



February 28, 2022

LaQuandra S. Nesbitt, MD, MPH
Director
DC Department of Health
899 North Capitol Street, NE
Washington, DC 20002

Via Hand Delivery and Electronic Mail

Re: Request to recognize exception for private religious schools from mask mandate imposed by Mayor's Order 2022-029 (Feb. 14, 2022).

Dear Dr. Nesbitt,

We are attorneys with Alliance Defending Freedom (“ADF”), and we represent several parents of children in Catholic schools in the District of Columbia, in connection with the organization ADWPARENTS.org. Mayor Muriel Bowser’s Order 2022-029 will lift the District-wide mask mandate for bars, restaurants, gyms, entertainment and sports venues, shops, and other businesses starting March 1. Yet, the Order conspicuously—and quite unjustly—leaves children in private schools masked, with no end in sight. This makes no sense, especially in light of the fact that nearby jurisdictions in Virginia and Maryland do not impose mask mandates on private school children. And just last night, Congress—located at the heart of the District—lifted its own mask mandate for its Members and Staff.

Pursuant to Section III.3 of Mayor’s Order 2022-029, which authorizes you to grant exceptions to the Order, we are writing to request an exception to the mask mandate for all private, parochial, or independent religious schools and the children who attend those schools. Such an exception is required by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, and various provisions of the U.S. Constitution. Mayor Bowser’s insistence on masking private school children substantially burdens parents’ ability to educate their children in accordance with their faith and at the religious or parochial schools of their own choosing. We kindly request that you recognize this exception by close of business (5:00 p.m.) on March 1, 2022.

* * *

ADF is the world’s largest legal organization committed to protecting religious freedom, free speech, marriage and family, parental rights, and the sanctity of life.

ADF has been closely monitoring various restrictions on religious schools that were imposed under the guise of an ongoing emergency, including Mayor Bowser's February 14, 2022 Order. ADF has been communicating with parents who send their children to religious and parochial schools throughout the District, including ADW Parents.¹ These parents have been voicing their concerns about the harmful effects of the masks on the children and the substantial burden on their ability to educate their children consistent with their faith and at religious schools of their choice.

Parents and their children at Catholic schools operating in the District are substantially burdened in their exercise of religion by the mask mandate. Those parents, children, and schools sincerely exercise their religious beliefs by participating in and paying for all of their activities at their Catholic schools. *See Catechism of the Catholic Church* ¶ 2226 ("Parents have the mission of teaching their children to pray and to discover their vocation as children of God. The parish is the Eucharistic community and . . . a privileged place for the catechesis of children and parents."). The Catholic Church teaches that parents "have the right to choose a school for them which corresponds to their own conviction." *Id.* ¶ 2229. It is also considered a religious "duty" on the part of the parents to "choos[e] schools that will best help them in their task as Christian educator" for their children. *Id.* The Archdiocese of Washington, which supervises archdiocesan Catholic schools in the District of Columbia and in Montgomery, Prince George's, Charles, Calvert, and St. Mary's counties in Maryland, recently implemented a mask-optional policy in all of its schools, but stated it cannot follow that policy in the District because of the Mayor's Order.² The Archdiocese further asserted it is "advocating with city officials to make face coverings optional for our school families in the District. We invite parents to do the same." *Id.*

Education in a parochial or independent Catholic school is critical for the children's education and formation in faith. Children communicate with teachers and students, and vice versa, throughout the school day in the course of engaging in an educational dialogue motivated by and immersed with their religious beliefs. This communicative exercise of religion occurs not only orally but through facial

¹ These parents include Sheila Dugan, Andrew Cleary, and Matt Johnson, with children enrolled in Blessed Sacrament School; Kelly Duval, with children enrolled in Our Lady of Victory School; and John Feehery, with a child enrolled at St. Peter School on Capitol Hill; *see also* ADW Parents, *About Us*, <https://www.adwparents.org/about>.

² Archdiocese of Washington Catholic Schools, "Secretary Letter to Catholic School Parents: Update on Masking Policy" (Feb. 17, 2022), available at <https://adwcatholicschools.org/news/secretary-letter-to-catholic-school-parents-update-on-masking-policy/>; *see also* Archdiocese of Washington Catholic Schools, "A Faith-Based Education that Lasts a Lifetime," available at <https://adwcatholicschools.org/> (listing the regions where archdiocesan schools are located).

expressions. Engaging in and reading facial expressions during the educational process is not only an essential component of reading, speaking, articulation, and rhetorical skills, it is also essential to the healthy social interaction and development that forms a core part of the exercise of religion in Catholic schools. Class discussion forms an essential component of learning the substantive content of a course and of developing the ability to interact and engage with teachers and other students having different ideas and modes of expression. The Catholic educational process requires teachers to fully perceive, interact with, and encourage proper expressions and affirmations of mental, social, and spiritual health and well-being from their students, including through their facial expressions.

Wearing masks during school substantially burdens this exercise of religious education. Masks prevent students and teachers from clearly articulating their words, from being effectively heard, from learning language skills and enunciation, and from communicating with the full range of human emotions and facial muscle groups during the education of the whole person. Masking children and teachers significantly injures socialization, emotional intelligence, mental health, and the complex relationship between words and facial features. Masking blunts the education of a broad range of student personalities, from children who are shy to those who are outgoing, and a broad range of student skills, from those who struggle to speak and understand well to those who need the opportunity to excel. Masks are uncomfortable, they inhibit breathing, they get covered with moisture and mucus, they cause skin irritation and headaches, and they introduce significant unpleasantness and student irritation into an educational setting that needs to be pleasant and welcoming to enhance students' enjoyment and interest in the subjects being taught. These and related burdens negatively and substantially injure the religious exercise of school children, their parents who are paying for and participating in the school community, of the teachers and other school staff, and of the school itself.

As a result, applying the Mayor's mask mandate to religious schools substantially burdens the parents' and childrens' religious exercise. RFRA applies to the District of Columbia, 42 U.S.C. § 2000bb-2, and private religious schools are "persons" protected by RFRA, see *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707–08 (2014). Under RFRA, the District "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," except if the District "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

Applying the mask mandate set forth in Mayor's Order 2022-029 to religious schools neither advances a compelling interest of the District, nor is it the least restrictive means of doing so. As the Supreme Court has explained, the District cannot "rely on broadly formulated interests," such as the general interest in preventing harms from COVID-19 to children, to justify its burdens, but instead "courts must scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1881 (2021) (cleaned up). In other words, the District must show it has a compelling interest to deny the exception we are requesting in this letter. But it cannot do so, for two reasons.

First, the existence of a multitude of categorical exemptions to the mask mandate negates the possibility that the District has a compelling interest to deny an exception to private religious schools. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006) (statutory exemption "fatally undermines the Government's broader contention that" it is operating a "closed regulatory system that admits of no exceptions under RFRA."). Mayor's Order 2022-029 refrains from imposing a mask mandate on numerous venues and situations where an equal or higher alleged risk of COVID-19 transmission may exist. For example, the new mask mandate (and, indeed, the previous Mayor's Order) does not apply to business employees in indoor office spaces in the District. By this exemption, the District allows adult employees to congregate maskless in larger numbers and for longer hours than children are gathered in my clients' school. As another example, the District has long exempted persons actively eating or drinking at a restaurant, effectively allowing the entire restaurant to be full of unmasked people with no limitation on how long or how closely packed they sit at their tables.

To these longstanding exemptions Mayor's Order 2022-029 adds a large universe of additional exempted venues—so many that it would be more accurate to characterize the private-school mask mandate the exception, and private maskless gatherings as the rule. The Order allows both adults and children to congregate maskless in, for example: restaurants, bars, taverns, sports and entertainment venues, gyms, recreation centers, indoor athletic facilities, grocery stores, pharmacies, big box stores, other retail establishments, and other businesses. As another example, thousands of persons can attend an indoor sports event for hours at a time maskless. Hundreds of people can pack a dance club or concert until late hours in the morning, maskless. And in all of these exempt venues, the Mayor's Order imposes no limitation whatsoever on how many persons there need to be vaccinated or show a negative test result, nor on where the attendees live, whether the District, nearby states, or any other place. To further undermine any interest in continuing to impose a mask mandate on religious schools, the Mayor's Order justifies its

panoply of exemptions by describing several reasons why the District no longer has an interest to impose a mask mandate. *See* Mayor's Order 2022-029, § I.

This universe of exemptions "fatally undermines" the possibility that the District could show, as it must under RFRA, that it has a compelling interest to deny an exception at my clients' religious schools. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. at 434. A compelling interest is an interest "of the highest order," *Fulton*, 141 S. Ct. at 1881, and one cannot exist when the government allows its interest to go unenforced in nearly every other venue in the District. RFRA does not allow the District to give less respect to the religious exercise of persons participating in a Catholic school than it gives to all the other persons gathered for nearly every other purpose.

Second, the mask mandate is fatally flawed under RFRA because it creates "a system of exemptions." *Id.* Mayor's Order 2022-029, at paragraph III.3, authorizes your department, the Department of Health, to "promulgate binding regulations and guidance on the scope of the indoor mask requirement imposed by paragraph 2," which is the mandate applicable to private, parochial, and independent schools, and that section says the Department of Health "may authorize exceptions to it." No criteria or limits are imposed on the Department of Health's ability to authorize such exceptions. The existence of this system of exceptions "undermines the City's contention that its [] policies can brook no departures" for private religious schools. A system where exceptions may be granted supports a religious entity's claim for an exception regardless of whether exceptions have been granted in the past. *See Fulton*, 141 S. Ct. at 1879. Consequently, Mayor's Order 2022-029 creates a system of exceptions that undermines any claim the District could make that there is a compelling interest to deny an exception to my clients.

In addition to lacking a compelling interest to deny an exception for religious schools, the District has many "less restrictive means" of advancing its interests. First, the District cannot prove that the mask mandate on religious schools actually advances its interests. In light of the extreme contagiousness of the Omicron variant of COVID-19, all children and teachers are likely to get COVID-19 regardless of whether children mask in school, and likely most of them already have natural immunity protecting them from serious illness in the future. Children face an extremely low risk of serious illness from COVID-19, occupying the lowest risk category, so that any interest the District may be achieving is extremely marginal and therefore not compelling. And the District has no data with which to prove that denying an exception to the mask mandate at my clients' schools would actually lead to increased transmission of COVID-19. The District fails the compelling interests test if its "evidence is not compelling," which occurs if the government relies on

research “based on correlation, not evidence of causation.” *See Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 800 (2011). Here the District cannot provide correlating evidence, much less causal evidence, that granting an exception to the mask mandate at religious schools would result in serious infections of COVID-19.

Finally, a “less restrictive means” of achieving the District’s alleged interest is available, and also requires the District to grant an exception to the mask mandate at religious schools. The District has already vindicated other options by choosing to pursue its interests by means less restrictive than a mask mandate in nearly every other venue. Those alternative mechanisms that fall short of a mask mandate include such things as “encourag[ing]” individuals “to undertake the mitigation measures and make personal decisions that are appropriate for them,” to launch COVID-19 services centers in all eight wards, and to promote vaccines and boosters. *See Mayor’s Order 2022-029*, § I. Because the District considers these means acceptable in nearly every other venue, it cannot refuse to limit itself to these means in my clients’ schools.

The Mayor’s mask mandate substantially burdens the religious exercise of religious schools, parents, and their children, hindering their religious education by forcing masks on them, their teachers, and their classmates. Refusing to grant an exception for religious schools would not be the least restrictive means of advancing any compelling government interest that the District would have to prove in court. Therefore, we respectfully request that the District acknowledge that the mask mandate on schools in Mayor’s Order 2022-029 does not apply to private, parochial, or independent religious schools.

The need for this exception is not a surprise. Many religious school officials and parents have been asking the District for an exception since Mayor’s Order 2022-029 was issued, and that Order lifts the mask mandate in the universe of venues described above starting on March 1, 2022. Therefore, we ask that you respond to this letter by 5:00 PM on Tuesday March 1, 2022.

If you do not do so, the parents whose children attend religious schools in the District may choose to vindicate their rights under RFRA and the First Amendment by seeking appropriate relief in court, including but not limited to temporary and preliminary injunctive relief, damages, and attorneys’ fees and costs. *See* 42 U.S.C. § 2000bb-1(c); 42 U.S.C. §§ 1983, 1988(b). Please let me know if you would like to discuss this matter.

* * *

Dr. LaQuandra Nesbitt
February 28, 2022
Page 7

Respectfully Submitted,

s/ *Matthew S. Bowman*

David A. Cortman

Ryan J. Tucker

Matthew S. Bowman

Frank H. Chang

ALLIANCE DEFENDING FREEDOM

440 First Street, NW, Suite 600

Washington, DC 20001

(202) 393-8690

mbowman@adflegal.org

cc: Mayor Muriel Bowser