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Via electronic mail

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Dear Mr. Husband:

I represent several parents of children in non-public schools in the District of Columbia. Their children continue to be subjected to a mandate widely abandoned by other jurisdictions and contradicted by scientific evidence: universal indoor masking in schools. Their children are forced to wear masks in school, even as the District of Columbia has freed bars, restaurants, clubs, gyms, and most other businesses from indoor mask requirements. The District of Columbia continues this mandate despite plummeting COVID case numbers—and even though the scientific evidence shows that COVID poses no greater risks to children than everyday viruses. As the D.C. Circuit just explained about other COVID orders, “this is March 2022, not March 2020.” *Huisha-Huisha v. Mayorkas*, No. 21-5200, 2022 WL 628061, at *13 (D.C. Cir. Mar. 4, 2022). Mayor Muriel Bowser’s Emergency Orders look “like a relic from an era with no vaccines, scarce testing, few therapeutics, and little certainty.” *Id.*

Worse, the Mayor’s Orders harm children. One family I represent includes a child who is deaf and relies on cochlear implants and lip reading together to access spoken language. The Mayor’s unnecessary mask mandate has profoundly damaged his academic progress and social interactions, undermining his confidence and potentially his future schooling. But while the Mayor frees businesses who would suffer economic harm from her mask theater policies, she has doubled down on the population least at risk from COVID and most harmed by mask mandates: schoolchildren.

Apart from their arbitrary and unreasoned nature, the Mayor’s Orders compelling non-public schools to require masks must be vacated for a more fundamental reason: the Orders are unlawful. The D.C. Code prohibits the Mayor from ruling by emergency order in perpetuity, and it requires agencies to conduct lawful rulemaking. We request that you respond to this letter by 12:00 p.m. on March 8, 2022, and clarify that the Mayor’s Orders do not and cannot force non-public schools to require masks. Otherwise, we will be forced to take legal action to have the Mayor’s unlawful orders vacated.

* * *

I. The February 14, 2022 Order is Void Ab Initio as the Mayor Lacks the Authority to Rule Through Consecutive “Emergency” Orders.

On February 14, 2022, Mayor Bowser issued Mayor’s Order 2022-029. That order ended indoor mask mandates at restaurants, bars, gyms, pharmacies, and “[o]ther businesses.” § III.1. But, pursuant to the order, prior “indoor mask requirements” “shall continue in effect” at, among other places, “[p]ublic, public charter, private, parochial, and independent schools.” § III.2. Moreover, according to the order, “[a]ny regulations or guidance previously promulgated by the Department of Health pertaining to indoor mask requirements” at schools “shall remain in effect unless modified or rescinded by the Department of Health.” § III.3. The order states that it “shall remain in effect until repealed, modified, or superseded.” § IX.

Under D.C. Code § 7-2306, “An emergency executive order . . . issued by the Mayor shall be effective for a period of ***no more than 15 calendar days***.” Accordingly, the February 14 order’s “continuation” of the prior mask requirements was void ab initio. No reasonable interpretation of D.C. Code § 7-2306’s 15-day limit would permit the Mayor to issue continuing emergency orders every 15 days. Instead, the statute’s meaning is plain from its text and context: the Mayor may issue ***one*** 15-day emergency order. After that, if “extenuating circumstances, such as death, destruction or other perilous conditions prohibit the convening of at least two-thirds of the members of the Council of the District of Columbia for consideration of emergency legislation,” “the Mayor may extend the emergency executive order for up to 15 days.” D.C. Code § 7-2306(c). Absent other authority—such as that provided by the Council for certain *other* COVID orders, *id.* § 7-2306(c-1)—the Mayor cannot keep ruling through endless 15-day executive orders.

If the Mayor *could* issue successive 15-day emergency orders, the 15-day limitations in § 7-2306 would be meaningless. As the D.C. Court of Appeals has explained when interpreting a similar provision stating that an emergency act “shall be effective for a period of not to exceed ninety days,” such provisions do not provide “authority to pass another substantially identical emergency act in response to the same emergency.” *D.C. v. Washington Home Ownership Council, Inc.*, 415 A.2d 1349, 1359 (D.C. 1980). Emergency powers are “an exception to the fundamental legislative process,” “not an alternative legislative track to be used repeatedly whenever the [Mayor] perceives an ongoing emergency.” *Id.*

Other courts have agreed that if successive emergency orders were possible, timing “limitations would be no more than perfunctory renewal requirements and would serve as merely a trivial check on indefinite emergency executive powers.” *Fabick v. Evers*, 956 N.W.2d 856, 865 (Wis. 2021). That the D.C. Council gave the Mayor longer emergency authority to extend *other* executive orders, *see, e.g.*, D.C. Code § 7-2306(c-1), “shows that when the legislature wishes to authorize an emergency response that” can be effective for longer, “it knows how to say so.” *Fabick*, 956 N.W.2d at 865. The Council did not do so for this order or any prior order imposing a binding mask mandate.

More, any other reading would render the additional 15-day authority where the Council is unavailable surplusage. If the Mayor could simply issue substantially the same orders repeatedly, there would be no need for this narrow 15-day additional authority—which still imposes a requirement for the Mayor to “make a reasonable attempt to consult with those members of the Council of the District of Columbia not affected by death, destruction, or other perilous

conditions.” D.C. Code § 7-2306(c). Under D.C. law, “each provision of the statute should be construed so as to give effect to all of the statute’s provisions, not rendering any provision superfluous.” *Feaster v. Vance*, 832 A.2d 1277, 1283 (D.C. 2003) (cleaned up).

Finally, allowing successive 15-day orders would contravene the statute’s context. The statute provides a narrow avenue for the Mayor to issue executive orders outside the usual legislative process. “[R]epeated enactments of numerous ‘emergency’ measures would effectively result in permanent” executive rule, “a result directly in contravention of the” tripartite system of government. *Washington Home Ownership*, 415 A.2d at 1365 (Gallagher, J., concurring). There can be no dispute that the Mayor is using her Orders as “the functional equivalent of (and hence to circumvent the requirements for) permanent legislation.” *Atchison v. D.C.*, 585 A.2d 150, 156 (D.C. 1991).

Thus, as other courts confronted with similar issues have concluded, an emergency order time limitation prohibits such “continuing” orders. *See Fabick*, 956 N.W.2d at 868 (“We conclude that Wis. Stat. § 323.10’s duration-limiting language forbids the governor from declaring successive states of emergency on the same basis as a prior state of emergency”); *In re Certified Questions From United States Dist. Ct. , W. Dist. of Michigan, S. Div.*, 958 N.W.2d 1, 10 (Mich. 2020) (“To allow such a redeclaration would effectively render the 28-day limitation a nullity.”).

Under the statute’s plain meaning, the Mayor’s indoor masking order expired, at the latest, 15 days after it was first issued in Mayor’s Order 2021-097 on July 29, 2021. Counsel is unaware of any D.C. Council action purporting to make this order permanent. The limited additional authority conveyed by § 7-2306(c-1) and (c-2) is not relevant to this issue. Nor do the Council’s recent Public Emergency Extension resolutions speak to the Mayor’s authority on this point or abrogate § 7-2306’s 15-day limitation. Those authorities pertain to the first emergency executive order, Mayor’s Order 2020-045, which did not impose masking requirements, did not apply to non-governmental entities, and cannot serve as the basis of any mask-related enforcement action.

The Mayor’s indoor mask requirement for non-public schools is invalid for a second, independent reason. As noted, the February 14 order purports to “continue” a set of orders dating to July 2021’s Mayor’s Order 2021-097. *That* order, however, said merely that “[a]ll persons must wear masks indoors as prescribed by DC Health guidance and regulations.” § II. It authorized DC Health and the Office of the State Superintendent of Education (OSSE) “to issue mandatory, binding regulatory guidance,” and “[a]ny compulsory statements in their guidance . . . are to be treated as lawful regulations.” § IV.¹ And it purported to be effective indefinitely. § VII.

By merely “continuing” this July mandate, Mayor’s Order 2022-029 does not satisfy the requirements of an emergency executive order in the first place. Such orders “shall state” “[t]he specific requirements of the order and the persons upon whom the order is binding” and “[t]he duration of the order.” D.C. Code § 7-2304(a)(3–4). Neither the July order nor the latest order fulfills these requirements. Instead, both orders state an indefinite duration and delegate the authority to formulate all specifics to DC Health and OSSE.

¹ As shown next, this impermissibly sidesteps the requirements of DC’s Administrative Procedure Act, which prescribes the processes the Mayor and her agencies must follow to issue rules, including emergency rules.

Finally, even if the February 14 Order were otherwise valid, it expired by March 1. For all these reasons, the Mayor should immediately clarify that private, parochial, and independent schools are no longer subject to a mask mandate.

II. The Mask Mandate Does Not Comply with the Administrative Procedure Act.

Even if the Mayor's July 2021 Order were legal, and even if it purported to bind private parties (it did not), DC Health's and OSSE's "guidance" implementing the July order does not have the force of law. Under DC's Administrative Procedure Act (DCAPA), "a rule of general applicability" "may not be given effect unless it has first been adopted following notice-and-comment rulemaking and publication in the D.C. Register." *Andrews v. D.C. Police & Firefighters Ret. & Relief Bd.*, 991 A.2d 763, 769 (D.C. 2010). The DCAPA provides only a narrow allowance for rulemaking outside these strictures. If an emergency rule "is necessary for the immediate preservation of the public peace, health, safety, welfare, or morals, the Mayor or such independent agency may adopt such rules as may be necessary in the circumstances, and such rule may become effective immediately." D.C. Code § 2-505(c). "Any such emergency rule shall forthwith be published," and "[n]o such rule shall remain in effect longer than 120 days after the date of its adoption." *Id.*

The mask mandates are in every sense rules of general applicability, as they are the agencies' "statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." D.C. Code § 2-502(6)(A). The mask "guidance" "cannot fairly be viewed as interpreting . . . a statute or a regulation"; it purports to "make[] new law." *Andrews*, 991 A.2d at 771. DC Health started issuing mask mandates soon after the Mayor's July Order.² Yet it does not appear that these mandates were ever published in the District of Columbia Register as required for emergency rules, much less subjected to full notice-and-comment rulemaking. The Mayor cannot evade her rulemaking obligations by simply labeling her mandates as "guidance."

Moreover, to the extent that the agencies' self-styled "guidance" relies on the July 2021 Order's delegation of authority, the rule certainly could not outlast its underlying authority—*i.e.*, the Mayor's Order—so it expired after 15 days. *Cf. Hija Lee Yu v. D.C. Rental Hous. Comm'n*, 505 A.2d 1310, 1311 (D.C. 1986) ("The validity and effectiveness of any agency's rules depend on the statute creating that agency and giving it rule-making power.").

Even if the mandate had been issued and published as an emergency rule under the DCAPA (D.C. Code § 2-505(c))—which it was not—it would have expired after 120 days, on November 27, 2021. As shown above, and for many of the same reasons, an agency cannot evade the 120-day rule by issuing successive "emergency" rules pertaining to the same emergency and subject. That would undermine the point of both the 120-day rule and the DCAPA's general notice-and-comment requirements. *E.g.*, *Washington Home Ownership*, 415 A.2d at 1354 ("[A]n 'emergency' prerogative and procedure is extraordinary and should not be substituted freely for the regular procedure."); *Psychare Mgmt., Inc. v. Dep't of Soc. Servs. Div. of Med. Servs.*, 980 S.W.2d 311, 313 (Mo. 1998) ("The department . . . did not have authority to renew the emergency rule."); Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703, 755 n.124

² DC Health, *Coronavirus 2019 (COVID-19): Mask Guidance for the General Public*, <https://tinyurl.com/2neuznnu> (July 30, 2021).

(1999) (collecting cases and explaining that “[t]he APA rulemaking provisions in numerous states” “[i]n effect” “require the emergency rule to be accompanied by a request for comments if the agency wishes the rule to remain in effect after 120 days”); Babette E.L. Boliek, *Agencies in Crisis? An Examination of State and Federal Agency Emergency Powers*, 81 *Fordham L. Rev.* 3339, 3373 (2013) (“The time limit on emergency rule effective dates are, by far, the most direct control state legislatures impose on the emergency rulemaking process.”).

Thus, no agency “guidance” validly imposes a mask mandate on non-public schools.

III. Any Claim of Indefinite, Unlimited Executive Authority Would Violate the Nondelegation Doctrine.

If the relevant provisions of the D.C. Code were interpreted to permit the Mayor or agencies to impose indefinite rules with general effect, that would violate the nondelegation doctrine. “[I]n the District Charter, Congress chose to create, as a general proposition, the familiar tripartite structure of government for the District.” *Wilson v. Kelly*, 615 A.2d 229, 231 (D.C. 1992) “By specific language, ‘the legislative power granted to the District by this Act is vested in and shall be exercised by the Council in accordance with this Act’” and “[t]he executive power of the District shall be vested in the Mayor.” *Id.* The “principal function of th[is] separation of powers” is to “protect individual liberty.” *Clinton v. City of New York*, 524 U.S. 417, 482 (1998) (Breyer, J., dissenting). Because the federal nondelegation doctrine follows from similar principles, D.C. courts have assumed that the doctrine applies. *Unum Life Ins. Co. of Am. v. D.C.*, 238 A.3d 222, 232 (D.C. 2020).

The D.C. Code gives the Mayor time-limited authority to issue orders “necessary for the immediate preservation of the public peace, health, safety, or welfare.” D.C. Code § 7-2304(a); *see also id.* § 2-505(c). As other courts have concluded in similar cases, reading that already broad authority to be *indefinite* would violate the nondelegation doctrine. “[A]s the scope of the powers conferred . . . becomes increasingly broad, in regard to both the subject matter and their duration, the standards imposed upon the [Mayor’s] discretion . . . must correspondingly become more detailed and precise.” *In re Certified Questions*, 958 N.W.2d at 20. That is because “the conferral of indefinite authority accords a greater accumulation of power than does the grant of temporary authority.” *Id.* at 19.

Here, the D.C. Code’s authority for the Mayor’s emergency powers “encompass a substantial part of the entire police power of the state.” *Id.* at 20. The use of those powers during COVID to reach essentially every aspect of business and personal conduct proves the point. The Code provides hardly any limitation or guidance—apart from the 15-day time limitation (and 120-day limitation for agency emergency rules). *Cf. id.* at 23 (“a ‘necessary’ standard . . . neither supplies genuine guidance to the [Mayor] as to how to exercise the authority delegated to her . . . nor constrains her actions in any meaningful manner”). If those time limitations could be evaded by copying and pasting “emergency” orders, then “it would be idle to pretend that anything would be left of limitations upon the power of the [legislature] to delegate its lawmaking function.” *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935). The Mayor would “possess[] free rein to exercise a substantial part of [D.C.] legislative authority—including police powers—for an indefinite period of time.” *In re Certified Questions*, 958 N.W.2d at 24. This constitutional

infirmity points again to what the statutory text makes clear: successive emergency orders or rules are unlawful.

IV. The Mask Mandate is Arbitrary, Capricious, and Not Supported by Substantial Evidence.

Last, apart from these problems, the Mayor’s and DC Health’s orders are unreasonable, arbitrary, capricious, and not supported by substantial evidence. First, there is not an “emergency” within the meaning of the relevant D.C. Code provisions. “[T]he word ‘emergency’ describes an unexpected development urgently requiring a prompt response.” *Nat’l Ass’n of Postmasters of U.S. v. Hyatt Regency Washington*, 894 A.2d 471, 476 (D.C. 2006). “[E]mergency circumstances by definition cannot last very long.” *Atchison*, 585 A.2d at 157. Yet the Mayor’s Orders have ruled through “emergency” authority for nearly two years. During that time, the D.C. Council has continued its regular meetings, underscoring the baseless nature of any claim that the Mayor’s unilateral action is somehow *necessary* to address any ongoing emergency. *Cf. Washington Home Ownership*, 415 A.2d at 1354 (“an ‘emergency’ prerogative . . . should not be substituted freely for the regular procedure”).

Even if an emergency existed in 2020, or 2021, it does not exist now. To begin, D.C. has reported *zero* COVID deaths among children ages 0–19 during the pandemic.³ And case numbers in D.C. have plummeted by 92% since the beginning of January.⁴ Hospitalization rates during that same period are down 97%.⁵ The Mayor’s own Order acknowledges these precipitous declines. Mayor’s Order 2022-029 § I.4.

The Mayor has not offered any non-arbitrary explanation as to why an indoor mask requirement for non-public schools is appropriate, when she has eliminated the mask mandate for so many entities—like gyms and bars—that pose significant transmissibility risks. Again, children are not at severe risk from COVID: many common viruses pose a greater threat to children than COVID.⁶ And the mask mandate would not alleviate transmissibility concerns, particularly given that most children can only wear cloth masks.⁷ As for teachers, D.C. already requires all private, parochial, and charter-school employees to be vaccinated⁸—with a vaccine considered highly

³ AAP, *Children and COVID-19: State Data Report* Appendix tbl. 5A (Feb. 24, 2022), <https://tinyurl.com/26bwa6uz>.

⁴ See *Key Metrics*, Coronavirus D.C., <https://perma.cc/R6KX-PQPR> (last visited Mar. 4, 2022) (listing community spread as “Low”).

⁵ See *id.* (As of February 28, only 126 D.C. hospital patients had coronavirus.).

⁶ See, e.g., Anya Kamenetz, *After 2 Years, Growing Calls to Take Masks Off Children in School*, NPR (Jan. 28, 2022), <https://tinyurl.com/bdfau7zm> (Children “‘have minuscule risk of serious illness or death from COVID.’”); *Flu & Young Children*, CDC, <https://www.cdc.gov/flu/highrisk/children.htm> (last visited Mar. 4, 2022) (“Each year, millions of children get sick with seasonal flu; thousands of children are hospitalized, and some children die from flu.”).

⁷ See Caitlin M. Dugdale & Rochelle P. Walensky, *Filtration Efficiency, Effectiveness, and Availability of N95 Face Masks for COVID-19 Prevention*, JAMA Network (Aug. 11, 2020), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2769441> (“Surgical masks” have a “much lower filtration efficiency,” with some as low as 37%.); Maria Godoy, *With Omicron, You Need a Mask That Means Business*, NPR (Dec. 23, 2021), <https://www.npr.org/sections/health-shots/2021/12/23/1066871176/mask-n95-omicron-contagious> (“Cloth masks [do not] cut it with omicron”); Kamenetz, *supra* n.6 (“cloth masks, experts say, are insufficient to contain the spread of the omicron variant”).

⁸ *Mayor Bowser Announces COVID-19 Vaccination Requirements for All Adults Regularly in Schools and Child Care Centers and for Student Athletes*, Executive Office of the Mayor, <https://mayor.dc.gov/release/mayor-bowser-announces-covid-19-vaccination-requirements-all-adults-regularly-schools-and> (last visited Mar. 4, 2022).

effective.⁹

Nor has the Mayor adequately considered or even referenced the harms that mask mandates have on children. Experts now highlight the “negative impacts of prolonged masking.”¹⁰ For example, “[n]umerous scientific papers have established that it can be harder to hear and understand speech and identify facial expressions and emotions” when others are masked—and these are “critical developmental tasks.”¹¹ “[T]he president of the American Federation of Teachers” has said “that the constant use of masks impedes the learning process.”¹² Similarly, because the “masking interferes with nonverbal communication and emotional bonding,” it inhibits “social interactions” between children.¹³ For deaf children, these harms are especially severe. And these significant costs far outweigh any illusory masking benefit. Neither the Mayor nor her subordinate agencies have given any consideration to these concerns, and they have not engaged in the type of reasoned decision-making process that the law requires. *See The Washington Times v. D.C. Dep’t of Emp. Servs.*, 724 A.2d 1212, 1221 (D.C. 1999) (“[T]he function of the court in reviewing administrative action is to assure that the agency has given full and reasoned consideration to all material facts and issues.”).

* * *

For all these reasons, the Mayor’s February 14 Order does not and cannot require private, parochial, or independent schools to require indoor masking. Without appropriate clarification by the Mayor or your office by 12:00 p.m. on March 8, we may choose to seek redress in an appropriate court. Though this letter focuses on non-public schools, a court order addressing the deficiencies outlined above could have far-reaching consequences. Please let me know if you would like to discuss this matter.

Sincerely,

s/ Christopher Mills

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cc: Mayor Muriel Bowser via Mr. Eugene Adams; D.C. Office of the Attorney General

⁹ *COVID-19 Vaccines Are Effective*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/index.html?s_cid=10464:how%20effective%20is%20the%20covid%20vaccine:sem.ga:p:RG:GM:gen:PTN:FY21 (Dec. 23, 2021) (“COVID-19 vaccines are *safe and effective*.”); *see also* Mayor’s Order 2022-029 § 1.5 (“COVID-19 vaccine booster shots have proven to be highly effective in preventing hospitalizations and death.”).

¹⁰ Kamenetz, *supra* n.6.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*