IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

WILLIAM WAGNER, *et al.*	)	
	)	
Plaintiffs,	)	Case No. 2022 CH 01285
	)	
v.	)	Honorable Judge Sophia Hall
	)	
JESSE WHITE, *et al.*	)	
	)	Calendar 12
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

NOW come Plaintiffs, by and through their attorneys, with their response to Defendants' Motion to Dismiss and state as follows:

In opposing Plaintiffs'—and all Illinoisans right to core political speech—Defendants Ian Linnabary, Cassandra Watson, William Cardigan, Laura Donahue, Tonya Genovese, Catherine McCrory, William McGuffage, and Rick Terven (collectively, "Board") filed, on March 23, 2022, a combined motion to dismiss the complaint and a reply to Plaintiff's motion for preliminary injunction (hereafter, "Defs' Br."). Also on March 23, 2022, Defendants Illinois Secretary of State Jesse White and Illinois Governor J.B. Pritzker filed similarly-titled combined motions that substantively adopted and incorporated the arguments presented in the Board's brief, other than the argument that neither Illinois official is a proper defendant. For purposes of this response to the Board's motion to dismiss, the Plaintiffs will address the substantive arguments of the Board's brief as though presented by all Defendants, and will also address the argument whether the individual Defendant Illinois officials are proper defendants.

INTRODUCTION

Plaintiffs wish to exercise their voting rights with the same accommodation afforded to

others in Illinois. It is settled law in Illinois that initiative petition circulation is political speech, and that political speech, including the right to petition, is a clearly ascertainable right entitled to constitutional protection. *Coalition for Political Honesty v. Illinois State Board*, 83 Ill.2d 236 (1980) ("*Coalition II*"). The gravamen of this claim is that Plaintiffs are entitled to the same accommodation as Defendants allowed to others.

ARGUMENT AGAINST DEFENDANTS' MOTION TO DISMISS

I. Plaintiffs Have Standing Under Section 2-619.[1]

Under long-standing principles of Illinois voting-rights jurisprudence, the nine individual Plaintiffs and their ballot proposition group—the Committee for the Illinois Democracy Amendment—have standing in this suit to protect their initiative petition rights under Article XIV, Section 3 of the Illinois Constitution. In 1980, the Illinois Supreme Court granted initiative petitioners and their organizations, individually and on behalf of all others similarly situated, the right to file suit against the State Board of Elections which was violating their Article XIV, Section 3 initiative rights. *Coalition II*, 83 Ill. 2d 236 (Ill. 1980). In 1976, the Illinois Supreme Court also granted the Coalition for Political Honesty, "an association that circulated the initiative petition throughout the State," the right to intervene in a lawsuit concerning an Article XIV, Section 3 initiative. *Coalition for Political Honesty v. State Board of Elections*, 65 Ill. 2d 453, 456 (Ill. 1976) (*"Coalition I"*).

To establish standing, a plaintiff must show, "only some injury in fact to a legally cognizable interest. The claimed injury, whether actual or threatened, must be distinct and palpable, fairly traceable to the defendant's actions, and substantially likely to be prevented or

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[1] The Board's Combined Brief repeats § A twice under their Argument. *See* Defs.' Br. at 7 & 12. Plaintiffs have assumed Defendants intended the first § A on Pg. 7 to be a § I, and the first § B on Pg. 11 to be a § II.

redressed by the grant of the relief requested." *Borsellino v. Putnam*, 2011 IL App (1st) 102242 ¶ 91. The Illinois Supreme Court recognized that the rights conferred under Article XIV, Section 3 of the Illinois Constitution are a fundamental right. *Coalition II*, 83 Ill. 2d at 247-48 (Ill. 1980).

When standing is challenged by way of a motion to dismiss, the Court must accept as true all well-plead facts in the plaintiff's complaint and all inferences that can reasonably drawn in the plaintiff's favor. If a fact is not apparent from the face of the complaint, it must be supported by affidavit. §2-619. Defendants did not provide an affidavit here. Plaintiffs alleged the following facts: Plaintiffs are Illinois voters who are forced to choose between their heath and the right to petition and vote. (Complaint ¶ 2) The right to petition and vote is guaranteed by the Illinois Constitution. (Complaint ¶¶ 31-34) Illinois candidates and legislators were accommodated and allowed to collect signatures and to vote electronically during the pandemic. (Complaint ¶¶ 57, 63) Plaintiffs seek the same right to collect signatures electronically. (Complaint ¶¶ 68) During the COVID-19 pandemic, the petition requirements unduly burden the Plaintiffs' right to petition under the Illinois constitution. (Complaint ¶ 78)

Accepting as true, the above-pled facts, and drawing all inferences in the Plaintiffs' favor, it is clear that the Plaintiffs have standing to seek equal protection of the election laws, and to seek the same voting accommodation enjoyed by candidates and legislators.

Defendants claim that there has never been state action preventing Plaintiffs from gathering signatures in person, and that Plaintiffs' apprehension of gathering signatures is not fairly traceable to any action of the Defendants. Plaintiffs' injury is fairly traceable to Defendants' unequal application of the petition requirements, and refusal to extend the same accommodation to Plaintiffs which was extended to others.

Defendants also claim that relief is not likely to redress Plaintiff's injury. The injury at

issue is Defendants' insistence on strict compliance with election regulations during a pandemic, while allowing an accommodation to some. Therefore, an injunction against those election regulations certainly satisfies the redressability argument.

II. Plaintiffs Have Stated Plausible Causes of Action In All Counts of the Complaint.

First, Defendants' §2-615 arguments to dismiss the complaint should be rejected because they rely on tests developed by federal courts to analyze the rights under the Federal Constitution, not the Illinois Constitution which can grant broader protections to the citizenry. *See* Defs' Br. §§ II(A) & (B). Even assuming Defendants properly applied those tests, the restrictions are unreasonable, not narrowly tailored, and do not sufficiently serve a legitimate interest. Second, Defendants' arguments that the Complaint fails to state a claim under the Equal Protection Clause ("EPC"), and does not present a structural or procedural amendment to Article IV, should also be declined because the restrictions impinge on fundamental rights, and the proposed amendment is limited to structure and procedure. *See* Defs' Br. §§ II(C) & (D).

A. Defendants have set forth an incorrect analytical framework regarding Counts I (Right of Initiative and Right to Ballot Access) and Count IV (Right to Due Process) and given advances in technology and Defendants' own past actions, the current requirements of notarization and original handwritten signature are unreasonably restrictive.

Defendants cite to a federal analytical framework under the Federal Constitution. Defs' Br. 12-13. Though the Illinois Supreme Court undertook the same framework in *Coalition II,* 83 Ill.2d 236 (Ill. 1980), the Court has since stated that the rights of initiative and to petition inherent in the Free Speech clause of the Illinois Constitution, Article I Section 4, may give greater protection than the Federal Constitution's Free Speech clause. *People v. DiGuida*, 152 Ill.2d 104, 128 (Ill. 1992) ("We have adopted an analysis independent of that given cases decided by the Supreme Court under the first and fourteenth amendments."); *City of Chicago v. Pooh Bah Enterprises,* 865 N.E.2d 133, 168 (Ill. 2006). Both *Pooh Bah* and *DiGuida* looked to the

supreme courts of our sister states in construing their constitutions to shed light on whether their free speech, right of initiative, and right to petition provisions afforded rights greater than those declared by the Federal Supreme Court under the Federal Constitution.

Other supreme courts have held their constitutions prevent burdensome restrictions similar to those presented in the Complaint. The Arizona Supreme Court struck down a state law which eliminated an entire class of persons eligible to sign an initiative petition as an unconstitutional deprivation of voters' constitutional right of initiative. *Stillman v. Marston*, 107 Ariz. 208 (Ariz. 1971). More recently, from a case decided this year, the Supreme Court of Michigan struck down provisions of their election code as overly burdensome on free speech rights. *League of Women Voters of Mich. v. Sec'y of State*, 35, Jan. 24, 2022 (Mich. 2022).[2] *League of Women Voters* presents facts and issues similar to those presented in the Plaintiffs' Complaint regarding the requirement for petition circulators to file signed affidavits with their petitions. *Id.* at 31-36. The Michigan Supreme Court found the contours of their Free Speech clause to be similar to the Federal Constitution and so analyzed First Amendment cases to hold the restrictions as unconstitutional. *Id.* at 35. It also cited to the Federal Supreme Court case of *Buckley v. Am Constituional Law Found.* 525 US 182, 203 (1999) to swat the defendant's claimed interest of preventing fraud. *League of Women Voters,* 34-35, fn. 20.

Actual fraud-in-fact is a common theme in the cases Defendants cite for the proposition that Illinois courts have continued to uphold the restrictions. Defs. Br. 14-15, citing *Fortas v. Dixon,* 122 Ill.App.3d 697 (1st Dist. 1984); *Huskey v. Municipal Officers Electoral Bd. for Village of Oak Lawn,* Ill.App.3d 201 (1st Dist. 1987); and *Canter v. Cook County Officers*

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[2] At the time of filing this brief, this opinion had no citation. The case can be found here: https://www.courts.michigan.gov/48fd9f/siteassets/case-documents/briefs/msc/2021-2022/163711/lwv-op.pdf

Electoral Bd., 170 Ill.App.3d 364 (1st Dist. 1988). In all three cases, potential candidates appealed, at either the Electoral Board or Circuit Court level, the denial of their petitions to be on the ballot. In all three cases, witnesses testified, including the circulators themselves, that fraud had been committed; some circulators admitted they had tasked the collection of signatures to others despite the circulators' signatures being on the affidavit. Those facts are not present in this Complaint and so the three cases should be distinguished from the case here.

Even under the federal test, assuming that preventing fraud is a legitimate state interest, the current restrictions here are unreasonably restrictive for that stated purpose. The reasonableness test in this context is commonly called the *Anderson-Burdick* test:

> [T]he Court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward bythe State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Tripp v. Scholz, 872 F.3d 857, 864 (citing *Anderson v. Celebrezze,* 460 U.S. 780, 789 (1983).

The *Tripp* court added, "Of course, the existence of a less restrictive alternative may be relevant to an assessment of reasonableness[.]" *Tripp,* 872 F.3d at 870 (citations omitted). Here, there is a less restrictive alternative: signatures collected through electronic means. Relevant to this analysis is that the Board already accepted this method of collecting signatures in 2020. The stated interest of preventing fraud was no less of a concern in 2020 than it is now; yet Defendants' brief repeatedly hammers preventing fraud as the reason they cannot allow the collection of electronic signatures today. Because there is a less restrictive alternative that does not burden Plaintiffs' rights even under the Federal Constitution, the restrictions are

unreasonable. For the same reason, the restrictions are not narrowly tailored.

B. Defendants have applied an improper First Amendment test to the right of initiative and ballot access restrictions at issue here and even if proper, the restrictions are not narrowly tailored for the same reasons set forth under §II(A), above.

In §II(B) of their brief, Defendants attempt to elide the distinction between Illinois and federal doctrine with the sweeping statement that the Illinois Supreme Court applies the First Amendment content-neutral test "in lock-step with federal precedent." Defs' Br. at 15. This is incorrect. The Illinois Supreme Court applies a *limited* lockstep doctrine which recognizes that even when the language of the Illinois and federal constitutional provisions mirror each other, Illinois courts can depart from federal construction based on "debates and the committee reports of the [Illinois] constitutional convention, something which will indicate the provisions of our constitution are intended to be construed differently than are similar provisions in the Federal Constitution[.]" *City of Chicago v. Alexander,* 2017 IL 120350 ¶ 31 (citations omitted). Further, *City of Chicago* analyzed the peaceable assembly clause under Article I, Section 5 of the Illinois Constitution, not the Free Speech clause found in Article I, Section 4, and so that case has limited applicability here. Likewise, Defendants' reliance on Judge Pallmeyer's quote should also be discounted for its sole analysis under the First Amendment. *Morgan v. White*, No. 20-cv-2189, 2020 U.S. Dist. LEXIS 86618 (N.D. Ill. May 18, 2020).

However, even under a content-neutral Federal First Amendment test, the restrictions are not narrowly tailored to the interest of preventing fraud. The Supreme Court of Utah contemplated the state interest of fraud in allowing the use of electronic signatures. *Anderson v. Bell*, 2010 UT 47 (Utah 2010). State officials against electronic signatures contended that electronic signatures lacked the "apparent authority" of handwritten or holographic signatures. *Id.* at fn. 7. In rejecting this theory, the Utah Supreme Court wrote:

> This position is based on a theory that a holograhic signature is self-authenticating because the reviewing party may merely look at the signature and see that someone put pen to paper to sign their name…We are unpersuaded that an electronic signature presents special concerns regarding candidate fraud; a candidate could as easily handwrite or type fraudulent names onto a certificate of nomination.

Id.

Concerns regarding the authenticity and genuineness of electronic signatures are not new. *See* R.J. Robertson, jr. & Thomas J. Smedinghoff, *Illinois Law Enters Cyberspace: The Electronic Commerce Security Act,* ILL. BAR JOURNAL VOL. 87 NO. 6, June 1999, https://www.isba.org/ibj/1999 /06/illinoislawenterscyberspacetheelect (last accessed March 25, 2022). In this article, the authors discuss security procedures to minimize the risk of fraud. In a more recent Illinois Bar Journal article from March 2021, the authors raise technology solutions to solve the issue of authentication such as the use of the signer's finger or smartphone. Daniel C. Katzman, *Are E-Signatures E-nough?,* ILL. BAR JOURNAL VOL. 103 NO. 3, March 2021, https://www.isba.org/ibj/2021/03/areesignaturesenough (last accessed March 25, 2022). And that the Board has already accepted electronic signatures in 2020 only illuminates that the restrictions are not narrowly tailored because the same concerns of fraud existed then as now. Defendants' past actions and advances in technology demonstrate electronic signatures can be more secure, in terms of authenticity and genuineness, than handwritten signatures.

Finally, Defendants rail repeatedly in their brief, and especially in § II(B), that the safety concerns of the pandemic have receded. Defs' Br. 16-17. Yet, in an emergency motion filed in the Illinois Supreme Court on February 22, 2022—one week after Plaintiffs filed their Complaint—Defendant Gov. Pritzker and other Illinois executive agencies described the ongoing COVID-19 pandemic as the "most serious public health crisis of the past century" with "particularly serious impact on people who are immunocompromised". Exhibit A at 18 & 22.

The motion noted two surges of COVID-19 of "unprecedented severity" and cases reaching a "record high in January, 2022". *Id.* at 2 & 4. The movants observed that "lives and work have been upended" and unvaccinated children were "more susceptible to contracting and spreading COVID-19 to their teachers, parents, and other community members". *Id.* at 18-19, 23 And the motion mentioned "extraordinary uncertainty among the public" and "new degrees of strain and anxiety". *Id.* 19 & 22. Defendants cannot make a good faith argument before this Court that the pandemic's "dangers have largely receded" (Defs' Br. at 16) when they made an about face before another tribunal.

C. The restrictions implicate a fundamental right placing them under strict scrutiny review.

"In evaluating challenges under equal protection, the court must first determine whether the statute implicates a fundamental right *or* whether it discriminates against a suspect class." *People v. Hollins,* 2012 IL 112754 (Ill. 2012) ¶ 40 (emphasis added). Defendants cited to *Hollins* to set forth the correct test. Defs.' Br. at 19. Defendants also appear to admit that the right at stake is a fundamental right. *Id.* Certainly, *Coalition II* held the right to initiate petitions to amend the Illinois constitution is a fundamental right "intertwined with the rights of those who vote thereon." *Coalition II,* 83 Ill.2d 236, 248. Thus, when a fundamental right is at stake—whether or not the government action implicates a suspect class—the correct test to apply is strict scrutiny, not rational basis. The next sentence after the one Defendants cite in *Hollins* itself illuminates this point: "Defendant concedes that his equal protection claim is subject to a rational basis analysis, thereby implicitly acknowledging he is not a member of a suspect class *and no fundamental right is at issue." Hollins,* 2012 IL 111754 ¶40 (emphasis added).

"In order to survive strict scrutiny, the measures employed by the legislature must be necessary to serve a compelling state interest, and must be narrowly tailored thereto, i.e., the

legislature must use the least restrictive means consistent with the attainment of its goal." *In re DW,* 827 N.E.2d 466, 481 (Ill. 2005). *In re DW* demonstrates no suspect or quasi-suspect class needs to be invoked to apply strict scrutiny. The fundamental right in play in that case involved the right of parents to control their children's upbringing. *Id.* So, the Illinois Supreme Court never entertained any arguments regarding suspect classes.

""The constitutional guarantee of equal protection requires that the government treat similarly situated individuals in a similar manner." *Id.* at 482. Similarly situated individuals are comparators. Both the 2020 candidates and the current members of the General Assembly are valid comparators. First, regarding the 2020 candidates, it is irrelevant that the 2020 election candidates obtained the accommodation of electronic signatures via judicial fiat. *See* Defs.' Br. at 17. But even if relevant, the Plaintiffs here seek a judicial fiat as well. Both the 2020 candidates and Plaintiffs filed lawsuits seeking electronic signatures. Both seek a judicial fiat, or order, to mandate the accommodations of electronic signature collection and a waiver of the requirement to notarize petition sheets. One wonders why Defendants raised this as a distinction.

The only other distinctions Defendants point to vis-à-vis the 2020 candidates are: (a) time (2020 vs. 2022) and; (b) that the candidates two years ago sought to be placed on the ballot whereas the Plaintiffs seek to place an initiative on the ballot. Defs' Br. 17-18. These distinctions also have no bearing on whether the 2020 candidates are valid comparators. Regarding (a) the difference in time, this distinction is the equivalent of an employer in a disability discrimination case attempting to remove a comparator who received the accommodation of an ergonomic workstation from the court's consideration because, though the plaintiff requested the same accommodation, the comparator received the workstation two years prior to the date the plaintiff sought the same accommodation. Regarding the distinction of (b) candidacy versus issue on the

ballot, under the same hypotheticial, this argument is akin to the employer attempting to remove the comparator because the comparator's disability stemmed from a congenital cause whereas the plaintiff's disability arose from a car accident; both comparator and plaintiff need the same accommodation despite the difference in how or why they need it. For the same reason, the distinctions between candidacy and ballot issue are irrelevant to the comparator analysis.

Second, the General Assembly members are valid comparators as well. The relevant factors are that both Plaintiffs and General Assembly members seek to amend the Illinois Constitution by vote. General Assembly members already have the accommodation of electronically voting from their home, the state capitol, or even in their car. Plaintiffs desire the same end result. The end result and the method of obtaining that end result are the relevant factors in establishing the General Assembly as valid comparators.

Having established comparators who were treated better, the restrictions should be struck down under strict scrutiny. This conclusion flows from the same logic under the content-neutral Federal First Amendment test discussed in § II(B), above. Under both the conten-neutral test and the EPC strict scrutiny test, the restrictions must be narrowly tailored to a state interest except instead of a legitimate state interest under the content-neutral test, the interest under the EPC strict scrutiny test must be compelling. But words matter; the difference between "legitimate" and "compelling" matter. Synonymous with "compelling" is cogent, convincing, and influential. Synonymous with "legitimate" is genuine, logical, and reasonable. Thus, "compelling" requires a greater, or more convincing, showing by the state than "legitimate"—that the interest is truly cogent and not merely genuine or logical. Because the Plaintiffs have demonstrated in § II(B) that the restrictions are not narrowly tailored to hit the target of a legitimate state interest, the same restrictions miss the mark even more so to hit an interest that is compelling.

D. The Plaintiffs' proposed amendment complies with the requirement of Illinois Constitution Article IV, Section 3 that constitutional amendments be limited to structural and procedural subjects.

Finally, contrary to the Defendants' assertions, the Illinois Democracy Amendment initiative referendum does comply with the constitutional requirement that proposed amendments be limited to structural and procedural subjects contained in Article IV of the Illinois Constitution. The Democracy Amendment creates a structural legislative office of Public Advocate by amending Article IV, Section 1, entitled "Legislature—Power and Structure." The Democracy Amendment also amends procedural subjects in Section 8, "Passage of Bills," by amending Subsection 8(b) and Subsection 8(c).

The people of Illinois have the authority to establish and enforce ethical standards for the legislative branch of government to prevent corruption in the passage of bills. The recent admission by Commonwealth Edison in a Deferred Prosecution Agreement with federal prosecutors that it participated in a decade-long bribery scheme to corrupt the Illinois General Assembly's structure and procedure underlines the need for the Democracy Amendment. The Democracy Amendment does not amend majority requirements for the passage of bills and does not require legislation to be submitted to voter referendum after a record roll call vote has been taken on the legislation by both houses of the General Assembly. The Illinois Democracy Amendment is based on Article V, Section 1 (Legislative Procedure) of the Massachusetts Constitution which requires roll call votes by both houses of the legislature on bills petitioned for by voters equaling three percent of the number of votes cast for Governor in the preceding election.

The purpose of Article XIV, Section 3 is contained in the "Address to the People" adopted by the Illinois Constitutional Convention before the 1970 ratification vote by Illinois

voters: "Thus a reluctance on the part of the General Assembly to propose changes in its own domain can be overcome." 7 Proceedings 2677-78.

The determination of what are structural and procedural subjects contained in Article IV of the Illinois Constitution has been closely contested in divided votes by the Illinois Supreme Court over the past five decades. See *Hooker v. Ill. State Board of Elections*, 2016 IL 121077 (4 to 3 vote with written dissent); *Chicago Bar Association v. Illinois State Board of Elections*, 161 Ill. 2d 503 (1994) (4 to 3 vote with written dissent).

In the first case addressing the issue in 1976, the Illinois Supreme Court confessed, "Justice Brandeis is reported to have observed that some questions can be decided, even if not completely answered. The process of decision, he said, does not demand that one point of view be accepted as entirely right and the other rejected as entirely wrong. It is sufficient that the scale of judgment tips." *Coalition for Political Honesty v. State Board of Elections I*, 65 Ill. 2d 453 (1976) (written dissent).

In light of significant differences of opinion between Illinois Supreme Court justices over the definition of structural and procedural subjects contained in Article IV, the Circuit Court is wise to exercise prudence and judicial restraint by resisting the Defendants' invitation to determine the Illinois Democracy Amendment does not comply with the requirements of Article XIV, Section 3 of the state constitution.

Judicial restraint is particularly appropriate in light of the Illinois Supreme Court's determination that the Article XIV, Section 3 initiative involves a fundamental voting right that is subject to strict scrutiny: "Clearly, the rights of those who seek to exercise their constitutional privilege to initiate an amendment to that constitution are intertwined with the rights of those who vote thereon." *Coalition II*, 83 Ill. 2d at 248.

Defendant State Board of Elections has a long history of hostility toward everyday voters seeking to exercise their Article XIV, Section 3 powers. In 1976, Defendant Board expended taxpayer dollars to hire dozens of investigators to interrogatee petition circulators at their homes regarding their participation in a statewide Political Honesty initiative petition drive which collected 635,138 signatures, the most ever collected for a proposed Article XIV initiative.

In 1980, Defendant State Board of Elections voted to keep the Cutback Amendment referendum proposed by Article XIV initiative from being submitted to the voters. The Illinois Supreme Court overruled the State Board of Elections' substantive determination that the Cutback Amendment did not comply with the constitutional requirements for the initiative process. The Supreme Court ordered the State Board of Elections to certify the Cutback Amendment proposition for submission at the November 4, 1980 election. *Id.*

Similarly, this Court should not allow Defendant State Board of Elections in the instant case regarding the Illinois Democracy Amendment to interfere with the constitutional initiative process in order to deny Plaintiff petition circulators and Illinois voters their fundamental voting rights which are guaranteed by Article XIV, Section 3 of the Illinois Constitution.

III. Governor Pritzker and Sec. of State Jesse White are Proper Parties

The Illinois Governor Pritzker has used his supreme executive authority under Article V, Section 8 of the Illinois Constitution to suspend statutory or constitutional provisions in order to protect public health and keep people safe. Governor Pritzker has the power and authority to issue an executive order allowing for the submission of initiative and referendum petitions electronically in addition to submission by hand delivery in order to "facilitate full participation in the electoral process which is essential to a strong democracy" and consistent with "social distancing and other public health measures to limit the spread of COVID-19.

Defendant Secretary of State Jesse White is the Illinois state officer who is

constitutionally authorized to accept filings of initiative petitions for constitutional amendments pursuant to Article XIV, Section 3 of the Illinois Constitution. Any injunctive order regarding initiative petitions must necessarily name the Secretary of State in his official capacity. Not only is Jesse White, as Secretary of State a proper party, he is a necessary party to this action.

WHEREFORE, Plaintiffs respectfully pray that the Court grant Petitioner's Motion for Preliminary Injunction, and grant the relief set forth in the prayer for relief.

Respectfully submitted,

/s/ Michael P. Latz

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Exhibit A

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E-FILED
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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

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[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

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[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

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[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

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[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"

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[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]

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[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

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[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,

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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

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JUSTICE

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JUSTICE

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JUSTICE

_____
JUSTICE

DATED: _____

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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.

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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.

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