regulations . . . have the force and effect of law"; "[t]herefore, they must be construed by the same standards governing the construction of statutes").

Each of the EOs in question state that they were issued under the Governor's emergency powers under the IEMA Act, including sections 7(8) and 7(12) of that statute. *Austin* SR2420, 2424, 3940, 4894; SR1089, 1100. The IEMA Act authorizes the Governor to issue a proclamation that a "disaster"—including an "epidemic," 20 ILCS 3305/4—exists, triggering his ability to exercise specified emergency powers, *id.* § 7. And sections 7(8) and 7(12) respectively afford the Governor the authority to "control . . . the occupancy of premises" within a disaster area and "exercise any

other functions, powers, and duties as may be necessary to promote and secure the safety and protection of the civilian population." *Id.* §§ 7(8), (12).

By requiring individuals entering school buildings to wear a mask, students and school personnel to temporarily stay out of schools if exposed to Covid-19, and school personnel to provide vaccine records or negative test results, the Governor placed conditions on who can occupy school buildings in the disaster area—here, the entire State. The EOs thus "control . . . the occupancy of premises" within the disaster area, placing them squarely within his authority under section 7(8). *Id.* § 7(8); *see also Cooke v. Ill. State Bd. of Elections*, 2021 IL 125386, ¶ 78 (courts "may look to the dictionary to discern an undefined term's plain and ordinary meaning"); *Occupancy*, Merriam-Webster Online Dictionary, https://bit.ly/3LGbLHY (defining "occupancy" as "the fact or condition of being occupied," *e.g.*, "occupancy by more than 400 persons is unlawful").

The EOs also fell within the Governor's authority to "exercise any other functions, powers, and duties as may be necessary to promote and secure the safety and protection of the civilian population" under section 7(12). In each EO, the Governor made findings showing the necessity of masking, exclusion, and testing, respectively. *See Austin* SR2419-20, 2423-24, 3936-37; SR1088-89, 1099-1100. And, as the circuit court recognized, SR3253, State defendants offered evidence that a layered approach to mitigations in schools is the best method to protect the State from the spread of Covid-19 in schools, *Austin* SR2414-17, 4490-91; SR1078-86. Because these mitigations are necessary to promote and secure the safety and

protection of the civilian population, they are authorized under the Governor's section 7(12) authority.

Notwithstanding that the EOs were issued under the IEMA Act, the circuit court concluded that State defendants needed to adhere to section 2 of the IDPH Act before enforcing them. This was wrong. Indeed, section 2(m) of the IDPH Act expressly states that requirements outlined in section 2 of the IDPH Act should not be read to supersede "response plans and procedures established pursuant to IEMA statutes." 20 ILCS 2305/2(m). Because the EOs fit squarely within such plans and procedures, section 2 of the IDPH Act has no effect on the Governor's exercise of his emergency powers.

For its part, the circuit court reasoned that section 2(m) was inapplicable because sections 2(b) through 2(e) of the IDPH Act state that IDPH may order quarantine, tests, or vaccines only with a person's consent or if it obtains a court order. A8, A19, A25; *see also* 20 ILCS 2305/2(b)-(e). In doing so, the court nullified section 2(m)'s clear directive that no part of section 2 may supersede plans established under the IEMA Act such as the EOs. *See Nelson v. Artley*, 2015 IL 118058, ¶ 25 ("Construing a statute in a way that renders part of it a nullity offends basic principles of statutory interpretation."). And it created the absurd result that State defendants must pursue individual hearings for each student or school personnel member who refuses to wear a mask, stay home while potentially infected with Covid-19, or be tested for Covid-19. Such a result, which would require conducting individualized hearings in every school in every corner of the State,

would cripple State defendants' ability to act nimbly to prevent the virus's spread. *See Goss v. Lopez*, 419 U.S. 565, 583 (1975) (rejecting argument that schools were required to give students individualized hearings before imposing brief suspensions because such a rule would require "countless" hearings); *Evans v. Cook Cnty. State's Atty.*, 2021 IL 125513, ¶ 27 ("Statutes must be construed to avoid absurd or unjust results."). The General Assembly did not intend to hamstring the Governor's emergency powers during a pandemic by requiring him to pursue thousands of hearings before exercising them—that is precisely why it included section 2(m) to exempt IEMA Act plans and procedures from the procedural requirements of section 2.

And the circuit court's conclusion that the "only way" the EOs could have been effective would have been through an exercise of the Governor's authority to suspend regulatory statutes under section 7(1) of the IEMA, *see* A8-9, ignores the Governor's authority to exercise any of the emergency powers in section 7, including sections 7(8) and 7(12), *see* 20 ILCS 3305/7 (authorizing Governor to exercise any of emergency powers listed). It also conflicts with precedent establishing that when, as here, the IDPH Act does not apply, 20 ILCS 2305/2(m), the Governor need not suspend its provisions under section 7(1), *see Fox Fire*, 2020 IL App (2d) 200623, ¶ 41 (Governor not required to suspend section 2(c) of IDPH Act where that provision did not apply to closures of businesses).

Finally, the appellate court's conclusion that the EOs have no effect without the IDPH Emergency Rule overlooks the plain language in the EOs, which

unequivocally requires schools to comply with the masking, vaccine, and testing requirements. *See* A36-37; *Austin* SR2420 (schools "must" require "the indoor use of face coverings"); *Austin* SR2425-26, 4895 (schools "must" temporarily exclude individuals likely exposed to Covid-19 from school grounds); SR1093, 1103 (unvaccinated school personnel "must undergo testing for COVID-19" and "[s]chools shall exclude School Personnel who are not fully vaccinated against COVID-19 from the premises unless they comply with the testing requirements").

Nor do the EOs condition these requirements on IDPH promulgating rules implementing them. Indeed, the EOs state that IDPH "*may* promulgate emergency rules as necessary to effectuate" them or "aid in [their] implementation." *Austin* SR2426 (emphasis added); SR1628; *see also* SR1107 (IDPH and ISBE "may adopt emergency rules" regarding personnel testing); 20 ILCS 3305/19 (directing State's "departments, offices and agencies are directed, upon request, to cooperate with and extend such services and facilities to the Governor"). Thus, the EOs imposed mandatory requirements regarding masking, exclusion, and testing but left IDPH and ISBE with the discretion to promulgate complementary rules. *See People v. Ousley*, 235 Ill. 2d 299, 313-14 (2009) (use of the word "shall" in one instance and "may" in another intended to make former provision mandatory and latter permissive). So, regardless of whether the agencies exercised that authority, the clear independent commands of the EOs have the force and effect of law.

In sum, the EOs remain effective and implement the masking, exclusion, and testing requirements under the independent authority vested in the Governor by

the IEMA Act. The IDPH Act has no bearing on those exercises of the Governor's emergency powers because section 2(m) makes clear that the procedures of section 2 of the IDPH Act do not apply to them. On this basis alone, this Court should grant leave to appeal, reverse the appellate court's dismissal order, and vacate the circuit court's TRO.

2. The IDPH Act also does not apply because the EOs are not IDPH quarantine orders, as confirmed by the validly promulgated IDPH Emergency Rule.

The IDPH Act does not apply for the additional reason that the masking, exclusion, and testing requirements are not quarantines ordered by IDPH. Section 2(c) of that statute requires IDPH to comply with certain procedures before "order[ing]" that someone be "quarantined or isolated." 20 ILCS 2305/2. Section 2(d) requires IDPH to provide certain notices before "order[ing]" tests or vaccines. *Id.* § 2(d). And section 2(e) provides that IDPH may "quarantine" individuals who refuse to comply with those orders. *Id.* § 2(e). But again, the Governor, not IDPH, implemented the masking, exclusion, and testing requirements through the EOs. These statutory provisions, which apply only to IDPH, necessarily do not affect mitigations put in place by the Governor. *See* 20 ILCS 2305/2(c)-(e) (placing limits on quarantines by "the Department"). Indeed, Section 2(m) of the IDPH Act explicitly provides that the "individual provisions of subsections (a) through (h) of this Section apply to any order issued by the Department under this Section." *Id.* § 2(m).

Similarly, the circuit court's suggestion that the testing requirement requires compliance with section 2(d) and 2(e) of the IDPH Act is incorrect because those provisions apply when the IDPH "orders" tests or vaccines, but the EOs do not order school personnel to obtain either. A19, A25. These requirements are conditions of being able to enter a school, but they do not prohibit school personnel from working remotely or seeking other employment. *See Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (noting that university policy requiring unvaccinated students "to wear masks and be tested" was "not constitutionally problematic" and students "who do not want to be vaccinated may go elsewhere"). Providing vaccine or testing records is no different from other requirements that ISBE maintains for teachers. *E.g.*, 23 Ill. Admin. Code § 1.610 & 1 App. A (describing license requirements for certain types of school personnel).

In addition, under the IDPH Emergency Rule, masking, temporary exclusion from school, vaccination, and testing are not "quarantines" triggering the procedural requirements of section 2(c) of the IDPH Act. *See* 20 ILCS 2305/2(c). The IDPH Act does not define that term, and IDPH's Emergency Rule stated that masking, temporary exclusion, vaccination, and testing do not qualify as quarantines. SR1532; 45 Ill. Reg. at 12148. Indeed, the Emergency Rule explained that quarantine requires the "physical separation and confinement" of an individual. SR1525; 45 Ill. Reg. at 12139, 12141. "'Confinement' . . . has been defined as '[t]he act of imprisoning or restraining someone.'" *People v. Phelps*, 211 Ill. 2d 1, 8 (2004) (quoting Black's Law Dictionary 294 (7th ed. 1999)); *see also*

Confined, Ballentine's Law Dictionary (3d ed. 1969) ("Imprisoned; required to remain in one place."). No one is physically restrained or imprisoned by being required to put on a mask. And the temporary exclusion and testing requirements do not involve imprisonment or physical restraint—they merely prevent personnel from entering a school if they refuse to comply, leaving them otherwise uninhibited.[12]

The circuit court's holding that IDPH's Emergency Rule was invalid because it was not justified by an emergency also was incorrect, for at least three reasons. First, the court afforded no deference to IDPH's determination that Covid-19 is an emergency even though an "[e]mergency" is defined as "any situation that an agency finds reasonably constitutes a threat to the public interest, safety, or welfare." 5 ILCS 100/5-45(a); *see also Fox Fire*, 2020 IL App (2d) 200623, ¶ 20 ("Courts should refrain from considering the wisdom behind any adopted methods to combat the spread of disease."); *Champaign-Urbana Pub. Health Dist. v. Ill. Labor Rels. Bd.*, 354 Ill. App. 3d 482, 489 (4th Dist. 2004) ("[t]he existence of an emergency is primarily a matter of agency discretion"). Second, the court's conclusion that the pandemic conditions did not constitute an emergency at the

[12] As noted, the Emergency Rule also deleted the definition of "Quarantine, Modified," on which the circuit court relied in concluding that masking, temporary exclusion, and testing were forms of "quarantine" under the IDPH Act. *See* A11, A23; SR1523-26. But as discussed, there was no IDPH "order" triggering the protections of section 2. Additionally, masking is not a "modified quarantine" because it is a universal, as opposed to "selective," measure, and because it is a preventative measure, as opposed to a responsive measure undertaken after a person has been "exposed to a contagious disease." SR1525-26.

time that the rule was adopted in September 2021 ignored that cases and hospitalizations were rising as the new school year was beginning, *see Austin* SR2412, as well as the Emergency Rule's express reference to the Governor's disaster proclamations stating that "[t]he COVID-19 outbreak . . . is a significant public health crisis that warrants these emergency rules," *Austin* SR2412, 2830; *see also* 5 ILCS 100/5-45(b) (requiring "agency's finding and a statement of the specific reasons for the finding shall be filed with the [emergency] rule"). By referencing the Covid-19 outbreak and the Governor's related disaster proclamations, IDPH met its duty to state its reasons for finding that an emergency existed, for there can be no dispute that Covid-19 poses a threat to the public interest, safety, and welfare. *See* SR2409-14.[13]

3. The circuit court failed to consider the Governor's independent constitutional authority to implement the masking, exclusion, and testing requirements.

Not only does the IDPH Act not supersede the EOs and the IDPH Emergency Rule, plaintiffs have no likelihood of success on the merits because the Governor had the authority to implement the masking, exclusion, and testing requirements through his constitutional power to protect the public health in a crisis. The authority to protect the public health flows directly from the Governor's "supreme executive power," Ill. Const. art. V, § 8, and thus exists independently of the IDPH

[13] The circuit court's determination that Covid-19 is not a sufficient emergency to justify emergency rulemaking under section 5-45 of the Administrative Procedure Act, 5 ILCS 100/5-45, is inapplicable to ISBE's proposed non-emergency rule implementing the testing requirement, *see* 45 Ill. Reg. at 15598, 15602-03; *see also* 5 ILCS 100/5-40.

Act and the IEMA Act. The circuit court's failure to address this independent source of authority before entering a TRO is another reason to vacate its order.

The State has long possessed police power "to preserve the public health," and Illinois courts have refrained from interfering with this power "except where the regulations adopted for the protection of the public health are arbitrary, oppressive and unreasonable." *People ex rel. Barmore v. Robertson*, 302 Ill. 422, 427 (1922); *see also Fox Fire*, 2020 IL App (2d) 200623, ¶20 ("Courts should refrain from considering the wisdom behind any adopted methods to combat the spread of disease."). And in the extraordinary circumstances now prevailing in the State—a once-in-a-century pandemic—the Governor's constitutional authority allows him to take immediate measures needed to protect public health, subject to the limitations outlined by this Court in *Barmore*. *See also, People v. Adams,* 149 Ill. 2d 331, 343 (1992) ("[T]here are few, if any, interests more essential to a stable society than the health and safety of its members. Toward that end, the State has a compelling interest in protecting and promoting public health and, here, in adopting measures reasonably designed to prevent the spread" of disease); *Vill. of Spillertown v. Prewitt,* 21 Ill. 2d 228, 230 (1961) ("It has often been said that the most important of police powers is the preservation of the health and safety of the citizens of a community.").

Also relevant is the fact that the Illinois General Assembly did not prohibit the Governor from exercising such authority under the IDPH Act or the IEMA Act. Section 2 of the IDPH Act places procedural limits on IDPH's authority to issue

quarantine orders, not the Governor's authority to respond to a public health crisis. *See* 20 ILCS 2305/2(b), (c), (m). And the IEMA Act explicitly states that the power it confers on the Governor is in *addition to*, not *exclusive of*, his other legal powers, including that "under the constitution." 20 ILCS 3305/3(d). Thus, the Governor's independent constitutional powers are fully intact. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

C. The circuit court abused its discretion in finding that plaintiffs established irreparable harm for which they have no adequate legal remedy.

This Court also should grant leave to appeal and vacate the TRO because the circuit court abused its discretion in finding that plaintiffs would suffer irreparable harm without injunctive relief. As noted, "[i]t is always an abuse of discretion for a trial court to base a decision on an incorrect view of the law," *A&R Janitorial*, 2018 IL 123220, ¶ 15, and here, the circuit court's finding of irreparable harm was based on its misapprehension that the IDPH Act applied to the EOs, A21-22.

This legal error aside, the circuit court abused its discretion in concluding that plaintiffs showed irreparable harm sufficient to warrant entry of extraordinary relief. Beyond the fact that plaintiffs were subject to, and complied with, the masking, exclusion, and testing requirements for months before seeking emergency relief in the form of a TRO, *see Austin* SR113-14, 483; SR298, none of those requirements impose the type of harm justifying the extraordinary relief awarded by the circuit court, *see Bridgeview Bank Grp. v. Meyer*, 2016 IL App (1st) 160042, ¶ 21 (delay in seeking relief is relevant to irreparable harm).

As for the masking requirement, masks are required only for those who can "medically tolerate" them, *e.g.*, EO 2021-20, § 1, thus avoiding any potential harm to the wearer beyond mere "inconvenience[ ]," *Cruz v. Pritzker*, No. 21-cv-5311, 2021 U.S. Dist. LEXIS 238627, at *7 (N.D. Ill. Dec. 14, 2021) (quotations omitted); *see also id.* at *6-7 (rejecting challenge to school mask requirement in EO 2021-18). And requiring students to continue wearing masks will protect, not harm, them: masks help reduce Covid-19's spread, which is especially critical given the relatively low vaccination rate among children at present. *Austin* SR2414-17, 4489-91.

As for the temporary exclusion requirement, any claim that, without a hearing under the IDPH Act, plaintiffs might be mistakenly identified as close contacts and required to temporarily stay home is too speculative to warrant injunctive relief. *See Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry.*, 195 Ill. 2d 356, 371-72 (2001) ("an injunction will not be granted . . . because there is a mere possibility or apprehension on the part of the plaintiff that some illegal act will be done") (quotations omitted). This is especially true because even those identified as close contacts need not be excluded from school if they are asymptomatic, were masked when exposed to the virus, and test negative four times after the exposure. SR1632-33. The possibility that all of the students and staff named in these cases will be excluded from school despite being healthy is too "remote and speculative" to warrant a TRO. *See Callis*, 195 Ill. 2d at 372-73.

Although in-person instruction is preferable, students who must temporarily stay home are not deprived of their education, as they must be offered remote

learning. SR1633. Indeed, temporary remote learning for those exposed to Covid-19 will ensure that most students can continue in-person learning. *Austin* SR3141-43, 3211-12. By temporarily excluding only students identified as at the highest risk of having contracted Covid-19, other students can continue in-person learning. Without this mitigation, schools may have to shift to full remote learning in response to outbreaks or to avoid them. *See Austin* SR3141, 3145-46, 3202.

Finally, the testing requirement applicable to the staff plaintiffs will not inflict irreparable harm because those plaintiffs have an adequate remedy at law. SR3249. Consequences to employment are not irreparable because money damages representing lost wages and other benefits can compensate that harm. *Webb v. Cnty. of Cook*, 275 Ill. App. 3d 674, 677 (1st Dist. 1995); *Hess v. Clarcor, Inc.*, 237 Ill. App. 3d 434, 452 (2d Dist. 1992); *McMann v. Pucinski*, 218 Ill. App. 3d 101, 108 (1st Dist. 1991); *Int'l Ass'n of Firefighters Loc. No. 23 v. City of E. St. Louis*, 206 Ill. App. 3d 580, 587 (5th Dist. 1990). Even if the *Allen* plaintiffs faced discipline or termination because they refused to adhere to the masking or testing requirement, then, they could be compensated through reinstatement and back pay. *See Kanter & Eisenberg v. Madison Assocs.*, 116 Ill. 2d 506, 510-11 (1987) ("If there is an adequate legal or equitable remedy which will make the plaintiff whole after trial, a preliminary injunction should not issue.").

D. The circuit court erred by refusing to balance the hardships.

Finally, the circuit court abused its discretion by applying the incorrect standard in balancing the hardships. As noted, it is well established that the circuit

court must balance "the relative hardships imposed on the parties" by the TRO, as well as the public interest. *Buzz Barton*, 108 Ill. 2d at 387. Despite recognizing that a court "must" perform this balancing test, A5, the circuit court ultimately concluded that it was "not necessary . . . as such balancing has already been conducted by the Legislature." A26. By failing to consider the effects of entering a TRO on the parties to this case or the public, the court applied the wrong standard and thus abused its discretion.

This Court should intervene in this case on this basis alone, as the circuit court's TRO conflicts with appellate court precedent stating that this balancing is indispensable before issuing a TRO. *JL Props.*, 2021 IL App (3d) 200305, ¶ 60. There, the appellate court affirmed the denial of a preliminary injunction as to the Governor's EOs implementing an eviction moratorium during the pandemic "based on the equities alone," *id.* ¶ 61, explaining that, "even if a plaintiff makes a *prima facie* showing as to [the other] elements the circuit court may not issue a preliminary injunction unless the balance of hardships and public interests weighs in favor of granting the injunction," *id.* ¶ 60. The circuit court's refusal to balance the hardships cannot be reconciled with the holding in *JL Properties*.

Additionally, the balance of hardships strongly weighs against the TRO because of the public health risks and disruptions to in-person education created by that order, on the one hand, and the lack of irreparable harm absent a TRO, on the other. Indeed, the TRO causes significant, and irreparable, harm while this case proceeds. As explained, the layered approach outlined in the EOs is important to

curbing the spread of Covid-19 in schools, especially because children are currently vaccinated at lower rates than adults, making them more susceptible to contracting and spreading Covid-19, not only among themselves, but also to their teachers, parents, and other community members. *Austin* SR2412-13. In addition, the heightened risk of Covid-19 spread has caused some schools to shift to full-time remote learning, depriving students of valuable in-person instruction. *See* Emergency Mot. for Stay Pending Appeal filed in *Allen* at 24-25, *Austin* at 19-20, *Graves* at 20-21, and *Hughes* at 19-20.

Moreover, the heightened risk that their children might contract Covid-19 absent the mitigations may cause parents to remove their children from school, SR1829, including medically vulnerable children who are especially protected by these measures, SR910-11. The unrefuted evidence also shows that future outbreaks among students and staff may force schools to shift to full-time remote learning, resulting in more students being deprived of in-person education, *see* SR910-11, 1828-29, 1832-33, 1835-36, and depriving many students of essential food, as well as social and mental health services, SR918-19; *see* SR2201-02.

The circuit court predicted that these harms would not come to pass because State defendants could impose these same requirements so long as they comply with the procedures of the IDPH Act. *See* A26. But as discussed, this is impracticable because the IDPH Act requires any quarantine or isolation to be authorized by a court order following a hearing. *See* 20 ILCS 2305/2(c), (e). A Covid-19 outbreak in just one school district thus could require public health

authorities to initiate and pursue hundreds or even thousands of hearings. *See* SR915 (Chicago Public Schools has more than 330,000 students and 33,000 school-based employees); *Austin* SR3315 (noting that, in 2021-2022 school year, 1,556 students in Plainfield Community Consolidated School District tested positive for Covid-19 and 5,836 students and staff were identified as close contacts); *Austin* SR3161-62 (noting that, on December 21, 2021, 600 Valley View Community Unit School District students were excluded from school because they tested positive or were identified as close contacts). Such an immense procedural hurdle would make implementation of these crucial public health measures impossible even in the face of a future spike in Covid-19 cases, especially since the circuit court stated that the TRO will remain in effect until "trial on the merits." A28. Moreover, such a process would frustrate the purpose of the IDPH Act (to protect the "interests of the health and lives of the people of the State," 20 ILCS 2305/2), *and* IEMA Act ("protect the public peace, health, and safety in the event of a disaster," 20 ILCS 3305/2(a)).

III. Alternatively, If The Appeal Is Deemed Moot, This Court Should Exercise Its Supervisory Authority To Vacate The TRO.

Alternatively, if the Court does not grant leave to appeal, then it should nevertheless exercise its supervisory authority to vacate the TRO, which the appellate court should have done once it determined that the appeal was moot. The appellate court here dismissed State defendants' interlocutory appeal of the circuit court's TRO as moot. A33. But the appellate court did not also vacate the TRO, thereby leaving the TRO in place and rendering it unreviewable. And the appellate court failed to vacate the TRO at the same time as dismissing the appeal as moot

even though State defendants specifically urged vacatur in the event that it were to rule based on mootness. *See* State Defs.' Resp. to Feb. 15, 2022 Order at 10.

When an appeal is moot and no mootness exception applies, a reviewing court "[n]ormally" will vacate the lower court order or judgment that is the subject of the appeal because otherwise "it would leave standing" the lower court's "unreviewed" order or judgment. *In re Adoption of Walgreen*, 186 Ill. 2d 362, 366-67 (1999). After all, if an appeal is dismissed as moot, the reviewing court "do[es] not determine the correctness" of the lower court's order. *Id.* at 366; *see also People v. Jackson*, 231 Ill. 2d 223, 228 (2008) (because appeal was moot, "appellate court's judgment must be vacated"); *In re Randall M.*, 231 Ill. 2d 122, 133-34 (2008) (because appeal was being dismissed as moot, "we have no choice but to vacate the appellate court's decision below"); *Felzak v. Hruby*, 226 Ill. 2d 382, 394 (2007) (similar).

The appellate court here erred by not vacating the circuit court's TRO at the same time as it dismissed State defendants' appeal as moot. The appellate court effectively let a TRO stand even though it decided that the controversy underlying the order no longer existed. And that the appellate court found no live controversy was based on actions of others, not any action by the parties to this litigation, and was facilitated by the appellate court not ruling on State defendants' emergency motion for a stay pending appeal until after it decided to dismiss the appeal. *See* A34, A38.

Moreover, the circuit court's TRO should not remain in place because it construed several Illinois statutes, *see* A7-9, A11-12, A16-17, which may affect the

merits of this case as it proceeds to final judgment, as well as provide non-binding authority in other cases challenging the Governor's Covid-19 mitigation efforts, *see Felzak*, 226 Ill. 2d 382, 394 (2007) (vacating lower court judgment is proper after appeal becomes moot if lower court order could impact subsequent litigation); *La Salle Nat. Bank v. City of Chi.*, 3 Ill. 2d 375, 382 (1954) (moot judgment must be "set aside" so that "the matter will not be res judicata"); SR304 (referring to other circuit court rulings on masking and temporary exclusion).

This Court's "supervisory authority is a broad and unusual power, which is unlimited in extent, undefined in character[,] and grants jurisdiction without pretending to intimate its instruments or agencies." *People v. Lyles*, 217 Ill. 2d 210, 217 (2005) (cleaned up). At a minimum, then, if mootness were to carry the day before this Court, this Court should nonetheless step in and exercise its supervisory authority to correct the appellate court's error and vacate the TRO. This Court has granted such relief under similar circumstances, *see, e.g.*, *Commonwealth Edison*, 2016 IL 118129, ¶¶ 22, 27 ("Appellants alternatively ask this court to exercise its supervisory authority to vacate the appellate court opinion" because "this appeal is now moot"; "we vacate the judgment of the appellate court" because "this court is unable to pass on the correctness of the appellate court's opinion"), and thus should do so here. There is no reason for this Court to depart from what is "[n]ormally" done in these circumstances. *Walgreen*, 186 Ill. 2d at 366-67. In short, this Court should not permit the appellate court's refusal to vacate the circuit court's TRO stand.

CONCLUSION

For these reasons, State defendants request that this Court grant their petition for leave to appeal, reverse the appellate court's dismissal order, and vacate the circuit court's TRO. Alternatively, if the Court does not grant leave to appeal, State defendants request that this Court exercise its supervisory authority to vacate the TRO, which the appellate court should have done once it determined that the appeal was moot.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

SARAH A. HUNGER
ALEX HEMMER
Deputy Solicitors General

/s/ Jane Elinor Notz
JANE ELINOR NOTZ
Solicitor General
NADINE J. WICHERN
EVAN SIEGEL
CARSON R. GRIFFIS
JONATHAN J. SHEFFIELD
LEIGH J. JAHNIG
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5376 (office)
(312) 909-4218 (cell)
CivilAppeals@ilag.gov (primary)
Jane.Notz@ilag.gov (secondary)

CERTIFICATE OF COMPLIANCE

I certify that this Petition conforms to the requirements of Supreme Court Rules 341 through 343 made applicable by Supreme Court Rule 315(d). The length of this Petition, not including the items identified as excluded from the length limitation in Rule 341(b)(1), is 12,960 words.

/s/ Nadine J. Wichern
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5659 (office)
(773) 590-7119 (cell)
CivilAppeals@ilag.gov (primary)
Nadine.Wichern@ilag.gov (secondary)

CERTIFICATE OF FILING AND SERVICE

I certify that on February 22, 2022, I electronically filed the foregoing **Petition For Leave To Appeal** with the Clerk of the Court for the Supreme Court of Illinois, by using the Odyssey eFileIL system.

I further certify that the other participants in this case, named below, are not registered service contacts on the Odyssey eFileIL system, and thus will be served by transmitting a copy to all primary and secondary e-mail addresses of record designated by those participants on February 22, 2022.

Counsel of Record for Plaintiffs

Thomas G. DeVore
tom@silverlakelaw.com

William J. Gerber
will@gerberlaw.net

Lance C. Ziebell
lziebell@lavellelaw.com

Counsel of Record for School District Defendants, Intervenors, And Amici

Merry C. Rhoades
Christine L. Self
mrhoades@tuethkeeney.com
cself@tuethkeeney.com

Robert E. Swain
Stephanie E. Jones
rob@krihaboucek.com
stephanie@krihaboucek.com

James A. Petrungaro
Paulette A. Petretti
Adam Dauksas
jpetrungaro@edlawyer.com
ppetretti@edlawyer.com
adauksas@edlawyer.com

Caitlin Frazier Satterly
Jason T. Manning
fsatterly@hlerk.com
jmanning@hlerk.com

Charles A. LeMoine
clemoine@dykema.com

H. Allen Yow
ayow@rblawyers.net

William R. Pokorny
Shelli L. Anderson
Jennifer A. Smith
Dana Fattore Crumley
Nicki Bazer
Scott Metcalf
Melissa Sabota
Koga Ndikum-Moffor
Caroline K. Kane
wrp@franczek.com
sla@franczek.com
jas@franczek.com
dfc@franczek.com
nbb@franczek.com
srm@franczek.com
mds@franczek.com
knm@franczek.com
ckk@franczek.com

David J. Braun
S. Jeff Funk
Luke M. Feeney
Brandon K. Wright
dbraun@millertracy.com
jfunk@millertracy.com
lfeeney@millertracy.com
bwright@millertracy.com

Lisa R. Callaway
Dawn M. Hinkle
Abigail C. Rogers
lcallaway@ecbslaw.com
dhinkle@ecbslaw.com
arogers@ecbslaw.com

Loretta K. Haggard
Natalie J. Teague
lkh@scwattorney.com
njt@scwattorney.com

John Shapiro
Richard Self
Dylan Smith
jshapiro@freeborn.com
rself@freeborn.com
dsmith@freeborn.com

Jay E. Greening
Robert B McCoy
Jeffrey J. Gaster
jay.greening@mhtlaw.com
robert.mccoy@mhtlaw.com
jeffrey.gaster@mhtlaw.com

Nikoleta Lamprinakos
Susan E. Nicholas
Dennis L. Weedman
Hailey M. Golds
nlamprinakos@robbins-schwartz.com
snicholas@ robbins-schwartz.com
dweedman@ robbins-schwartz.com
hgolds@ robbins-schwartz.com

Vincent D. Resse
Melanie Renken
vreese@mickesotoole.com
mrenken@mickesotoole.com

John O'Driscoll
Jodriscoll@tresslerllp.com

Jerrold H. Stocks
jstocks@decatur.legal

Mallory A. Milluzzi
mamilluzzi@ktjlaw.com

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Nadine J. Wichern
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5659 (office)
(773) 590-7119 (cell)
CivilAppeals@ilag.gov (primary)
Nadine.Wichern@ilag.gov (secondary)