

**STATE OF RHODE ISLAND  
SUPREME COURT**

RICHARD SOUTHWELL, and  
JULIE MCKENNEY

Petitioners

v.

S.U. No.

DANIEL J. MCKEE, in his official capacity as the  
Governor of the State of Rhode Island; and  
NICOLE ALEXANDER-SCOTT, in her official  
Capacity as the Director of the Rhode Island  
Department of Health

Respondents

**PETITIONER’S PETITION FOR ISSUANCE OF  
WRIT OF CERTIORARI IN SUPPORT OF THEIR  
REQUEST TO REVIEW A DECISION  
OF THE SUPERIOR COURT DENYING  
MOTION FOR PRELIMINARY INJUNCTION**

Petitioners hereby move this Court for the issuance of a writ of certiorari reviewing a decision of the Superior Court denying Petitioners’ request for a preliminary injunction, pursuant to Rule 13 of the Supreme Court Rules of Appellate Procedure. Attached is a copy of the decision of the Court below.

**1. STATEMENT OF THE CASE:**

This matter involves a verified complaint by parents and grandparents of public school aged children in the State of Rhode Island. The Complaint sought relief from mandates from both the Governor and the Rhode Island Director of Health that all

children in public schools wear masks throughout the school day. The State issued these mandates in two ways: First, on August 19, 2021, the Governor issued an Executive Orders 21-86 and 21-87, pursuant to his authority under the Emergency Management Act, Ch. 15 of Title 30, and particularly, R.I. Gen. Laws § 30-15-9.<sup>1</sup> These orders were issued for 30 days, and extended on September 17 and October 15.<sup>2</sup>

After the within suit was filed on September 16, 2021, on September 23, the Rhode Island Department of Health (RIDOH) issued Emergency Regulation 216-RICR-20-10-7, “Masking in Schools” (“Emergency Regulation”). This Regulation was issued pursuant to R.I. Gen. Laws § 42-35-2.10, and was by its term issued for 45 days or until the expiration of the Executive Orders, whichever occurs later; however, on the Secretary of State website it is listed as lasting until January 20, 2022, or a total of 120 days.

In challenging these mandates, Petitioners sought a preliminary injunction, arguing that all four factors – that the petitioners (1) have a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) the balance of the equities, including the possible hardships to each party and

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<sup>1</sup> In the executive order, the Governor also relied upon his inherent Constitutional powers under Article XI, as well as his powers under Title 23, Chapter 8 of the General Laws, which converts “Quarantine Generally”. Neither of those bases were argued by the Governor in his memorandum as providing authority to issue the Executive Order.

<sup>2</sup> The orders were extended again on November 12, the day on which the Decision was issued.

to the public interest, tip in their favor, and (4) that the issuance of a preliminary injunction will preserve the status quo - favored the issuing of an injunction against the enforcement of the mask mandates.

Petitioners argued that neither mandate was enacted according to proper procedure. The Executive Orders violated the recent amendments to R.I. Gen. Laws § 30-15-9, which terminated the Governor's power to issue new executive orders related to COVID-19. Any other reading of these amendments would violate the non-delegation doctrine in conceding to the Governor powers unlimited in both scope and time.

With regard to the Emergency Regulation, the RIDOH failed to follow proper statutory procedure in making specific a "Statement of Reason for Finding Imminent Peril", and failing to post such a Statement on its website or otherwise "publishing" it on the RIDOH website. Moreover, the Regulation was not enacted in response to an "imminent peril", since the mandatory masking of students has been in existence since September of 2020, and more than adequate time existed to convene normal regulatory process to enact a regulation which considers all of the statutory requirements such as a cost-benefit analysis, or properly considering the efficacy of masks as well as the potential for harm caused by such forced masking.

Finally, the Petitioners argued that the State failed to follow a narrowly tailored response in addressing a compelling state interest in addressing a public health concern.

The State ignored the harm to children in forcing them to wear an unproven medical devise (masks), and ignored a significant body of evidence that forcible masking of students in a school setting does not stop the spread of COVID-19.

**2. RELIEF SOUGHT NOT AVAILABLE IN ANY OTHER COURT:**

Since this is a request for this Court to review the denial of a request for preliminary injunctive relief, the appropriate route to obtain review is by petition for certiorari in accordance with Rule 13 of the Supreme Court Rules of Appellate Procedure. *Ciprian v. Providence Sch. Bd.*, 29 A.3d 1239 (R.I. 2011); *see also*, *Paramount Office Supply Co., Inc. v. D.A. MacIsaac, Inc.*, 524 A.2d 1099 (R.I. 1987). No notice of appeal is required or necessary.

**3. PROCEEDINGS BELOW:**

With regard to the standards for a preliminary injunction, the Court found that the Petitioners satisfied one of the elements, that they and their children were suffering irreparable harm, including the physical and emotional discomfort and interference with the children's ability to interact with teachers and peers, and the parents' experiencing the distress of witnessing their children's discomfort, and some Plaintiffs making the difficult decision to homeschool their children rather than send them to school with masks.

However, in balancing the equities, the Court found that this harm caused to the Petitioners and their children was outweighed by the risk presented by COVID-19, and

the ability of the Governor and RIDOH to adequately respond to this risk. With regard to the status quo, the Court made no specific finding as to when the “last peaceable status” was prior to the filing of the litigation. Instead, the Court noted that the relief sought would change the current state of affairs.

Ultimately, the gravamen of the Court’s decision rested on its determination of the likelihood of success on the merits. The Court found that the Emergency Management Act was sufficiently limited in both scope and time as to avoid a non-delegation issue, and that the amendments to the statute did not limit the Governor’s ability to issue and re-issue executive orders for periods of 180 days in response to whatever determination of “disaster” he makes. As for the Emergency Regulation, the Court did find that the RIDOH violated the statute in failing to properly make a statement of imminent peril; however, the Court excused that mistake, finding that case law from this Court mandated he give “great deference” to the agency in issuing an emergency regulation.

Petitioners submit that the Court erred in denying the preliminary injunction. The grounds for said petition are set forth in the attached memorandum of law.

Plaintiffs,  
By their Attorneys,

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## **CERTIFICATION**

I hereby certify that I served this document through the electronic filing system on the following attorneys of record:

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