E-FILED
Transaction ID: 4-22-0090
File Date: 2/15/2022 12:10 PM
Carla Bender, Clerk of the Court
APPELLATE COURT 4TH DISTRICT

NO. 4-22-0090

**IN THE APPELLATE COURT OF ILLINOIS,
FOURTH JUDICIAL DISTRICT**

ROBERT GRAVES, *et al.*, ***Plaintiffs-Appellees*,** **v.** **GOVERNOR JB PRITZKER, *et al.*,** ***Defendants-Appellants*.**	**Appeal from the Seventh Judicial Circuit Court of Sangamon County, Illinois** **Case No. 2021-CH-500003**

MEMORANDUM OF *AMICI CURIAE* ILLINOIS FEDERATION OF TEACHERS AND ILLINOIS EDUCATION ASSOCIATION IN SUPPORT OF PETITION FOR EMERGENCY REVIEW OF TEMPORARY RESTRAINING ORDER

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The Circuit Court's February 4, 2022 order ("Order") is remarkable. Though fashioned as a "Temporary Restraining Order," it disregards the very equitable principles that are supposed to guide the issuance of such extraordinary relief. Rather than preserve the *status quo*, the Order upsets arrangements under which schools have operated this entire academic year. Rather than balance the hardships and consider the public interest in a manner commensurate with the gravity of the issues, the Order conducts a cursory weighing of the equities that fails to grapple with the real-world implications of its ruling. Rather than confine itself to the parties, the Order casts a shadow over the policies of school districts not before the Circuit Court. Granting what amounts to permanent declaratory relief, the Order deems "null and void" rules that have enabled schools to remain open during the pandemic, and invites "non-named Plaintiffs and School Districts throughout this State" to "govern themselves accordingly." (Order at 28 & nn. 39-40.)

Although framed in terms of statutory interpretation and neutral adherence to the rule of law, the Order betrays value-based judgments about the interests at stake and a startling disregard for the practical consequences of its mandates. In an act of judicial overreach, the Circuit Court has upended officials' efforts to reconcile the State's compelling interest in both community health and the education of its children. Because the Order violates well-established standards governing the exercise of the Circuit Court's equitable powers, it should be reversed.

I. The Circuit Court's Balancing of the Equities Was Deficient, Requiring Reversal.

Particularly given the weighty public interests at stake, the Order's balancing of hardships and its consideration of the public interest are legally and factually deficient. This flaw constitutes an abuse of discretion warranting reversal. *See JL Properties Group B, LLC v. Pritzker*, 2021 Ill App (3d) 200305, ¶ 57 ("If the circuit court finds that the harm to the public or to the opposing party outweighs the benefits of granting the injunction, it must deny the motion for a preliminary injunction, even if all of the other requirements for granting a preliminary injunction are met."); *see also Guns Save Life, Inc. v. Raoul*, 2019 IL App (4th) 190334, ¶71 (although plaintiff "demonstrated a fair question as to each of the elements required," affirming denial of preliminary injunction that "would change the status quo and would not benefit the public interest").

A. In Balancing the Equities, the Circuit Court Gave Inadequate Consideration to the Public Interest and Undue Weight to Plaintiffs' Interests.

On the one hand, the Order downplays the public interest through a combination of omission and unpersuasive reasoning. On the other, the Order fails to subject plaintiffs' purported interest to necessary scrutiny.

1. The Order's analysis of the public interest is fundamentally flawed.

The Order essentially dispenses with any serious consideration of the public interest by framing the issue this way: "Plaintiffs do not seek any order of this Court dismantling masking, vaccination or testing policies in their totality. Only that due process under the law be afforded to them should they choose to object to being

quarantined, which by definition includes masks, as well as being subject to vaccination or testing." (Order at 26 (emphasis in original).") But can anyone seriously doubt that affording "due process" to those who refuse to wear a mask will substantially disrupt mitigation measures and thereby jeopardize the wellbeing of students, teachers and staff in schools? Plaintiffs bore the burden of establishing their entitlement to a TRO. Yet the Order cites no record evidence to support the implication that restraining enforcement of mitigation measures absent "due process" will have minimal practical effect on those measures.

Perhaps most striking, the Order appears to suggest that the Circuit Court can dispense altogether with balancing the hardships or considering the public interest: "This Court has already found the Plaintiffs are entitled to this due process under the IPDH Act, so the question for the Court is what hardship this might create for Defendants or the public. It is not necessary for the Court to weigh these potential risks presented by the Defendants as such balancing has already been conducted by the Legislature." (*Id.*) As discussed, that is not the law. The issuance of a temporary restraining order is an extraordinary exercise of judicial power, to which plaintiffs must demonstrate they are entitled. All the more so where, as here, plaintiffs request a mandatory injunction altering the *status quo*. The Circuit Court cannot satisfy its obligation to consider the consequences *its own order* will have on the public – students, teachers, staff and, by extension, their families – by alluding to some unspecified "balancing" that the legislature has purportedly conducted.

In a similar vein, the Order "refuses to look forward at what transpired after the Emergency Rules were implemented regarding the Omicron variant." (Order at 14 n.23.) Whether that refusal is sound as a matter of statutory analysis, it cannot be maintained in considering the public interest. Yet, having refused to delve into this topic in considering plaintiffs' likelihood of success on the merits, the Order fails to revisit it when considering the equities. That failure is inconsistent with the Circuit Court's obligation to consider the public interest before granting injunctive relief.

2. The Order's weighing of plaintiffs' interests is flawed.

On the other side of the ledger, by invoking, in mantra-like fashion, an ill-defined right to "due process," the Order gives undue weight to plaintiffs' purported interest.

The Order's treatment of the mask mandate is a case in point. Having concluded, for purposes of its merits analysis, that masking is a form of "quarantine," the Circuit Court appears to conclude, as noted above, that plaintiffs must be afforded "due process" before being required to wear a mask. But what sort of "process" is "due" someone who objects to wearing a mask? A determination whether that person is entitled to a medical exemption? If so, before seeking court intervention, shouldn't that person first need to claim, and be denied, the medical exemption? Or, since individual preference seems to be the paramount consideration for plaintiffs, should "due process" require a determination whether the person is infected? That approach would seem to make little sense in dealing with a virus that can be transmitted by people who are asymptomatic. Moreover, such an approach would certainly render any attempted mask mandate a dead letter. Nevertheless, beyond simply invoking a

right to "due process," the Order doesn't wrestle with these questions, which must be addressed to evaluate the relative hardships and the Order's impact on the public interest.

In this regard, it also bears noting plaintiffs "are not asking to be allowed to make a self-contained choice to risk only their own health." *Cassell v. Snyders*, 990 F.3d 539, 550 (7th Cir. 2021); *see also Troogstad v. City of Chicago*, – F. Supp. 3d –, 2021 WL 5505542, at *5 (N.D. Ill. Nov. 24, 2021) ("When an individual's behavior directly affects the health and welfare of others in the community, she cannot rely on the Supreme Court's longstanding protection of 'intimate and personal choices,' . . . to the utter exclusion of all other interests."). In the school context, even in normal times, individual preferences often must yield to concern for the general welfare. That is all the more true in the midst of a pandemic. *See Hagler v. Larner*, 284 Ill. 547, 553 (1918) ("The right to enjoy school and other privileges, recognized by our law, must be so used and enjoyed as not to expose other people unnecessarily to dangerous diseases or contagions."); *Klaassen v. Trustees of Indiana Univ.*, 7 F.4th 592, 594 (7th Cir. 2021) ("If conditions of higher education may include surrendering property and following instructions about what to read and write, it is hard to see a greater problem with medical conditions that help all students remain safe when learning.").

Because plaintiffs' purported interest—the "right" not to wear a mask on school premises, the "right" not to be excluded from a school facility if deemed a close contact, or the "right" not to take a test for COVID-19—has "negative consequences (even life-threatening at times) for other people, that interest is not absolute." *Troogstad*, 2021

WL 5505542, at *5; *see generally Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) ("Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own [liberty] . . . regardless of the injury that may be done to others."). Therefore, even assuming for argument's sake that plaintiffs have identified some legal infirmity behind the measures at issue (and they have not), plaintiffs cannot plausibly claim infringement of a fundamental right weightier than the public interests at stake. Given that reality, the balance of harms weighs overwhelmingly in favor of reversal.

* * *

In short, the Circuit Court's balancing of harms and consideration of the public interest was fatally deficient.

B. The Protection of Public Health Is a Compelling State Interest.

In balancing the equities, the Circuit Court should have given far more weight to the State's interest in protecting public health. The preservation of public health is among the most important ends of government. *See Adams*, 149 Ill. 2d at 343 ("There are few, if any, interests more essential to a stable society than the health and safety of its members."); *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) ("Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.").

The pursuit of that goal thus implicates the State's police powers at their apex. *Adams*, 149 Ill. 2d at 343 (noting "the broad sweep of the State's power in this area, and the compelling nature of the governmental interest"); *Methodist Med. Ctr. of Ill.*

v. Ingram, 82 Ill. 2d 511, 522-23 (1980) ("In focusing on its due process argument, plaintiff and amici have almost completely ignored the broad scope of the State's police power in the area of health[,] [which] is sufficient to justify, in proper circumstances, uncompensated deprivation of personal liberty as well as deprivation of property."); *People ex rel. Baker v. Strautz*, 386 Ill. 360, 364 (1944) ("When a State employs its police power to safeguard the public health it may act in a summary manner even though the result is to deprive a citizen of his liberty.").

Consistent with the above principle, the State's and the public's interest in arresting the spread of COVID-19 is substantial. *See JL Properties*, 2021 IL App (3d) 200305, ¶ 59 ("[T]he circuit court correctly found . . . the State and the public had a strong interest in preserving public health . . . ."); *Miranda v. Alexander*, 2021 WL 4352328, at *6 (M.D. La. Sept. 24, 2021) ("The state's interest in preventing the spread of COVID-19 and protecting individuals' health is substantial.") (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020)) (denying TRO against implementation of mask mandate). Plaintiffs' motions should have been evaluated in this context.

C. The Court Gave Insufficient Weight to the Public Interest in Safely Keeping School Open for In-Person Learning.

The public interest refers to "the interests of those not before the court." *Cassell*, 990 F.3d at 550. It thus encompasses the interests of parents, students, teachers, and staff who need schools to remain open, and "who did not consent to [the] trade-off," *id.*, between health and personal autonomy that plaintiffs wish to be free to make. *See generally Jacobson*, 197 U.S. at 29 ("[I]t was the duty of the constituted

authorities primarily to keep in view the welfare, comfort, and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few.").

The emergency measures at issue were implemented precisely "to allow schools in Illinois . . . to conduct in-person teaching and learning, while at the same time keeping students, teachers, staff, and visitors safe."[1] *See Klaassen*, 7 F.4th at 594 ("A university will have trouble operating when each student fears that everyone else may be spreading disease. Few people want to return to remote education—and we do not think that the Constitution forces the distance-learning approach on a university that believes vaccination (or masks and frequent testing of the unvaccinated) will make in-person operations safe enough.")); *Miranda*, 2021 WL 4352328, at *6 ("[E]njoining the mask mandate would pose an increased risk of quarantines, illness and long-term learning disruptions."). If allowed to stand, the Order will deprive affected districts of their ability to assure students, teachers, and staff that schools are being conducted under reasonably safe conditions.[2] Given recent

[1] The State's Resp. in Opp. to Pls. Motions for Emerg. Prelim. Relief dated Jan. 2, 2022, Ex. 1 (Bleasdale Decl.) ¶ 29.

[2] School districts already have announced that starting February 7 their schools no longer will require teachers, staff, students and visitors wear a mask while in a school facility and close contacts will not have to isolate unless directed by the local health department. *See*, *e.g.*, https://www.d214.org/domain/889; https://www.sj-r.com/story/news/2022/02/06/schools-react-illinois-mask-mandates-covid-rules-being-voided/6680054001/; https://www.wglt.org/local-news/2022-02-06/school-mask-ruling-sets-off-weekend-scramble-in-school-districts; https://www.fox32chicago.com/news/arlington-heights-school-district-214-says-because-of-judges-ruling-masks-will-not-be-required-monday.amp; https://www.dailyherald.com/amp-article/20220205/news/220209476/.

events of public record, it is not alarmist to state that the Order threatens the availability of in-person school throughout the State of Illinois. To issue a temporary restraining order without even acknowledging this potential impact is incompatible with case law governing the Circuit Court's exercise of its equitable powers.

D. The Order Fails to Give Due Weight to Questions of Institutional Competence.

Finally, there is an additional consideration that tilts the equities decisively in favor of reversal of the Circuit Court's Order. Courts are not well-suited to the scientific judgments and policy trade-offs inherent in efforts to mitigate the fast-evolving threat that the pandemic poses to the general health and welfare. *See Lipsman v. Cortés-Vázquez*, 2021 WL 5827129, at *2 n.2 (S.D.N.Y. Dec. 7, 2021) (taking judicial notice "that COVID-19 poses a threat to public safety and welfare, that the threat has evolved over the course of the pandemic . . . , and the nature and extent of the threat is somewhat uncertain"). As the U.S. Court of Appeals for the Seventh Circuit recently admonished:

> [T]he scientific uncertainty surrounding the pandemic further cautions against enjoining state coronavirus responses unless absolutely necessary. The world has not suffered a pandemic this deadly since 1918. . . . . Accordingly, while "the Constitution cannot be put away and forgotten," *Roman Catholic Diocese* [*of Brooklyn v. Cuomo*], 141 S. Ct. [63, 68 (2020)], as judges without scientific expertise, we must appreciate these uncertainties and choose the course of action that will minimize the costs of being mistaken.

Cassell, 990 F.3d at 549.

This cautionary note is entirely in keeping with Illinois law. *See Adams*, 149 Ill. 2d at 343 ("States enjoy broad discretion in devising means to protect and promote public health."); *Strautz*, 386 Ill. at 365 ("The court has nothing to do with the wisdom

or expediency of the measures adopted."). Yet the Order fails to reflect the appropriate level of institutional humility. Instead, it purports to second-guess the judgments of those who have primary responsibility for protecting the public health. Plaintiffs "have a right to insist [on] compliance with" the Department of Public Health Act, the Order opines, "before the Defendant School Districts' masking, exclusion from school, quarantine, isolation, vaccination or testing policies are being thrust upon them, especially when there has been zero evidence that those children are contagious or highly likely to spread a contagious disease." (Order at 21-22 (emphasis supplied).)

On the basis of such tendentious reasoning, and the limited evidentiary record available at the TRO stage, the Circuit Court has nullified emergency health measures adopted in the midst of a pandemic that has killed more than 900,000 Americans and stretched Illinois' schools to the breaking point. If the Order is allowed to stand, the judiciary will have arrogated to itself an outsize role in crafting public health policy.

II. The Court Should Issue A Stay Pending Review Of The Circuit Court's Order.

For the following reasons, this Court should issue a stay pending its review of the Circuit Court.

First, for the reasons described above, in addition to the other reasons persuasively set forth in the State's memorandum, the Order constitutes an abuse of discretion and is thus likely to be reversed upon a review by this Court.

Second, as noted, the Order is a mandatory injunction that alters the *status quo* under which schools have been operating this entire academic year. If the Order is not stayed, it will have caused unnecessary disruption in the event this Court ultimately reverses. If this Court were to affirm following expedited review, a stay will have merely preserved the *status quo* and thus will not have caused substantial hardship or disruption.

Third, the Circuit Court's ruling and mandatory injunction provisions do not provide adequate guidance and can be expected to cause widespread uncertainty. For example, the Order enjoins requiring mask use by anyone who objects "except during the terms of lawful order of quarantine issued from their respective health department, in accordance with the IDPH Act." It is unclear how this injunction would apply as a practical matter, especially in light of the above observations regarding "due process." Accordingly, even were this Court to affirm in substantial part (and, for the reasons stated above, it should not), the Order will likely need to be modified to provide greater clarity as to what precisely is enjoined.

CONCLUSION

For the above reasons, *Amici* Illinois Federation of Teachers and Illinois Education Association respectfully request that this Court stay enforcement of and vacate the Circuit Court's February 4, 2022 Order.

Dated: February 7, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies pursuant to penalties of perjury as set forth in Section 1-109 of the Illinois Code of Civil Procedure that on February 7, 2022, he caused the foregoing *Memorandum of Amici Curiae Illinois Federation of Teachers and Illinois Education Association in Support of Petition for Emergency Review of Temporary Restraining Order* to be electronically filed with the Clerk of this Court using the Odyssey eFileIL system, which sent a notification of such filing to counsel of record via electronic mail, including the individuals identified below.

I further certify that on February 7, 2022, I served the individuals identified below by transmitting via email a copy of *Memorandum of Amici Curiae Illinois Federation of Teachers and Illinois Education Association in Support of Petition for Emergency Review of Temporary Restraining Order.*

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