Case Number: SU-2021-0280-MP
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Reviewer: Justin Coutu

**STATE OF RHODE ISLAND**
**SUPREME COURT**

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| 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 MEMORANDUM OF LAW IN SUPPORT OF THEIR 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

## BACKGROUND:

On June 29, 2021, the State of Rhode Island, through the Rhode Island Department of Education (RIDE), the Rhode Island Department of Health (RIDOH), and the Governor's office, all made clear to the public school districts of this State that mandatory masks in school were not going to be required for the upcoming 2021-22 school year. This made sense to all of the parents who prepared to send their children back to school; masks were no longer required in public establishments like restaurants and entertainment venues, vaccines and other

therapeutic interventions such as monoclonal treatments were available to protect vulnerable populations, and the evidence over the course of a year was that children seldom get sick from COVID-19, and none have died of COVID-19 in this state.

Moreover, orderly government seemed to have returned. The General Assembly finally convened, and passed a budget on July 6, 2021, which included an important amendment to the Emergency Management Act, R.I. Gen. Laws § 30-15-9. These amendments limited the powers of the Governor to issue an executive orders under a declaration of emergency with no time limit, after having issued one hundred and seventy-eight executive orders in the course of 487 days from the beginning of the COVID-19 crisis on March 2, 2020.

This all changed when the Governor suddenly reversed his public statements to the effect that he would not declare another state of emergency. On August 19, 2021, he then did so for only one reason: to reintroduce mandatory masks in public schools. He did not mandate masking in private schools, businesses or public places. He did not seek to reintroduce mitigation measures such as lockdowns, limited capacities for venues, or the myriad other restrictions imposed by his predecessor. His only goal was to forcibly mask children in public schools.

As justification for this effort, the Governor cited three legal bases: Article IX of the Rhode Island Constitution and the Rhode Island General Laws,

including, but not limited to, Title 30, Chapter 15, and Title 23, Chapter 8. None of these arguments can survive judicial scrutiny.

Because of these Executive Orders, parents in this state mobilized to challenge what they perceived to be an unjust and harmful infringement on the health and well-being of their children. First 14, then 35 individual families filed suit to stop the mandatory masking of their children. They argued that these children were being made to suffer significant harm.

Dozens of parents in this case, from all over the State, signed affidavits which the Court accepted as true, outlining that their children are suffering because of the mask wearing in school: Struggle breathing; headaches; sore throats; face rashes; heat causing moist masks and itchiness; anxiety, mood swings, exhaustion, anger, withdrawal and depression; struggles with home schooling and the loss of in school experiences; speech impaired children failing to get adequate instruction by seeing their teacher speak, and being able to respond clearly; children with breathing difficulty, such as asthma (not a recognized disability which would exempt them from wearing a mask) having their respiration impaired; loss of interest in school; confusion over why only they have to wear masks in school and not anywhere else; abusive behaviors by teachers, principals, nurses and aides demanding strict adherence to mask wearing without breaks, “hurry up” face forward”, silent lunches akin to Dickensian scenes out of Oliver Twist;

inconsistent enforcement of the mask mandate where some staff is understanding and others militant enforcers; lack of learning time as teachers and staff focus time on constantly monitoring masking and social distancing; difficulty understanding teachers or peers when they talk. There are many more parents, some afraid to come forward publicly to be subject to abuse which some of these parents have already been subjected to.

The Governor responded to the parents' motion by abandoning his claim to have independent constitutional authority to issue executive orders. Instead, he argued that based upon R.I. Gen. Laws § 30-15-9, he had the power to issue a "new" declaration of emergency based upon the "Delta variant", and re-issue executive orders under that declaration. He also dismissed out of hand the harm being suffered by the children and their parents, claiming it was "wholly unsubstantiated".

Perhaps concerned about the legality of the Executive Orders, one week after the filing of this case, the State went down another avenue to mandate masks in schools: on September 23, 2021, the Rhode Island Department of Health (RIDOH) issued Emergency Regulation 216-RICR-20-10-7, "Masking in Schools" ("Emergency Regulation"). RIDOH purported to issue this regulation under its general statutory authority conferred to it under R.I. Gen. Laws §§ 23-1-1, 23-1-17 and 23-1-18(4). In doing so, RIDOH circumvented the normal regulatory

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procedure for issuing school health regulations 216-RICR-20-10-4, instead issuing the regulation pursuant to the Emergency Regulation provisions of R.I. Gen. Laws § 42-35-2.10.

Of these two state mandates, the only one to expressly cite to any factual basis is the Executive Order; the Emergency Regulation references no facts or data to support their issuance, presumably relying upon EO 21-86. But this is fraught with issues:

1. The Executive Order requiring masks 21-87 (Exh. 5) requires that RIDOH issue a mask "protocol". That protocol was issued on August 19, 2021, expired on September 18, 2021, and was never renewed.
2. The Executive Order was renewed twice, once on September 17, and again on October 15. (Exh. 42) Neither order references any data or facts to support it, and neither references the RIDOH Emergency Rule.
3. Finally, to the extent the original Executive Orders make a number of assertions, upon closer review did not stand up to scrutiny.

The matter was heard intermittently over the course of seven dates, from September 30 through October 19. Four parents testified, and along with their expert witness, Dr. Andrew Bostom. The State called Dr. James McDonald, whose testimony occupied five of the seven days.

Dr. Bostom is a medical doctor and epidemiologist who has published 114 peer-reviewed studies, including a randomized control trial study. (Exh. 1) He taught for many years at Brown Medical School, and is Board Certified in Internal Medicine. Most recently, he is a Research Physician, at the Center for Primary Care and Prevention, Memorial Hospital of Rhode Island. He has been certified as an expert witness in other jurisdictions, including Federal Court.

Dr. Bostom testified to the evidence relied upon by the Governor in its justification for the Executive Order. First, the order claims that Delta variant has become dominant, and is maybe has a viral load 1000 times greater than the original strain of SARS CoV-2, and is 3-4 times more contagious than the original strain.

Whether Delta is the current dominant strain of COVID is irrelevant, given that it is of no greater concern than other strains, according to the CDC.[1] As for the

[1] Dr. McDonald agreed that, as of September 11, 2021, the CDC has stated:

a. Genetic variants of SARS-CoV-2 have been emerging and circulating around the world throughout the COVID-19 pandemic.
b. Viral mutations and variants in the United States are routinely monitored through sequence-based surveillance, laboratory studies, and epidemiological investigations.
c. The US government SARS-CoV-2 Interagency Group (SIG) developed a Variant Classification scheme that defines three classes of SARS-CoV-2 variants:
    i. Variant of Interest
    ii. Variant of Concern
    iii. Variant of High Consequence

scare quote of 1000x the viral load, Dr. McDonald referenced some unnamed China study to suggest that was possible. Again, there is no actual evidence that this is true. In any event, as Dr. Boston testified without contradiction, the Delta strain is significantly less contagious than the original Wuhan COVID-19 strain and the Alpha variant. (Exh. 6)

Second, the Order notes that unvaccinated people can spread the Delta variant. But that is true of all COVID-19 variants, as Dr. McDonald admitted. The vaccine does not prevent someone from getting the virus, or spreading it, it only lessens the severity of the infection. The CDC didn't always agree with that statement, when in May of this year the CDC Director stated that vaccinated people could go without masks. But that thinking changed after an outbreak in Provincetown MA among vaccinated men. (Exh. S) The fact that the CDC got this wrong permeates this case. The State relies almost exclusively on CDC pronouncement to support its claim that masks work and are not harmful to children, yet the CDC has gotten so much wrong about this pandemic one wonders why anyone would put such unquestioning faith in their opinions.

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d. The Alpha (B.1.1.7), Beta (B.1.351, B.1.351.2, B.1.351.3), Delta (B.1.617.2, AY.1, AY.2, AY.3), and Gamma (P.1, P.1.1, P.1.2) variants circulating in the United States are classified as variants of concern.
e. To date, no variants of high consequence have been identified in the United States.

Later, the Executive Order references that children under 12 cannot get vaccinated which, although true, is irrelevant to the issue of spreading the virus. As for the fact that children cannot use vaccines or monoclonal treatments, they are unnecessary for children who seldom get sick, and certainly don't have serious consequences from getting COVID-19.

In the third category of statistics, the Order references a high level of community transmission and new cases, increased hospitalizations, and such overcrowding of emergency departments that they are, "exceeding capacity and hospitals are on rolling diversion".

The hospitals in Rhode Island never exceeded capacity, and in fact hospitalizations decreased starting in mid-September, just as schools were opening after September 9. (Exh. 7) And cases began to drop on September 6, before schools opened. Hospitals never exceeded 90% capacity, and of that never more than 7% of the hospitalizations were of patients with a COVID-19 diagnosis. (Exh. 10) As for ICU beds, they never were above 93% capacity, having peaked on September 10, and are at about 83% today. (Exh. 11, 12) No evidence was presented to support the claim of "rolling diversions". Related to the hospital overcrowding was the need to open an alternate hospital in Cranston, which of course never happened.

Finally, in its most alarmist language, the Order states: "RIDOH's modeling team of statisticians and public health professionals reports that, based on statistical analysis, without continued and improved mitigation measures, the Delta Variant may cause an increase in the rate of deaths by the end of September 2021." There was no evidence to support this claim presented by the State, even though the order has been renewed twice already.

While the state did not focus on the number of recent deaths due to COVID-19, Dr. McDonald attempted to mislead this Court as to the seriousness of the threat of COVID-19 to children by citing to 3 pediatric COVID-19 deaths from last year. Caught with this misrepresentation, Dr. McDonald attempted to correct the misimpression by blaming the CDC definition. All that proved was that the CDC was overstating the total number of COVID-19 deaths by including any death with a positive test, even if the death was for totally unrelated reasons. And it proved that Dr. McDonald was not beyond stretching the truth to get support for his position on masking.

Dr. Bostom proved that point. There have been no COVID-19 deaths of anyone under age 24 in Rhode Island. (Exh. 22) Nationally, there have been approximately 500 COVID-19 deaths under age 18, however, that number is likely inflated given the liberal definition of dying "with COVID" as a review of death

certificates show about 35% of COVID-19 recorded deaths in children had no plausible chain of event or significant underlying condition. (Exh 19, Table 1).

Comparatively, the seasonal flu has been much more deadly to children: up to 5 times more in some recent years (Exh. 15, 16), including 3 such deaths in Rhode Island during the 2009-10 flu season. (Exh. 14) Conversely, the survival rate for a child who catches COVID-19 is estimated at 99.9998%.

In fact, COVID-19 is a disease that harms the elderly and those with significant comorbidities: 80% of deaths in Rhode Island are in those over 70 years old (Exh. 21). Nationally, 99.1% of deaths involved those with a least one underlying condition (hypertension, and lipid metabolism being the most common, and obesity, diabetes and anxiety disorders the strongest risk factors (Exh. 24). Moreover, 64% of deaths were in people with at least 6 underlying conditions (Ex. 24, Table 1)

Nor do scare mongering about pediatric COVID-19 hospitalizations bear scrutiny. There has been an average of about one pediatric hospitalization in the state since the Executive Order was issued. (Exh. 8)[2] There have been no pediatric hospitalizations either "with" or "because of" COIVD-19 since October 4 as

[2] The State did introduce a chart to show monthly pediatric hospitalizations (Exh. M), but these do not reflect if COVID-19 was the reason for the hospitalization. Moreover, this shows less than one average hospitalizations per day in August and September.

testified to by Dr. Bostom. Dr. McDonald could not dispute this fact since he admitted he has not looked at pediatric hospitalizations for a couple of weeks. Though not mentioned in the Executive Order, or Emergency Regulation, Dr. McDonald raised the specter of Long COVID and MIS-C conditions as a concern for children. But the evidence does not support his concern. In a 14 studies of children with persistent conditions, the evidence for Long COVID in children and adolescents is limited, and all studies have substantial limitation such as "lack of a clear case definition, inclusion of children without a confirmed COVID infection, self-reported symptoms without clinical follow-up and other biases, and lack of a control group, or did not show a difference between children who had been infected and those who were not." As for MIS-C, it is rare diagnosis in relation to COVID-19, and has been associated with other common cold viruses. (Exh. 13)

In an attempt to buttress the Governor's assertions in the Executive Orders, Dr. McDonald testified about a so-called "Dashboard" that was a very important "data rich" set that he consulted frequently to monitor the impact of COVID-19 on the state. That dashboard noted the following metrics: Estimated Prevalence of Infection; Community Transmission; Projected Community Immunity; 14 Day Projected Hospitalizations; and Hospital Overcrowding and the NEDOCS Score. Yet each of these metrics suffers from incomplete or outdated data, and changing definitions. When confronted about this, Dr. McDonald backtracked and claimed

this was not the only data he reviewed, but never mentioned what the other data was.

a. Estimated Prevalence of Infection

The State placed great weight on its modeling data. But it suffers the same fate as the miserably inaccurate modeling data from April 2020, which overstated hospitalizations by a factor of 10. (Exh. 10)

On June 30, 2021, the model showed everything was fine, the hospitalization rate was expected to be very low. Suddenly, on August 16, the model changed, and doom was predicted. Then on August 31, nothing; the model disappeared.

Another curious change: on June 30 the model was predicated on CDC modeling, which included test positivity rate. But Rhode Island's test positivity rate is very low, never above the 5% rate that was key to last year's lockdowns and mask mandates. Dr. McDonald discounted test positivity rate in the modeling, claiming that since the state conducts so many tests, it is no longer a valid metric. This is a curious statement, since his boss, Dr. Alexander Scott, in her letter to school districts on August 18, emphasized the positivity rate among children. (Exh. 37)

b. Projected Community Immunity

As with community spread, this data is incomplete and confusing. Does it include natural immunity; Dr. McDonald initially suggested it did. But when

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asked why the State does not test for natural immunity, he deflected and claimed there was no evidence natural immunity lasted past 90 days.

c. 14 Day Projected COVID Hospitalizations

This metric appears in the dashboard from June 30 through August 9, after which it is "under development" through September 9, and then disappears completely.

d. Hospital Overcrowding and the NEDOCS Score

Much was made by the State of the NEDOCS score, allegedly showing Emergency Department overcrowding. When it was pointed out that the "dangerously overcrowded" standard applied to EDs with as few as half as many beds filled, Dr. McDonald claimed the score reflects staffing issues as well, although it does not say so specifically. When also confronted with a study that NEDOCS is inaccurate because it often overestimates overcrowding (Exh. 44), the Doctor reverted to his personal experience with overcrowding of EDs, an experience everyone has had. Most importantly, however, the ED overcrowding, to the extent it exists, has nothing to do with COVID-19, since only about 5 % of hospital beds are being used by COVID-19 positive patients. (Exh. 9)

Dr. McDonald also testified to various studies he refers to in justifying the mask mandate. Nearly every study cited by the State to support its claim that masking works is contained in a Morbidity and Mortality Weekly Report

(MMWR). (Exhs. C, D, E, F, G, I, J, K, S and W), or Science Briefs put out by the CDC (Exh. B and R). All of these studies suffer from confounders, as Dr. McDonald called them: confirmation or recall bias, and an inability to generalize or prove a causal relationship between the findings and the conclusions suggested.

For example, the Marin County study was used to suggest that a teacher who removed her masked caused an outbreak of COVID-19 among her students. But "challenges in testing acceptance among possible contacts from outside the school led to difficulty in characterizing the outbreak's actual spread into the community, as is evidenced by later discovery of additional community cases with sequences indistinguishable from those in the school outbreak." (Exh. G) A Georgia states clearly that there was no statistical difference in COVID-19 incidences among students between schools mandating masks and those that did not. (Exh. F) A Saint Louis University study suggests that "Compared with masked exposure, close contacts with any unmasked exposure had higher adjusted odds of a positive test result." The problem is, "contact tracing were self-reported, which could introduce social desirability and recall bias or inaccurate data regarding mask use." (Exh. D) An "ecological" study comparing counties with mask mandates and those without stated bluntly: "causation cannot be inferred". (Exh. I)

In support of the State's argument that masks do not harm children, they point to a study from Italy. (Exh. T) In that study children wore masks for only 30

minutes. They also cite to a Science Brief put out by the CDC (Exh. B) The 7 studies cited in that paper as evidence that "mask wearing has no significant adverse health effects" were all non-randomized, and all involved adults. They all found some adverse effect: oxygen levels lowered increased CO2 tension, higher heart rate, but not enough to be "significant". One study consisted of six 10 minutes phases; another was self-reported after a 6 minute walk and then monitored for 30 minutes. These are hardly relevant to determine the effects, both physical and emotional to children wearing masks in school for 8 hours per day.

Interestingly, the State never introduced the one study cited by Dr. Alexander Scott to local school districts (Exh. 37), that involved the use of manikins in a conference room. (Exh. 38) The study is subject to so many limitations it is useless, and Dr. McDonald did not seem to agree with it being included in the letter his boss sent out.

The problem lies with the weight given these MMWR reports by the State. As is made clear in the 50 year history of the MMWR, these reports are not "peer-reviewed", but instead are go through a "clearance process" to ensure the report conforms to CDC policy. (Exh. 31) These are not independent studies; they are glorified house organs. As such, they are subject to political interference. Even Dr. McDonald had to admit that politics is affecting COVID-19 policy, although he

thinks it only affects states like Florida. Yet, he would not acknowledge the political pressure placed on the Governor by teachers unions in this state. (Exh. 40)

Perhaps what is the most significant deficiency with these studies is that none are Randomized Control Trials (RCT). Dr. McDonald agreed with Dr. Bostom that RCTs are the gold standard for making recommendations, let alone mandates. (Exh. 26) The reason is clear, the major threat to the validity of observational and other non-RCT studies are "intractable biases" which are attempted to be controlled for after the fact, with limited success.

Since 1920, when Dr. William Kellogg published his post-mortem on the effectiveness of masks in preventing the spread of the Spanish Flu in California in 1918, (Exh. 35) until the CDC guidance of February 27, 2020, that "CDC does not currently recommend the use of facemask among the general public." (Exh. 15), public health officials knew that masks don't work to stop the spread of a virus. Thirteen randomized control trials of community masking for the prevention of viral infections, including SARS-CoV-2, published between 2008 and 2021 proved that masking does not work. (Exh. 27).

Which lead to one of the more incredible assertions by Dr. McDonald that randomized control trials of masking children would be unethical. A rather remarkable statement given that children right now are being experimented upon

with an unproven vaccine which could have unknown long-term consequences.[3] But more directly, Dr. McDonald could not cite and was not even aware of the regulations regarding the use of children as research subjects (Exh 32). Dr. McDonald also asserted quite forcefully that as a member of the Independent Review Board, no such RCT would be permitted on children, yet he failed to note that RIDOH's IRB is on one of many thousands of such boards across the country, and he could not even remember the names of the members of his IRB, or when they even last met. (Exh. 33)

In a rare moment of candidness, when asked if he may suffer from his own confirmation bias in wanting to believe masks work, he admitted he might. That is certainly borne out by the complete lack of interest he had in reviewing data and studies which went against his preference for masks. For example, his boss Dr. Nicole Alexander Scott, referenced in a letter to School Districts on August 18, 2021, that southern states without mask mandates for school, "that have recently opened schools without these mitigation measures have seen their children's hospitals capacities pushed to the limits." (Exh. 37) When asked about the dramatic decrease in hospitalizations in these states since schools have reopened (Florida is down 85% since schools opened), the Doctor expressed no interest in researching these facts. He wanted to just focus on Rhode Island, seemingly

[3] And ignores that RCT on masking children is being done now in other countries (Exh. 34)

disavowing the very prominent point his boss made in the letter. The new facts fail to fit his narrative.

The same was true of experiences in other countries like Sweden. When confronted with potential evidence that Sweden had no child deaths and very few hospitalizations from COVID-19 where there is no mask mandate, (Exh. 41), again the Doctor expressed no interest in a country with a different health care system. Yet he had no problem analogizing to Rhode Island observational studies from counties in Arizona and California, making no attempt to compare the demographics and health care systems in those counties to Rhode Island. And he eagerly cited an unnamed study from China to suggest kids just love wearing masks.

Dr. McDonald toward the end of his testimony let his mask slip somewhat. He stated that "culturally" this country is not quite ready for permanent masking of kids in school, as is done in some other countries. When asked what metric will be used to end the Emergency Order, Dr. McDonald could not give a clear answer, just vague references to cases and hospitalizations being down, and vaccine approval for children. He even testified that when the COVID team met to discuss renewal of the order, there was in fact no discussion; everyone just nodded in approval to continue along. His testimony left one to wonder whether forced masking of children in schools will ever end.

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## STANDARD OF REVIEW:

When reviewing a hearing justice's decision to deny a preliminary injunction, this Court applies an abuse of discretion standard of review. *Iggy's Doughboys, Inc. v. Giroux*, 729 A.2d 701, 705 (R.I. 1999). The four factors that a trial court must consider in its decision on a motion for a preliminary injunction are:

> [W]hether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo.

*Foster Glocester Reg'l Sch. Bldg. Comm. v. Sette*, 996 A.2d 1120, 1124 (R.I. 2010)

When a party contends that the hearing justice made an error of law, this Court undertakes *de novo* review. *Providence Teachers' Union Local 958, AFL-CIO, AFT v. City Council of Providence*, 888 A.2d 948, 952 (R.I.2005) *(citing Rhode Island Depositors Economic Protection Corp. v. Bowen Court Associates*, 763 A.2d 1005, 1007 (R.I.2001)).

## ARGUMENT:

In his decision, the Hearing Justice reviewed each of the four factors in deciding a preliminary injunction. He found that the Plaintiffs were not likely to succeed on the merits; that although the parents and their children were suffering irreparable harm, that the harm potentially suffered by the community as a whole

as a result of COVID-19 outweighed the harm suffered by these innocent families; and never clearly decided what the *status quo ante* was.

For the reasons set forth below, the Trial Justice was clearly wrong in denying the injunction.

**1. <u>Likelihood of Success on the Merits</u>**

**a. The Trial Judge erred in his determination that the Emergency Management Act gave the Governor power to declare a state of emergency for an unlimited time period, and that the Governor could re-issue a mask mandate.**

As an initial matter, this Court owes no deference to the Governor in interpreting Emergency Management Act, R.I. Gen. Laws § 30-15-9. Instead, this Court should use traditional rules of statutory construction to determine the meaning. As one Court recently ruled in reviewing an emergency ordinance enacted during the pandemic:

> When engaged in statutory construction, this Court is directed to give effect to the plain meaning of a statute that is clear and unambiguous. *Western Reserve Life Assurance Co. of Ohio v. ADM Associates, LLC*, 116 A.3d 794, 798 (R.I. 2015) (*quoting Hough v. McKiernan*, 108 A.3d 1030, 1035 (R.I. 2015)). The ultimate goal of statutory construction "'is to give effect to the purpose of the act as intended by the Legislature.'" *Lang v. Municipal Employees' Retirement System of Rhode Island*, 222 A.3d 912, 915 (R.I. 2019) (*quoting Bluedog Capital Partners, LLC v. Murphy*, 206 A.3d 694, 699 (R.I. 2019)). "'When the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.'" *Town of Exeter, by and through Marusak v. State*, 226 A.3d 696, 700 (R.I. 2020) (quoting Lang, 222 A.3d at 915). Additionally, this Court must "'consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections.'" *5750*

> *Post Road Medical Offices, LLC v. East Greenwich Fire District*, 138 A.3d 163, 167 (R.I. 2016) (*quoting ADM Associates, LLC*, 116 A.3d at 798).

*29 Sylvan, LLC v. The Town of Narragansett*, WC-2020-0112 (Super. Ct of R.I., November 13, 2020, Taft-Carter, J.)

So what does the Emergency Management Act statute, as amended, mean? The amendment which was enacted on July 6, 2021, reads:

> (g) Powers conferred upon the governor pursuant to the provisions of subsection (e) of this section for disaster emergency response shall not exceed a period of one hundred eighty (180) days from the date of the emergency order or proclamation of a state of disaster emergency, unless and until the general assembly extends the one hundred eighty (180) day period by concurrent resolution.

Clearly, the intent of the amendment was to terminate the existing Emergency Orders issued by Governor Raimondo some 487 days earlier. It also meant that no new COVID-19 order could be issued. Finally, to avoid the non-delegation issue which arose when the Governor issued unending extensions of the emergency order, the General Assembly capped any new orders at 180 days.

There is an undercurrent to this case that the Governor believes that the original Executive Order 20-02 from March of 2020 is still in effect. (See Exh. U, which subtly changed the basis of the extension of EO 21-86 and 21-87 to include a reference to EO 20-02 as if it were still in existence. That language does not appear in the original EO 21-86) To maintain that EO 20-02 is still operative, even though it is more than 180 days old, would mean that the amendments to the

Emergency Management Act statute applies only prospectively. But that is not how amendments work when they are of a purely procedural nature.

> In general, statutes and their amendments are presumed to operate prospectively unless it appears by clear, strong language or by necessary implication that the Legislature intended to give the statute retroactive effect. . . . When a statute or ordinance lacks the requisite specificity or necessary implication regarding retroactive application, the distinction between a statute that is remedial in nature and one that creates a substantive legal right guides the analysis. . . . A statute is remedial or procedural in nature if it neither enlarges nor impairs substantive rights but prescribes the methods and procedures for enforcing such rights; in that event, it may be construed to apply retroactively.

*Zanni v. Town of Johnston*, 224 A.3d 461, 466 (R.I. 2020) (cleaned up). Executive Order 20-02 has been terminated, even if the Governor claims it is not.

It also defies logic to suggest that the "Delta" variant is some new state of emergency. Disaster is defined in R. I. Gen. Laws § 30-15-3 and includes "epidemic". The "epidemic" we are in is COVID-19, not some variant of it. Even Dr. McDonald referenced this fact by defining the current epidemic as the "Novel" coronavirus; novel in that we had no treatment or history of herd immunity, and hospital overruns. It is also confirmed by the CDC's own explanation of variants as:

> Viruses constantly change through mutation, and new variants of a virus are expected to occur. Sometimes new variants emerge and disappear. Other times, new variants persist. Numerous variants of the virus that causes COVID-19 are being tracked in the United States and globally during this pandemic.
> See https://www.cdc.gov/coronavirus/2019-ncov/variants/variant.html

The Trial Justice found that the Amendments did not reference COVID-19, and therefore did not terminate the Governor's powers to declare a new state of emergency. That is illogical and not rational interpretation of the Amendment. Otherwise, the Governor could simply keep declaring the same state of emergency after the expiration of the 180 days. The Amendment states that the Governor's powers: "shall not exceed a period of one hundred eighty (180) days from the date of the emergency order or **proclamation of a state of disaster emergency**." What is a Declaration of Emergency worth if there are no powers to address it. The two concepts cannot logically be divorced from one another.

**b. Under the Trial Justice's reading of the Emergency Management Act, the Governor's powers are unlimited as to scope and time, and would violate the non-delegation doctrine.**

If the Governor were able to declare every variant a new pandemic, his powers would be unlimited. This would raise serious non-delegation of powers issues. *See, e.g., Almond v. R. I. Lottery Comm'n*, 756 A.2d 186, 191-92 (R.I. 2000):

> Thus, this court has acknowledged that 'limited portions of the legislative power, if confined in expressly defined channels, may be vested by the general assembly in other bodies which it authorized to act as its agents or auxiliaries in carrying out its constitutional duties.' *Opinion to the Governor*, 88 R.I. 202, 205, 145 A.2d 87, 89 (1958).
>
> In sum, the delegation of legislative functions is not a per se unconstitutional action. Instead, it is the conditions of the delegation--the specificity of the functions delegated, the standards accompanying the delegation, and the safeguards against administrative abuse--that we examine in determining the

> constitutionality of a delegation of power. *See Davis v. Wood*, R.I., 427 A.2d 332, 335-36 (1981); *De Petrillo v. Coffey*, 118 R.I. 519, 524, 376 A.2d 317, 319 (1977); J.*M. Mills, Inc. v. Murphy*, 116 R.I. 54, 61, 352 A.2d 661, 665 (1976); *Jennings v. Exeter-West Greenwich Regional School District Committee*, 116 R.I. 90, 98, 352 A.2d 634, 638-39 (1976); *City of Warwick v. Warwick Regular Firemen's Association*, 106 R.I. 109, 118, 256 A.2d 206, 211 (1969). *See generally A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551, 55 S.Ct. 837, 852, 79 L.Ed. 1570, 1591 (1935) (Cardozo, J., concurring) (delegation permissible when 'canalized within banks that keep it from overflowing'); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421, 55 S.Ct. 241, 249, 79 L.Ed. 446, 459 (1935) (despite need for wide range of administrative flexibility, constitutional system requires limitation)."

This Court must read R.I. Gen. Laws § 30-15-9 as amended to avoid a constitutional concern. This Court has consistently applied rules of statutory construction to avoid constitutional issues and to render the provisions of laws consistent and valid, even when a "literal reading of [a] statute[ ] . . . would defeat or frustrate the evident intendment of the legislature." *Town of Scituate v. O'Rourke*, 103 R.I. 499, 507, 239 A.2d 176, 181 (1968).

**c. The Trial Justice mistakenly applies a rational basis standard for determining whether the Governor's action infringe upon the bodily integrity of school aged children who are obligated to attend school upon threat of criminal truancy.**

There can be no doubt that the forcible masking of children implicates a fundamental right to bodily integrity. For example, the U.S. Supreme Court recognizes that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Washington v. Harper*, 494 U.S. 210, 229 (1990). *See also, Sell v. United States*,

539 U.S. 166 (2003) (anti-psychotic drugs); *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261 (1990) (life-sustaining treatment); *Winston v. Lee*, 470 U.S. 753 (1985) (surgery under anesthesia); *Vitek v. Jones*, 445 U.S. 480 (1980) (transfer to mental hospital); *Rochin v. California*, 342 U.S. 165 (1952) (stomach-pumping). This long line of cases grows from the "well established, traditional rights to bodily integrity and freedom from unwanted touching." *Vacco v. Quill*, 521 U.S. 793, 807 (1997).

What is missing from the Trial Justice's analysis of the impact that a mask mandate has upon school aged children is the fact that these children not only have a constitutional right to education in this State, but also are legally obligated, upon pain of truancy, to attend school.

The Trial Justice asserts that this Court has found there to be no fundamental right to education in this state, citing *Woonsocket School Committee v. Chafee*, 89 A.3d 778 (R.I. 2014). But that case, and its predecessor *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995), dealt with the question of whether the Education Clause provides a "fundamental and constitutional right for each child to * * * an opportunity to receive an equal, adequate, and meaningful education." *Sundlun*, 662 A.2d at 55, 63." *Woonsocket Sch. Comm. v. Chafee*, 89 A.3d 778 (R.I. 2014).[4]

4 ARTICLE XII of the RI Constitution provides: "The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public

Not present in either case was a claim that the General Assembly, in its role of promoting education in Rhode Island, has made it compulsory. The failure to send a child to school, or to engage in an approved home school program, is punishable by fines and jail. R.I. Gen. Laws § 16-19-1. As many parents testified or swore in the complaint, home schooling is not an option for them, so they must send their children to school with masks.

In this context, the question is whether, in being forced to attend school, the State has the right to interfere with their bodily integrity. The Trial Justice says no; citing *Klaassen v. Trs. of Ind. Univ*. (7th Cir. 2021) and *Oberheim v. Bason* (M.D. Pa. 2021). *Klaassen* involves students who attend a university, not mandatory in Indiana and not subject to truancy. *Oberheim* involved a public school, but the issue of compulsory attendance was not addressed in that case.

The problem with these cases is that they fail to recognize this distinction regarding compulsory attendance. For example, the Court likened mask wearing to mandated bicycle helmets, hair nets and ear plugs. But children are not legally mandated to ride a bicycle; one has the right not to work in an industry that mandates hair nets or ear plugs. These are poor analogies to a student forced to attend school, and then forced to wear a mask. There is no option for them.

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schools and public libraries, and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education and public library services."

When viewed in this context, the Court should have analyzed the State's action under the standard as set forth in *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 141 S. Ct. 63, 67 (2020), which stated:

> Stemming the spread of COVID-19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as "narrowly tailored."

In that case, the Court made clear that: "there are many other less restrictive rules that could be adopted to minimize the risk." Id.

Underlying *Cuomo* is *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). But as one courageous Attorney General wrote in an Advisory Opinion to his state's legislative leaders:

> *Jacobson* alone cannot provide the answer. As one federal court recognized, "*Jacobson* predated the modern constitutional jurisprudence of tiers of scrutiny, was decided before the First Amendment was incorporated against the states, and did not address the free exercise of religion." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020) (internal quotation marks omitted); *see also, e.g., Cnty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 897 (W.D. Pa. 2020) ("Since [*Jacobson*], there has been substantial development of federal constitutional law in the area of civil liberties. As a general matter, this development has seen a jurisprudential shift whereby federal courts have given greater deference to considerations of individual liberties, as weighed against the exercise of state police powers."); *Bayley's Campground Inc*., 463 F. Supp. 3d at 32 ("[T]he permissive *Jacobson* rule floats about in the air as a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review.") Decided the same year as the now-repudiated decision in *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), the case seems out of step with our country's present understanding of the Bill of Rights. Extending it too far could lead to disastrous results- as demonstrated by the U.S. Supreme Court's use of *Jacobson* to justify forced sterilization in one infamous case. *See Buck v. Bell*, 274 U.S. 200, 207, 47 S.

> Ct. 584, 585, 71 L. Ed. 1000 (1927) (citing *Jacobson* and holding: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.").

Patrick Morrisey, West Virginia Attorney General, AGO 09102021 (September 10, 2021). Justice Oliver Wendell Holmes, Jr.'s infamous last line in his *Buck* decision read: "Three generations of imbeciles are enough." This should not be precedent upon which this Court relies.

Indeed, Justice Gorsuch's concurring opinion in *Cuomo*, highlights this point that where fundamental rights such as bodily integrity are at stake, strict scrutiny is the proper standard to use when analyzing the Government's actions.

> Why have some mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic? In the end, I can only surmise that much of the answer lies in a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack. Things never go well when we do.

Even if Delta were considered a new "disaster", the conduct of the Governor in exercising his authority under the statute is limited by constitutional concerns. Forcibly masking children is a serious infringement on their fundamental right to bodily integrity. However a compelling state interest there is in stemming a pandemic, the State's response must be narrowly tailored to meet that purpose. *See Cuomo*.

Yet the Governor's response is not even rationally related to the purpose. It is undisputed that only the elderly and those with significant comorbidities suffer from illness and death because of COVID-19. Yet the entire burden of the Governor's order falls on children, who do not die or get sick from COVID-19 any more than they do of the flu.

Moreover, none of the doomsday scenarios laid out by the Governor have come to pass. Hospitals are not overrun. Case transmissions by children are less than 5%. There were not 200 deaths by the end of September due to COVID-19. The modeling the State has used apparently has been either abandoned or so modified as to be meaningless.

**d. The Trial Justice correctly found that the Emergency Regulation 216-RICR-20-10-7 was enacted in violation of proper procedure, but then erroneously permits it to remain in effect.**

The Trial Justice agreed with the State that this Court has signaled that it would give great deference to RIDOH's determination of "imminent peril", and cites to Justice Stern's decision in *Vapor Technology Association v. Raimondo,* C. A. PC-2019-10370 (Super. Ct R.I., November 5, 2019). Decided just before the COVID-19 outbreak, that case involved the banning of flavored vaping products. The Court issued a TRO on the procedural grounds that RIDOH failed to publish, on is website, the Statement of Reasons for Imminent Peril. But the Court went on

to indicate that it would defer to the "reasonable construction by the [DOH, as it is] charged with the implementation."

*Vapor Technology* cites two Rhode Island Supreme Court cases. One involved the certification of breathalyzer tests, and the other limiting title preparation fees charged by car dealers. One doubts that, in deciding these cases, Rhode Island Courts would have ever contemplated they would be cited as justification for deference to RIDOH mandating forcible masking. Indeed, it is hard to believe that the same Court which criticized the "disgraceful ineptitude of certain state administrative agencies," *Park v. Rizzo Ford, Inc.*, 893 A.2d 216, 222 (R.I. 2006), would be willing to give great deference in a case such as this where more is at stake than $20 title fees.

In deciding the issue of whether "imminent peril" existed at the time of the Emergency Regulation, this Court cannot ignore the fact that 18 months transpired since the issuance of the original emergency order in March of 2020, and one year since schools returned with mandatory masking in September of 2020. There are School Health Regulations which have been in existence since at least 1964. They govern every conceivable health issue that could arise in a school setting: vision, hearing and scoliosis screening; medication administration; school records; immunization requirements; school construction standards; even a ban on hundreds of chemicals in schools.

Yet RIDOH waited until September 23, 2021 to issue an emergency rule. When asked, Dr. McDonald seemed befuddled by these school health regulations. They haven't been revisited in quite a while (except to look at medical marijuana in schools). He suggested that RIDOH didn't have the time to go through normal regulatory proceedings to issue a mask rule, a laughable point given masks have been in school for over a year at that point. Ultimately, he seemed to blame State lawyers for why the mask rule was not promulgated through the school health regulations.

Perhaps the real reason is that it would never pass muster under normal rule making procedures. For example under § 42-35-2.6, the agency must give a concise explanatory statement of the reasons for creation of the rule, including the agency's reasons for not accepting arguments made in testimony and comments. Under § 42-35-2.7, at least thirty (30) days before the filing of a final rule with the secretary of state, an agency shall publish the notice of the proposed rulemaking on the agency's website and with the secretary of state. The notice must also be published in a newspaper or newspapers having aggregate general circulation throughout the state. The notice must include, *inter alia*, "Where, when, and how a person may comment on the proposed rule and request a hearing, including the beginning and end dates of the public comment period." And "a citation to each scientific or statistical study, report, or analysis that served as a basis for the

proposed rule, together with an indication of how the full text of the study, report, or analysis may be obtained."

Under § 42-35-2.8, the agency must provide for a 30 day public comment period, and must provide for an opportunity for a hearing "if a request is received by twenty-five (25) persons, or by a governmental agency, or by an association having not less than twenty-five (25) members within ten (10) days of a notice posted in accordance with subsection (a) of this section. A hearing must be open to the public, recorded, and held at least five (5) days before the end of the public comment period."

The proposed rule must also contain a "Regulatory Analysis" under § 42-35-2.9, which requires:

a. An analysis of the benefits and costs of a reasonable range of regulatory alternatives reflecting the scope of discretion provided by the statute authorizing the proposed rule;

b. Demonstration that there is no alternative approach among the alternatives considered during the rulemaking proceeding which would be as effective and less burdensome to affected private persons as another regulation. This standard requires that an agency proposing to write any new regulation must identify any other state regulation which is overlapped or duplicated by the proposed regulation and justify any overlap or duplication; and

c. A determination whether: The benefits of the proposed rule justify the costs of the proposed rule; and that the proposed rule will achieve the objectives of the authorizing statute in a more cost-effective manner, or with greater net benefits, than other regulatory alternatives.

There is no reasonable explanation as to why RIDOH did not convene a regulatory hearing to consider the risk and benefits of forcible masking children in schools. There is no reasonable explanation as to why RIDOH did not cite to "each scientific or statistical study, report, or analysis that served as a basis for the proposed rule, together with an indication of how the full text of the study, report, or analysis may be obtained." There is no reasonable explanation for denying parents and other interested groups the opportunity to weigh in on these potential costs to children, or the lack of evidence to prove masks work and are not harmful. There is no reasonable explanation as to why RIDOH could not issue regulatory findings in writing as to why there is "no alternative approach among the alternatives considered during the rulemaking proceeding which would be as effective and less burdensome to affected private persons as another regulation."

Most incredibly, Dr. McDonald stated that no regulatory hearing is even contemplated to take place while this emergency rule is in effect. Based on this failure to even convene a regulatory hearing, one might suspect that RIDOH knows it could not satisfy those standards.

When asked why RIDOH waited to find "imminent peril" some two and one-half months after the Delta variant became a concern around the beginning of July, Dr. McDonald's answer was the agency did have time to go through normal rulemaking procedures. Nor could he answer why RIDOH never followed the

school health regulations procedures for the past 18 months. Even under the most deferential standard given a state agency, it is simply not imminent peril. There is no explanation, reasonable or otherwise, as to why the State waited. It is either "disgraceful ineptitude" as the Supreme Court put it in *Park v. Rizzo Ford*, or it more insidious in that RIDOH knows a mandatory masking rule would never pass the normal regulatory process.

The Emergency Regulation suffers other deficiencies. The statute requires the agency to publish on its website the reasons for the finding of imminent peril. Unlike the 800 word findings in *Vapor Technologies*, this Emergency Reguation states simply that it is "established for the purposes of protecting students, a significant portion of whom are still ineligible for vaccination, against COVID-19 and reducing transmission of the new COVID-19 variants in the school setting and beyond." How is this imminent peril to children? Where is the science to support such a statement? What difference does it make if students are unvaccinated, since they do not suffer from the disease, and vaccinations do not stop the spread of the virus? Where is the acknowledgment that only 5% of the community transmission occurs in schools, that the test positivity rate is low, and COVID-19 is responsible for less than 7% of hospitalizations? Where is the evidence that masks are not in fact harmful to children?

And for how long does the Emergency Regulation last? The Emergency Regulation is internally contradictory, as it states it is in effect for 45 days, but is listed on the Secretary of State's website as lasting until January 20, 2022, or a total of 120 days. Is it dependent the existence of the Executive Order? No one seems to know the answer to these questions.

**2. <u>The Other *Iggy's Doughboy* factors</u>**

The Court found irreparable harm, which cannot be disputed by the State. Instead, the Court found balancing the equities "tips" in favor of the State. Balancing equities is the same a cost-benefit analysis that the Governor and RIDOH failed to conduct in its enacting of the mask mandates. Yet, the Trial Justice again deferred to the claims of the State that the potential harm to all Rhode islanders outweighs the harm caused by forced masking of children in schools.

But the evidence does not support this. First, what is the population that this masking is intended to protect. It cannot be said to be children, since the uncontroverted evidence is that there have been no COVID-19 deaths under 25 in this State; there have been no COVID-19 pediatric hospitalizations for weeks; that children who do get COVID-19 have little to no symptoms; the survival rate is 99.9998%. It is uncontroverted that children have a greater chance to die of the

common flu or cold than COVID-19. While it is true that there may be some children at greater risk for COVID-19, targeted mitigation strategies to protect those children are a more appropriate than a masking strategy that harms hundreds or thousands of school children.

Faced with this fact that children simply are not at risk from COVID-19, the argument then shifts to protecting the population as a whole, not children. Surely it is selfish of these parents to expect that children can roam free in schools while the old and sick get sick and die from COVID-19. That may be true, if there was no harm being suffered by children, but since the Court found that there is harm, how does one justify that harm. The State can point to no evidence that proves that forced masking of students will save the life of one individual. Nor can it justify imposing that risk only on children, and not the population as a whole which is allowed to go through everyday life without a mask. And most importantly, it cannot or will not quantify the long-term harm being done to children by this forced masking, and whether that harm may itself result in physical or mental harm.

As for the final *Iggy's* factor, the Court is less than clear in its ruling, although it seems to take the position that the *status quo ante* is the current mask mandate situation. That seems in conflict with the fact that in this case, it is clear that the *status quo ante* was what was announced by the RIDE, RIDOH and the

Governor on June 29: there would be no mask mandate in public schools. (Exh. 46) The status quo on August 19, the day of the executive order, was no mask mandate. In considering the status quo, the Court considers the status prior to the changes first made by the defendant. *See, Foster Glocester Regional School Bldg. Committee v. Sette*, 996 A.2d 1120, 1128 (R.I. 2010) (trial justice properly found status quo to be maintaining Committee member in office).

As for the Emergency Regulation, that flowed directly from, and expressly relied upon the Executive Order. Moreover, that Rule was enacted after this complaint was filed, clearly in an attempt to backstop any challenge to the EO. The *status quo ante* supports the granting on the injunction requested.

**CONCLUSION:**

For all of the foregoing reasons, Petitioners request that this Court accept the Petition for Writ of Certiorari. In so doing, this Court should find that, as a matter of law, the Petitioners are likely to succeed on the merits that both the Executive Orders and the Emergency Regulation are void and unenforceable. This Court should also find that the Petitioners have satisfied the other elements necessary to the grant of a preliminary injunction: that the harm suffered by the Petitioners and their children is irreparable, that the equities favor an injunction to protect from that harm, and that the *status quo ante* is what existed as of August 19, 2021, i.e. no mask mandate in schools.

Respectfully submitted
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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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