03

E-FILED
2/22/2022 12:08 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

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.

EMERGENCY MOTION
FOR STAY PENDING APPEAL

Defendants-Petitioners Governor JB Pritzker, the Illinois State Board of Education ("ISBE"), the 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") respectfully move pursuant to Illinois Supreme Court Rule 305(b) for an order

[1] The appendix to the petition for leave to appeal ("A__") contains a list of all plaintiffs-respondents, defendants, and defendants-petitioners. *See* A80-111.

staying the temporary restraining order ("TRO") entered below by the circuit court on February 4, 2022, pending resolution of this Court's ruling on their petition for leave to appeal and any subsequent proceedings on appeal.[2]

Since the beginning of the school year, the Governor has issued a series of executive orders ("EOs") intended to protect students and school employees from Covid-19 by requiring students and staff to wear masks inside schools, requiring unvaccinated staff to test for Covid-19, and requiring those who test positive for, or have been exposed to, Covid-19 to stay home until it is safe for them to return. These requirements have provided safety and stability to students, teachers, and schools for months, and have safely and effectively guided schools through two surges of unprecedented severity without meaningful disruptions to in-person education.

The circuit court drastically altered this status quo by entering extraordinary relief in the form of a TRO that immediately halted the mask, exclusion, and testing requirements as applied to the named plaintiffs in over 150 school districts across the State. Its decision was badly flawed. Illinois law expressly permits the Governor to take a wide range of public-health measures to combat emergencies, including epidemics, and he did just that here. And the TRO will have substantial

[2] In support of this motion, State defendants submit a separate Supporting Record ("SR") of relevant materials. State defendants also rely on the supplemental records filed in the appellate court in *Allen v. Illinois Department of Public Health*, No. 4-22-0094 ("*Allen* SR"), *Austin v. Illinois Department of Public Health*, No. 4-22-0092 ("*Austin* SR"), and *Graves v. Pritzker*, No. 4-22-0090 ("*Graves* SR"). The tables of contents to those supporting records are found at A57-74.

consequences not only for State defendants, but for the parents, teachers, school staff, and children across the State whose health and safety are now governed not by evidence-based measures but by judicial order. Today, parents, teachers, school staff, and members of their communities are faced with impossible choices: Some schools have eliminated mitigation measures on the threat of legal liability, some parents have been forced to withdraw students from schools, and uncertainty regarding the applicable legal regime reigns. This Court should stay the circuit court's TRO during the pendency of these proceedings and restore the status quo.[3]

BACKGROUND

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

This case concerns Governor Pritzker's response to the Covid-19 pandemic, which has claimed the lives of over 32,000 Illinois residents in the last two years.[4] On March 9, 2020, Governor Pritzker declared that pandemic a disaster in Illinois under the Illinois Emergency Management Agency Act ("IEMA Act"), 20 ILCS

---

[3] Consistent with Illinois Supreme Court Rule 305(e), State defendants sought stays of the TRO both with the circuit court and with the appellate court. The circuit court informed the parties that it would not rule on State defendants' motion, based on the incorrect view that it "no longer has jurisdiction" due to the filing of the notice of appeal. SR31; *see Gen. Motors v. Pappas*, 242 Ill. 2d 163, 173-74 (2011). The appellate court, for its part, denied the stay motion, which was filed on an emergency basis, as moot based on its ultimate view that the appeal was moot. SR39.

[4] Ill. Dep't of Pub. Health, *COVID-19 Statistics*, https://dph.illinois.gov/covid19/data.html (last updated Feb. 18, 2022). This court may take judicial notice of information on government websites cited in this response, as well as from mainstream internet sources. *E.g.*, *People v. Johnson*, 2021 IL 125738, ¶ 54; *Kopnick v. JL Woode Mgmt. Co.*, 2017 IL App (1st) 152054, ¶ 26.

3305/1 *et seq.*[5] Although Illinois saw a relative decline in cases in the summer of 2021, cases began increasing in September 2021 before reaching a record high in January 2022. *See Allen* SR1081-82. School-age children have been significantly affected by this surge. Between June 19, 2021, and December 18, 2021, the case rate in Illinois reported by IDPH for people under 20 increased from 11 per 100,000 to 556 per 100,000. *Allen* SR1082.

Throughout the pandemic, Governor Pritzker has issued executive orders responding to various aspects of this ongoing public health emergency. As relevant here, on August 4, 2021, the Governor issued Executive Order ("EO") 2021-18, requiring Illinois schools to implement a range of Covid-19 mitigation strategies, including an indoor masking requirement. *Allen* SR413-15. Several weeks later, the Governor issued EO 2021-20, which, among other things, required workers in certain sectors, including school employees, to be vaccinated against Covid-19 or to provide negative results of an approved Covid-19 test on a weekly basis to be present at work. *Allen* SR1090. EO 2021-20 also authorized State agencies to "promulgate emergency rules as necessary to effectuate" the order. *Allen* SR1093.

The following month, the Governor issued additional executive orders meant to help curb the spread of Covid-19 in schools. EO 2021-22, issued on September 3, 2021, extended the September 5 deadline set forth in EO 2021-20 by two weeks for school personnel to either obtain the first dose of the vaccine or begin providing

[5] All executive orders and disaster proclamations can be found at https://www.illinois.gov/government/executive-orders.html.

Covid-19 test results. *Allen* SR1103. Unvaccinated school personnel who do not comply with the testing requirement were excluded from school premises. *Id.* EO 2020-24, issued on September 17, 2021, instructed schools to "refuse admittance to the School premises, extracurricular events, or any other events organized by the School" for specified periods of time 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. *Allen* SR1627-28. It also required students temporarily excluded from school to be offered remote learning. *Allen* SR1628. EO 2021-24 also provided that "State agencies . . . may promulgate emergency rules as necessary to effectuate [EO 2021-24] and aid in its implementation." *Allen* SR1628. EO 2021-25, issued four days later, required schools to investigate Covid-19 cases to identify "close contacts" also subject to temporary exclusion. *Allen* SR1630-33. The masking, testing, and exclusion requirements were extended in subsequent orders and are still in effect.

Consistent with the executive orders, ISBE and IDPH filed emergency rules on September 17, 2021. The ISBE Emergency Rule, *see* 45 Ill. Reg. at 11843 *et seq.*, amended portions of Title 23 of the Illinois Administrative Code to implement the vaccination or testing requirement for school personnel, *see Allen* SR1227. And 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 Allen* SR1528-32. The IDPH 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." *Allen* SR1532. It also amended IDPH's regulations defining "quarantine" and "isolation," which are not defined in section 2 of the Department of Public Health Act ("IPDH Act"), 20 ILCS 2305/2, to remove "requirements for the use of devices or procedures intended to limit disease transmission" and "exclusion of children from school" from those definitions. *Allen* SR1523-26.

The IDPH Emergency Rule was scheduled to expire on February 13, 2022, but was renewed by IDPH for an additional 150 days starting on February 14. On the following day, however, the Joint Committee on Administrative Rules ("JCAR") suspended IDPH's extended emergency rule, noting questions about how the rule would apply in light of the TRO that is the subject of these appeals (which, as further discussed below, *infra* p. 8, had found those rules "null and void," SR29).

The measures implemented by the Governor, ISBE, and IDPH are consistent with guidance from public health experts. As the EOs explain, during the relevant timeframe Covid-19 "cases for 5 to 11-year-olds and 12 to 14-year-olds went up dramatically," and in the views of experts, including the U.S. Centers for Disease Control ("CDC"), "increasing vaccination rates in schools," alongside "masking and regular testing, is vital to providing in-person instruction in as safe a manner as possible." *Allen* SR1099-1100. Specifically, these experts have found that a layered approach—including masking, vaccinations, weekly testing for unvaccinated school

personnel, and temporary exclusion of students and faculty exposed to Covid-19—is crucial to stopping the spread of Covid-19 in schools. *Allen* SR1085.

B. Proceedings below

As described more fully in State defendants' petition for leave to appeal, four separate actions were filed in the circuit court between September and December 2021 generally challenging the legality of the masking, testing, and exclusion requirements. The first, *Austin v. Board of Education of Community Unit School District No.* 300, No. 21MR91, was brought 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. The second, *Hughes v. Hillsboro Community School District No. 3*, No. 21MR112, was initiated by two parents, on behalf of their children, in the circuit court of Montgomery County on September 16, 2021. The third, *Graves v. Pritzker*, No. 21MR255, was initiated in the circuit court of Kendall County on October 18, 2021, by parents of public-school students in two school districts. The fourth, *Allen v. Board of Education of North Mac Community Unit School District #34*, No. 2021-CH-500007, was brought by roughly 90 teachers and staff employed at schools across Illinois on December 8, 2021, in Sangamon County. Although the plaintiffs in each action brought different claims against different school-district defendants, all generally sought temporary injunctive relief against enforcement of the relevant EOs and the emergency rules. Plaintiffs' primary claim was that State defendants and school districts lacked authority to impose the temporary exclusion,

testing, or masking requirements without following the procedures of section 2 of the IDPH Act (which generally require individualized hearings and a court order) because temporary exclusion and masking constituted a form of "quarantine" under that statute. Plaintiffs also argued that the emergency rules were invalid.

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 the named school districts from implementing the temporary exclusion, testing, and masking requirements without offering the individual hearings set out in section 2 of the IDPH Act. SR2, 29. The circuit court held that plaintiffs had "rais[ed] a fair question" as to whether the EOs fell within the scope of the IDPH Act, instead of the IEMA Act, such that the procedures outlined in section 2 of the IDPH Act applied. SR26. Without addressing State defendants' arguments that the executive orders 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. SR9-10. And notwithstanding section 2(m) of the IDPH Act, which states that the section 2 procedures do not supersede plans established under the IEMA Act, the court held 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. SR9, SR26.

The circuit court also held that equitable factors favored entry of a TRO. The court found that plaintiffs' asserted "right to insist compliance with" the IDPH Act (i.e., a bare statutory violation) itself constituted irreparable harm. SR22-23. As for the balance of hardships, the court stated that it was "not necessary" to "weigh the[] potential risks" of hardship to the defendants or the public because, in its view, "such balancing has already been conducted by the Legislature" in passing the IDPH Act. SR27-28.

State defendants appealed the TRO, as permitted by Illinois Supreme Court Rule 307(d). *Graves* SR1937; *Austin* SR5643; *Hughes* SR2207; *Allen* SR3306. After memoranda were filed by the parties, the appellate court issued an order directing the parties to explain how the appeal was affected by JCAR's February 15, 2022 decision to suspend the IDPH emergency rule challenged by the plaintiffs. Mem. Supp. Pet. for Rev. filed in *Austin*, *Graves*, *Hughes*, and *Allen*; Order Directing Parties to File Expl'n at 1-2. [6] All parties agreed that JCAR's decision affected only a portion of the TRO order and that there was still a live controversy before the appellate court. State Defs.' Resp. to Feb. 15, 2022 Order at 6-8; *Austin* Pls-Rts' Resp. at 6-7; *Graves* Pls-Rts' Resp. at 2-4.

On February 16, however, the appellate court issued a divided order dismissing the appeal as moot. SR34. The court held that plaintiffs' challenges to

---

[6] These appellate court filings, and others cited herein, are generally available at https://bit.ly/AustinConsolidated. The appellate court consolidated the appeals as *Graves v. Pritzker,* No. 4-22-0090, and this motion generally cites *Graves* filings. Filings in the individual appeals (before consolidation) are cited, as necessary, as "*Austin* at ___," "*Graves* at ___," "*Hughes* at ___," and "*Allen* at ___," respectively.

the IDPH emergency rule were moot because that rule was no longer in effect. SR36. And it reasoned that the Emergency Rules were "presumably necessary" to EO2021-24 because they were promulgated "immediately" after the Governor issued that EO. SR38-39. The court further found the public interest exception to the mootness doctrine inapplicable, because, among other things, the "changing nature of the COVID-19 pandemic" meant that it was "not clear," in the court's view, whether "these same rules would be reinstated" in the future. SR37. One justice concurred in part and dissented in part, explaining that, in her view, plaintiffs' challenge to the executive orders was not moot. SR39. "As it stands," she explained, "the majority's decision leaves open the question of whether the circuit court properly enjoined the enforcement of the executive orders." *Id.*

ARGUMENT

The Court should stay the TRO pending disposition of this appeal. "Courts have inherent power to grant a stay pending appeal, and whether or not to do so is a discretionary act" that is typically exercised "to preserve the status quo pending the appeal." *Stacke v. Bates*, 138 Ill. 2d 295, 302 (1990). Although this Court has not "follow[ed] a ritualistic formula" specifying the factors relevant to such a stay, it has explained that the movant must "present a substantial case on the merits and show that the balance of the equitable factors weighs in favor of granting the stay." *Id.* at 308-09. State defendants meet both prongs of this standard. They will succeed on the merits because the decisions below transparently rest on multiple independent legal errors. And the equities tilt strongly toward granting a stay, because the

TRO—which altered, rather than preserved, the status quo—has sowed serious uncertainty about the applicable legal regime and is exacerbating a once-in-a-century public-health crisis.

A. State defendants are likely to succeed on the merits.

State defendants are likely to succeed on the merits. The TRO entered by the circuit court rests on multiple legal errors, including that court's express refusal to balance the equities. And the appellate court's alternative disposition of the case—mootness—does not withstand serious scrutiny.

1. The appellate court erred in concluding that the appeal was moot.

To begin, the appellate court erred in concluding that the expiration of the IDPH rule rendered this appeal moot. Indeed, the appellate court erred twice over: The JCAR action does not moot the primary controversy between the parties (as all parties agree), and even as to the emergency rules, the public-interest exception to mootness applies.

An appeal is moot only if no actual controversy exists between the parties, or when it becomes impossible for the Court to render effectual relief. *Commonwealth Edison Co. v. Ill. Com. Comm'n*, 2016 IL 118129, ¶ 10. Here, it remains possible for the Court (and, for that matter, for the appellate court) to adjudicate plaintiffs' main challenge—i.e., their challenge to the Governor's EOs. As explained, *supra* pp. 7-8, Plaintiffs primarily challenge the legality and enforceability of those EOs, which require masking, testing, and temporary exclusion of affected individuals. The EOs were temporarily enjoined as to certain students and teachers through the

circuit court's TRO. SR29. Because JCAR's action related only to the extension of the IDPH Emergency Rule, it does not affect the EOs. So, as the dissenting justice explained, SR39, and the parties agreed below, *supra* p. 9, the validity, legality, and enforceability of the EOs continues to present a live case or controversy.

The appellate court disagreed, reasoning that the executive orders' validity hinged on the now-expired IDPH Emergency Rule. SR37-39. But that premise is flatly incorrect. As detailed further below, *infra* pp. 14-15, the Governor issued the executive orders pursuant to the IEMA Act, and so they are not dependent on the IDPH Act or the emergency rules. Indeed, EO2021-24 makes clear that the emergency rules were to support the EOs, not vice versa; it states that agencies, including IDPH, "*may* promulgate emergency rules as necessary to effectuate this [EO] and aid in its implementation." *Allen* SR1628 (emphasis added). And at the time the first EO with this language was issued, no circuit court had ever ruled in plaintiffs' favor as to the legality of the mitigation measures, *see Graves* SR61-63, so it is not the case—contrary to the appellate court's speculation—that the EOs could not stand without the rules.[7]

At the very least, even if the appeal were moot, the appellate court erred in declining to vacate the TRO (and, in doing so, leaving it unreviewable). When an appeal is moot and no mootness exception applies, an appellate court "[n]ormally"

[7] In addition, as State defendants explain in the petition for leave to appeal, even the aspect of the case that is affected by the JCAR action—plaintiffs' challenge to the emergency rules—falls within the public-interest exception to mootness. The appellate court erred, SR36-37, in concluding otherwise.

will vacate the lower court order or judgment that is on appeal because otherwise "it would leave standing" that "unreviewed" order. *In re Adoption of Walgreen*, 186 Ill. 2d 362, 366-67 (1999). 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, that is, let a TRO remain in place notwithstanding its view that the controversy underlying the order no longer existed. And its construction of Illinois law may affect the merits of this case as it proceeds to final judgment, as well as influence other challenges to the Governor's Covid-19 mitigation efforts. *See Felzak v. Hruby*, 226 Ill. 2d 382, 394 (2007) (vacating lower court judgment is appropriate after appeal becomes moot if lower court order could impact subsequent litigation). So even if the appellate court were correct to find the appeal moot—and it was not—it erred in leaving in place the TRO.

2. The circuit court erred in entering a TRO.

Defendants are also likely to succeed in showing that the circuit court erred in entering a TRO. To obtain a TRO, plaintiffs were required to show that they (1) had a clearly ascertainable right in need of protection; (2) were likely to succeed on the merits of their claims; (3) would suffer irreparable injury without the TRO; and (4) had no adequate remedy at law. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 62 (2006); *see Kable Printing Co. v. Mt. Morris Bookbinders Union*, 63 Ill. 2d 514, 523-24 (1976) (standards for injunctive relief apply to TROs entered after notice to opposing party). The circuit court, for its part, was required to balance the "hardships imposed on the parties" and on the public from granting or denying the

TRO. *Buzz Barton & Assocs., Inc. v. Giannone*, 108 Ill. 2d 373, 387 (1985); *see also JL Props. Grp. B, LLC v. Pritzker*, 2021 IL App (3d) 200305, ¶ 57. Plaintiffs failed on each of these metrics, and so the TRO, which is still in effect as a result of the appellate court's failure to vacate it, should be stayed.

First, plaintiffs are exceedingly unlikely to prevail on their claims. Plaintiffs' basic argument is the EOs at issue here could be authorized only under the IDPH Act, not under any other authority vested in the Governor, and that the EOs impose "quarantines" sufficient to trigger certain protections under the IDPH Act. But both premises are flawed.

To start, the EOs in question were issued under the authority vested in the Governor by the IEMA Act, making the IDPH Act inapplicable. Each of the EOs in question states that it is an exercise of the Governor's powers under the IEMA Act. *Austin* SR2420, 2424, 3940, 4894; *Allen* SR1089, 1100. And the EOs fit comfortably within those authorities. 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. Sections 7(8) and 7(12) respectively give 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). The EOs here exercised those authorities by setting conditions on who could "occupy" certain "premises" (*id.* § 7(8)), namely

schools, and by otherwise "promot[ing] and secur[ing] the safety" of educators and students (§ 7(12)).

Because the EOs were issued under the IEMA Act, the circuit court was wrong to suggest that State defendants needed to adhere to section 2 of the IDPH Act—which requires certain procedural steps to be taken before "quarantine[s]" are imposed, or "tests" and "vaccines" are ordered, 20 ILCS 2305/2—before enforcing them. Section 2(m) of the IDPH Act expressly states that section 2 should not be read to supersede "response plans and procedures established pursuant to IEMA statutes." 20 ILCS 2305/2(m). That should have been the end of the matter: Because the EOs here were issued "pursuant to IEMA statutes," *id.*, section 2 of the IDPH Act—including the requirements set out in sections 2(c), (d), and (e)—do not apply.

The circuit court disregarded section 2(m), but gave no reason why. That court appeared to reason that the Governor could have issued the EOs in question only by exercising his authority under section 7(1) of the IEMA Act to *suspend* the requirements imposed by the IDPH Act. SR9-10. But that reasoning is circular: The IDPH Act's requirements do not apply at all to the Governor's exercise of his IEMA authorities, so there was no need for the Governor to suspend them. And the circuit court offered no other reasoning for its failure to apply section 2(m). That error alone warrants reversal and justifies a stay of the TRO.

In any event, the masking, testing, and exclusion requirements are not quarantines ordered by IDPH. As noted, section 2(c) of the IDPH Act requires

IDPH to comply with certain procedures before "order[ing]" that someone be "quarantined or isolated," 20 ILCS 2305/2, and sections 2(d) and 2(e) require IDPH to provide certain notices before "order[ing]" tests or vaccines and authorize IDPH to "quarantine" individuals who refuse to comply with those orders. 20 ILCS 2305/2(d), 2(e). But these requirements do not apply here. For one, the Governor, not IDPH, imposed the masking, testing, and exclusion requirements, and so none of these measures are "ordered" by IDPH, as required to trigger the procedural requirements. For another, none of the measures directed by the EOs—masking, temporary exclusion from school, and testing—is a "quarantine" that triggers the requirements of section 2(c) of the Act. *See* 20 ILCS 2305/2(c). As IDPH explained in the emergency rule in place during the proceedings below, quarantine requires the "physical separation and confinement" of an individual. *Allen* SR1525; 45 Ill. Reg. at 12139, 12141. But no one is physically restrained or confined by being required to put on a mask. And the exclusion and testing requirements do not involve physical restraint—they merely prevent personnel from entering the school under certain circumstances. For this reason, too, the circuit court erred in entering a TRO, and that TRO should be stayed.

Second, plaintiffs did not show that any relevant equitable factor required entry of a TRO, and the circuit court abused its discretion in finding otherwise.

To start, the circuit court abused its discretion in holding that plaintiffs would suffer irreparable harm absent entry of a TRO. "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, and here, the circuit court's irreparable-harm holding was premised on multiple legal errors. The circuit court reasoned that the alleged deprivation of plaintiffs' rights under the IDPH Act gave rise to irreparable harm, SR22-23, but that conclusion was error multiple times over: The IDPH Act does not apply to the EOs, *supra* pp. 14-15, so plaintiffs' rights under that Act were not impaired. And although the circuit court asserted that a violation of that statute, standing alone, could constitute irreparable harm, SR23, the only authority the court cited for that proposition concerns deprivation of *constitutional* rights, *see Makindu v. Ill. High Sch. Ass'n*, 2015 IL App (2d) 141201, ¶ 42. But if a bare statutory violation gave rise to irreparable harm, this requirement would do no work in any statutory case. That cannot be right.

In any case, plaintiffs are not irreparably harmed by the enforcement of the EOs. Plaintiffs were subject to, and complied with, the masking, exclusion, and testing requirements for months before seeking a TRO, *see Austin* SR113-14, 483; *Allen* SR298, casting serious doubt on any claim to irreparable harm. And none of the public-health measures instituted by the EOs impose the type of harm justifying the extraordinary relief awarded by the circuit court. Masks are required only for those who can medically tolerate them, any exclusion from school is temporary (and, in the case of the students, accompanied by remote learning), and any consequences to the teacher plaintiffs, at the very least, are compensable via money damages. *See Webb v. Cnty. of Cook*, 275 Ill. App. 3d 674, 677 (1st Dist. 1995). Plaintiffs do not face irreparable harm.

Finally, the circuit court also abused its discretion in refusing to balance the relevant hardships. As noted, before entering a TRO, the circuit court must balance "the relative hardships" that a TRO would "impose[] on the parties" and the public. *Buzz Barton*, 108 Ill. 2d at 387; *see also JL Props.*, 2021 IL App (3d) 200305, ¶ 57. Despite recognizing that a court "must" perform this balancing test, SR6, the circuit court later concluded that it was "not necessary . . . as such balancing has already been conducted by the Legislature," SR27. That conclusion is incorrect, conflicts with this Court's express directions, and constitutes an abuse of discretion.

B. The equities tilt strongly toward Defendants.

Equitable factors compel a stay of the TRO. The continued TRO impairs State defendants' ability to respond to the most serious public-health crisis of the past century. And it has precipitated chaos for parents, children, teachers, school administrators, and the public. It should be stayed, and events returned to the pre-TRO status quo, pending the resolution of the appeal.

1. The TRO has exacerbated the public-health effects of the Covid-19 crisis.

To start, and most obviously, the TRO has impaired Defendants' ability to respond to the Covid-19 pandemic and in doing so has exacerbated the effects of that pandemic for all Illinois residents. The circuit court enjoined Defendants from implementing the public-health measures at issue here at a moment when the rate of Covid-19 among children was still unacceptably high. *See Allen* SR1082. This consequence is especially problematic because children are currently vaccinated at lower rates than adults, and thus are more susceptible to contracting and spreading

Covid-19, not only among themselves but also to their teachers, parents, and other community members. *Allen* SR1080-81.

The TRO has hamstrung State defendants' ability to take effective measures to mitigate the Covid-19 crisis within Illinois schools. Under the circuit court's view, State defendants cannot require any mitigating measures—from masks to tests to short-term exclusion—without going through the procedures set out in section 2 of the IDPH Act. SR27. But these procedures cannot reasonably be utilized in this context. Among other things, under the Act, even an immediate order for a quarantine or isolation must be followed by notice of a circuit court hearing within 48 hours. *See* 20 ILCS 2305/2(c). 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 Allen* SR915 (noting that Chicago Public Schools has more than 330,000 students and 33,000 school-based employees); *Allen* SR828-31 (noting that Plainfield Community Consolidated School District 202 employs more than 3,200 people, and in the 2021-22 school year, 5,836 students and staff were identified as close contacts).

2. The TRO has led to chaos for parents, children, teachers, school administrators, and the public.

The TRO has also given rise to extraordinary uncertainty among parents, children, teachers, school administrators, and the public about which rules govern and why. Indeed, it is not an exaggeration to suggest that the TRO has precipitated chaos in school districts across the State. Only the Court's intervention—returning

matters to the pre-TRO status quo—can resolve the uncertainty pending resolution of the appeal.

To start, school districts have been left in a state of profound uncertainty about the applicable legal regime. The circuit court entered a TRO only against the over 150 school districts that were named as defendants in the action on appeal, and only as to the named plaintiffs. But the TRO—and, now, the appellate court's decision declining to vacate it—has reverberated far beyond the scope of the case. Many school districts have, in the wake of the TRO, felt pressure to determine for themselves whether to continue to require students and employees to take steps to mitigate the risks posed by Covid-19 in line with the EOs that are the subject of this appeal. Educators and administrators across the State have described the post-TRO legal landscape as "chaos,"[8] as "confusing and frustrating,"[9] and as having led to "widespread confusion."[10] Some schools have stopped requiring masks and other mitigation measures, driven in part by concerns about legal liability.[11]

---

[8] Steven Spearie, *Illinois Court Tosses Pritzker's Mask Mandate Appeal, Leaving It Up to Districts*, State Journal-Register, Feb. 18, 2022, https://www.sj-r.com/story/news/2022/02/18/illinois-school-mask-mandate-lawsuit-face-coverings-optional/6780024001/.

[9] Paige Blanzy, *Peoria County Regional Superintendent of Schools: 'The Current Situation Is Confusing And Frustrating'*, Heart of Illinois ABC, Feb. 16, 2022, https://www.hoiabc.com/2022/02/17/peoria-county-regional-superintendent-schools-current-situation-is-confusing-frustrating/.

[10] Letter from Eric Twadell and Troy Gobble to Adlai Stevenson High School Parents, Feb. 18, 2022, https://www.d125.org/parents#fs-panel-16444.

[11] *See, e.g.*, Glenbard District 87, *Superintendent Discusses Shift To Mask Optional*, Feb. 17, 2022, https://www.glenbard87.org/news/superintendent-discusses-shift-to-mask-optional/.

All this uncertainty will increase, not diminish, over time. Since the entry of the TRO on February 4, two weeks ago, plaintiffs' counsel has filed or is preparing to file over 700 motions to join additional parties—plaintiffs who live and work in school districts across the State—to the actions on appeal. *See* SR59. The *in terrorem* effect produced by this rapid growth in the litigation (under which school districts and administrators fear additional students, parents, and staff being added to this lawsuit and to the TRO) has exacerbated the uncertainty associated with the TRO.

Those school districts that have chosen to implement their own mitigation measures—and the employees tasked with carrying those measures out—have also faced significant consequences. The appellate court explained that the TRO does not "restrain[ ] school districts from acting independently . . . in creating provisions addressing COVID-19." SR35. But parents who believe themselves to be shielded by the TRO from *all* mitigation measures, no matter their source, have sought to hold in contempt of court the third-party employees of school districts that have chosen to impose mitigation measures independently.[12] Indeed, plaintiffs' counsel

[12] *See* Tracy Swartz & Karen Ann Cullotta, *Two CPS Parents In School Mask Lawsuit Say Their Kids Were Told To Wear Masks Or Leave Mount Greenwood School, Want District Held In Contempt Of Court*, Chi. Trib., Feb. 14, 2022, https://www.chicagotribune.com/news/breaking/ct-chicago-public-schools-mask-mandate-lawsuit-20220214-kdfbxpvvujd4fjwk2crutpuugm-story.html.

has stated that he intends to seek prison time for such violations.[13] The circuit court has scheduled a hearing on the contempt motion for this week.

The TRO has also caused parents, families, and teachers new degrees of strain and anxiety. Many parents across the State, no matter how they feel about the mitigation measures, are "confused."[14] The TRO has had a particularly serious impact on families with children or other people who are immunocompromised, some of whom may need to move across district lines in order to find schools willing to establish mitigation measures they view as critical to protecting their families.[15] Unrefuted evidence below 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 Allen* SR910-11, 1828-29, 1832-33, 1835-36, and depriving many students of essential food and social and mental health services, *Allen* SR918-19.

And the chaos precipitated by the TRO has extended beyond schools, parents, and teachers. Relying on the theory articulated by the circuit court, under which

---

[13] Greg Bishop, *Two School Districts Face Contempt Motion Over Claims They Are Violating Mask Restraining Order*, Center Square, Feb. 14, 2022, https://www.thecentersquare.com/illinois/two-school-districts-face-contempt-motion-over-claims-they-are-violating-mask-restraining-order/article_79bfc3cc-8dc9-11ec-a02d-e7d8280c3374.html.

[14] Zoe Chipalla, *Illinois School Mask Ruling Leads To Confusion, Varied Responses Among Area Districts*, WIFR, Feb. 7, 2022, https://www.wifr.com/2022/02/08/illinois-school-mask-ruling-leads-confusion-varied-responses-among-area-districts/.

[15] Diane Pathieu, Craig Wall & Sarah Schulte, *More Confusion Surrounds Illinois Mask Mandate For Schools After State Committee Ruling*, ABC 7, Feb. 16, 2022, https://abc7chicago.com/illinois-jcar-mask-rule-pritzker-update-today-joint-committee-on-administrative-rules-mandate-for-schools/11569890/.

mitigation measures requiring masks must be imposed pursuant to the IDPH Act—i.e., after an individualized hearing and court order—plaintiffs' counsel has sued the Speaker of the Illinois House of Representatives and is seeking a new TRO on the theory that the General Assembly is prohibited from enforcing its own rules on masking and conduct based upon the same legal reasoning contained in the TRO. *See* SR59. That effort shows the TRO's reach: Under the theory on which that order relies, *no* masking measures can be imposed by state actors absent compliance with the IDPH Act, notwithstanding the consequences such a reading might have for public health within Illinois. The chaos engendered by the TRO is thus already spreading beyond the current dispute—and is doing so quickly.

Only this Court's intervention can halt this mischief. A stay pending appeal is meant primarily to "preserve the status quo pending the appeal." *Stacke*, 138 Ill. 2d at 302. A return to the pre-February 4 status quo pending the disposition of the appeal would restore the critical public-health measures at issue here, permit State defendants to implement new measures as the pandemic evolves, and bring needed order to those whose lives and work have been further upended by the TRO.

CONCLUSION

WHEREFORE, State defendants ask this Court for an order pursuant to Illinois Supreme Court Rule 305(b) staying the TRO entered by the circuit court pending its consideration of their petition for leave to appeal and any subsequent proceedings on appeal if the petition is granted.

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)

Attorneys for State Defendants-Petitioners

No. _____

IN THE
SUPREME COURT OF ILLINOIS

JULIEANNE AUSTIN, as the Parent or Legal Guardian of T.L. and L.A., *et al.*,	)	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.

ORDER

THIS CAUSE COMING TO BE HEARD on motion of State defendants-petitioners under Illinois Supreme Court Rule 305(b) motion for a stay pending appeal,

IT IS HEREBY ORDERED that the motion is ALLOWED / DENIED.

IT IS FURTHER ORDERED that the temporary restraining order entered by the circuit court on February 4, 2022, is hereby stayed pending this Court's resolution of State defendants-petitioners' petition for leave to appeal. If the petition is granted, the temporary restraining order is stayed pending this Court's resolution of the appeal on the merits.

ENTER:

_____ JUSTICE

_____ JUSTICE

_____	_____
JUSTICE	JUSTICE
_____	_____
JUSTICE	JUSTICE
_____	
JUSTICE	

DATED: _____

JANE ELINOR NOTZ
Solicitor 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 FILING AND SERVICE

I certify that on February 22, 2022, I electronically filed the foregoing **Emergency Motion for Stay Pending 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)