

Rights at Risk – Public Health

By Brent Adams

The COVID-19 pandemic has made clear that public health emergencies are not under the exclusive jurisdiction of public health officials. Rather, politicians and the courts played an arguably outsized role in determining whether the executive branch could implement COVID-19 countermeasures recommended by the CDC and departments of health. Two of the most significant countermeasures have been mandates related to masks and vaccines. Research has shown conclusively that masks and vaccines save lives. Regarding masks, research published in August 2021 found “that [mask] mandates saved 87,000 lives [in the United States] through December 19, 2020, while a nationwide mandate could have saved 58,000 additional lives.”¹ Regarding vaccines, research found that “Without a [national] vaccination [rollout] program, by the end of June 2021 there would have been approximately 279,000 additional deaths and up to 1.25 million additional hospitalizations.”²

Governor Pritzker’s many orders aimed at curbing the spread of COVID-19 triggered a torrent of litigation. Conservative groups and politicians, business interests, and churches filed much of it. The current Republican candidates for Governor and Attorney General, State Rep. Darren Bailey and Tom Devore, respectively, were especially active in pursuing judicial challenges to the Governor’s orders. Devore was Bailey’s attorney when Bailey filed a lawsuit in Clay County in April 2020 challenging Governor Pritzker’s stay-at-home order.³ The Clay County judge, Judge Michael McHaney, granted Bailey’s temporary restraining order, blocking the Governor’s order. What followed was a judicial ping-pong match involving multiple orders and various courts. At one point, Judge McHaney, in response to a Bailey request, set a hearing to determine whether Governor Pritzker should be held in contempt. The Illinois Supreme Court intervened to suspend the contempt hearing and moved the case to Sangamon County. In this way, the Supreme Court played an important role in curbing a conservative judge’s apparent disdain for the Governor and opposition to the government’s exercise of emergency powers. This was at a time when fairly little was known about the disease and the “case fatality rate” was at its highest.⁴ While COVID-19 now seems to be under control, it would not be unusual for the Governor to be challenged in his exercise of emergency powers in the future. The makeup of the Illinois Supreme Court is critical to keeping rogue judges in check.

The next state Supreme Court action in the bonanza of COVID-19 litigation concerned the school mask mandate. Governor Pritzker, on August 4, 2021, issued an order requiring the indoor use of masks by students and staff at all public and nonpublic schools serving pre-kindergarten through 12th grade. Attorney DeVore represented a handful of teachers and parents of children covered by the mask mandate. The plaintiffs asked Sangamon County Judge Raylene Grischow to enter an order restraining the State from enforcing the school mask mandate. Judge Grischow agreed, entering an order finding that students and teachers cannot be required to wear masks in school without their consent or a *full evidentiary hearing*. Judge Grischow was able to reach this conclusion based on her premise that masks were “a type of

¹ Hansen, N-J H and R C Mano, “[Mask Mandates Save Lives](#)”, IMF Working Paper No. 21/205 (2021).

² The Commonwealth Fund, [Deaths and Hospitalizations Averted by Rapid U.S. Vaccination Rollout](#) (July 17, 2021).

³ [Bailey v. Pritzker](#), Case No. 2020-CH-06 (Clay County Circuit Court, Fourth Judicial Circuit April 23, 2020).

⁴ Our World in Data, [Mortality Risk of COVID-19](#) (updated Aug. 27, 2022).

quarantine.”⁵ A quarantine restricts personal freedom to a significant degree. The same cannot be said of the requirement to wear a mask. The Illinois Supreme Court was never required to consider the merits of this case because a legislative committee had already tossed out the rules underpinning the mandate. Regardless, the state Supreme Court ruled 5-2 to vacate Judge Grischow’s order. Two of the court’s three Republican justices, Justices Michael Burke and David Overstreet, dissented from the order. As one commentator put it, “This legal battle has been more about the future than the present.”⁶ We can expect this type of legal tug-of-war in the event of future pandemics or other types of emergencies requiring the exercise of executive authority. The Illinois Supreme Court will essentially have to referee these types of battles.

⁵ Judge Grischow is the same judge who ruled that Illinois pawnbrokers did not have to comply with Illinois’ interest rate cap of 36% on loans. Without the cap, Illinois pawnbrokers can continue to loans at interest rates of 240%.

⁶ Rich Miller, *Illinois Times*, “Illinois Supreme Court reverses mask ruling” (Mar 3. 2022).