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STATE OF RHODE ISLAND
PROVIDENCE, S.C.

SUPERIOR COURT

RICHARD SOUTHWELL; JONATHAN BARRETT; JULIE AND PAUL MCKENNEY AIMEE SAYERS; MELISSA FITZGERALD; THOMAS BOYLAN; JESSICA LEBLANC; CAROLYN MORETTI; AMY MILLER; BILL CONNELL, JR.; EDWARD QUATTRINI, ORLANDO BRAXTON; DANIELLE FERGUSON; and CHERYL AND GREATHOUSE Plaintiffs, vs. DANIEL J. MCKEE, in his official capacity as the Governor of the State of Rhode Island et al. Defendants.	:	C.A. No. PC-2021-05915

DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Whether through fire, flood, or disease, every state faces disasters that threaten its citizens' property and life. COVID-19, and the presently dominant Delta variant, epitomizes this inevitability. When COVID-19 began in mid-March 2020, few would have predicted that in September 2021 – when this hearing began – over 680,000 United States citizens and millions world-wide would be dead. Rhode

Island, of course, has not been immune, with over 2,800 residents dead. While some may quibble over the definition and classification for a "COVID-19 death," there can be no disagreement – and certainly no evidence to the contrary – COVID-19 and the present Delta variant have wreaked havoc and caused hundreds of thousands of death – and even more illnesses – in the United States.

The United States Supreme Court long ago observed that "[t]he authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions." *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905) (upholding governmental authority to mandate vaccine for smallpox). In these emergent situations, the Court explained, it is "[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Id*. *See also id*. at 29 ("the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare, comfort, and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few").

Rhode Island law embraces these principles and has delegated responsibilities for dealing with certain emergencies to the Department of Health and the Governor.

The Rhode Island General Assembly enacted R.I. Gen. Laws § 23-1-1, which provides in relevant part:

> *[t]he department of health shall take cognizance of the interests of life and health among the peoples of the state*; shall make investigations into the causes of disease, the prevalence of epidemics and endemics among the people, the sources of mortality, the effects of localities, employments and all other conditions and circumstances on the public health, and do all in its power to ascertain the causes and the best means for the prevention and control of diseases or conditions detrimental to the public health, *and adopt proper and expedient measures to prevent and control diseases and conditions detrimental to the public health in the state*. (Emphases added).

Another portion of the General Laws – entitled "Emergency Management" – recognizes that "[t]he governor shall be responsible for meeting the dangers to the state and people presented by disasters." R.I. Gen. Laws § 30-15-9(a). A "disaster" is expressly defined to include, among others, an "[e]pidemic." R.I. Gen. Laws § 30-15-3(2)(vi). This statute continues that "[a] state of emergency shall be declared by executive order or proclamation of the governor if he or she finds a disaster has occurred or that this occurrence, or the threat thereof, is imminent." R.I. Gen. Laws § 30-15-9(b).

Here, the Governor and the Department of Health invoked their statutory authority to require that all students (age 2 and older), staff, teachers, and visitors to K-12 schools wear a mask while indoors. The Plaintiffs challenge these directives. Though extensive evidence was presented to this Court, the issue is narrow: a motion for a preliminary injunction. As the Supreme Court has observed, "the office of a

preliminary injunction is not ordinarily to achieve a final and formal determination of the rights of the parties or of the merits of the controversy, but is merely to hold matters approximately in status quo, and in the meantime to prevent the doing of any acts whereby the rights in question may be irreparably injured or endangered." *Fund for Community Progress v. United Way of Southeastern New England*, 695 A.2d 517, 522 (R.I. 1997).

In deciding whether to issue a preliminary injunction, the hearing justice should determine whether 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 Regional School Bldg. Comm. v. Sette*, 996 A.2d 1120, 1124 (R.I. 2010).[1]

II. LIKELIHOOD OF SUCCESS ON THE MERITS

A. PLAINTIFF CONFLATES THE GOVERNOR'S POWERS TO DECLARE A STATE OF EMERGENCY AND THE GOVERNOR'S POWERS TO ISSUE AN EXECUTIVE ORDER PURSUANT TO A DECLARED STATE OF EMERGENCY

[1] In Plaintiffs' memorandum of law, they rely on three exhibits that were not entered as full exhibits during the hearing, Plaintiffs' Exhibits 41, 44 and 47. Plaintiffs' Memorandum, 8, 11-12 and 17. Given that the three exhibits were not entered into evidence, they cannot be considered in Plaintiffs' argument. Additionally, Plaintiffs' memorandum references a New York Times article in footnote 6, page 11. This article was not an exhibit at the hearing and should not be considered in Plaintiffs' argument.

On August 19, 2021, Governor Daniel J. McKee issued Executive Order 21-86, which declared a new state of emergency based upon what had become a new, dominant, more contagious, and highly potent variant of COVID-19, the Delta variant. Among the findings in Executive Order 21-86 are:

- the Delta Variant may have a viral load 1,000 times greater than the original strain of SARS-CoV-2 that hit Rhode Island in 2020;
- the Delta Variant is more than twice as contagious as recent variants, and 3-4 times more contagious than the original strain, leading to a significant increase in transmission who are not vaccinated and breakthrough infection in some people who are fully vaccinated;
- both unvaccinated and vaccinated people can spread the Delta Variant;
- since vaccines are only authorized for people 12 and older, people less than 12 years old are particularly susceptible to infection from the Delta Variant; and
- Rhode Island is seeing increasing cases of COVID-19 in children and expects to see more childhood cases increase. Exhibit 4.

During the hearing, none of these findings were rebutted, although admittedly, Dr. Bostom attempted to assert, against the mainstream medical community, that the Delta strain is less contagious than the original strain of COVD-19 through Exhibit 6. This position by Dr. Bostom is erroneous. Exhibit 6 fails to provide a comprehensive picture of the pandemic and is limited to peak times - three months out of nineteen months - fails to address the viral load, and that vaccines were not widely available in December 2020 or April 2020. Even more so, Exhibit 6 does

not deny that for the Delta variant, average peak cases are about 245, about 145 over the "high prevalence" standard established by the Centers for Disease and Prevention Control.[2]

Additionally, Executive Order 21-86 contains additional findings to support the conclusion that Rhode Island was facing a new and emergent threat. For example:

- On July 4, 2021, Rhode Island had only 11.2 new cases of COVID-19 per 100,000 people in the prior 7 days; by August 16, it had 195.6 new cases of COVID-19 per 100,000 people;

- As of July 4, 2021, there were 22 hospitalized COVID-19 patients in the hospital, whereas on August 16, 2021, there were 103 hospitalized COVID-19 patients; and

- Since August 11, 2021, Rhode Island had been experiencing a high level of community transmission of the Delta Variant, defined as more than 100 cases of COVID-19 per 100,000 people in the past 7 days. Exhibit 4.

During the hearing, none of these findings were rebutted.

On the same day as Executive Order 21-86 was issued declaring a state of emergency, *i.e.*, August 19, 2021, Governor McKee issued Executive Order 21-87.

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[2] Throughout his testimony, Dr. Bostom never testified to a medical degree of certainty. *See Riley v. Stone*, 900 A.2d 1087, 1095 (R.I. 2006) ("Once the trial justice concluded that the witness failed to render expert opinion testimony with the requisite degree of positiveness, Dr. Kim no longer was qualified to render expert opinion testimony about the standard of care in this case."). Thus, the failure to testify to the requisite standard, should render Dr. Bostom's testimony of no moment and should be excluded.

That Executive Order was issued pursuant to, among other provisions, Chapter 15 of Title 30. According to Executive Order 21-87, all Local Education Agencies ("LEA") that have not adopted a universal indoor masking requirement must abide by a universal indoor masking protocol developed by the Rhode Island Department of Health ("RI DOH"). Executive Order 21-87 added that the RI DOH protocol "shall require universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools." Both parties agree that on August 19, 2021, RI DOH issued a masking directive consistent with Executive Order 21-87. After the masking protocol expired, on September 23, 2021, RI DOH issued Emergency Regulation 216-RICR-20-10-7, which provides, inter alia, "[a]ll students, school personnel, visitors, and vendors at LEAs without a universal indoor masking requirement must wear a mask when entering and while inside school buildings."

1. The Budget Amendment's Affect on the Executive Orders

The Plaintiffs' challenge to Executive Order 21-86 (declaration of emergency) and Executive Order 21-87 (masking directive) is focused upon R.I. Gen. Laws § 30-15-9(g), a Budget Amendment passed in July 2021. Plaintiffs claim that the intent of this Budget Amendment was that "no new COVID-19 order could be issued." Plaintiffs' Memorandum, at 21-22. Two problems confront the Plaintiffs: first, this is not what the Budget Amendment says, and second, the Budget Amendment concerns only R.I. Gen. Laws § 30-15-9(e) – the powers the Governor

may exercise after declaring a state of emergency – not R.I. Gen. Laws § 30-15-9(b), the power the Governor has to declare a state of emergency. A review of Chapter 15 of Title 30 makes this pellucid.

Specifically, Rhode Island General Laws § 30-15-9(b) authorizes the Governor to declare a state of emergency. Section (b) was not amended during the past legislative session and provides:

> [a] state of emergency shall be declared by executive order or proclamation of the governor if he or she finds a disaster has occurred or that this occurrence, or the threat thereof, is imminent. The state of disaster emergency shall continue until the governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist and terminates the state of disaster emergency by executive order or proclamation, but no state of disaster emergency may continue for longer than thirty (30) days unless renewed by the governor. The general assembly, by concurrent resolution, may terminate a state of disaster emergency at any time. Thereupon, the governor shall issue an executive order or proclamation ending the state of disaster emergency and what actions are being taken to control the emergency and what action the public should take to protect themselves. All executive orders or proclamations issued under this subsection shall indicate the nature of the disaster, the area or areas threatened, and the conditions that have brought it about or that make possible termination of the state of disaster emergency. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and, unless the circumstances attendant upon the disaster prevent or impede, promptly filed with the agency, the secretary of state, and the city and town clerks in the area to which it applies.

The General Assembly's 2021 Budget Amendment in no way altered any language in the above paragraph and even before March 2020, the foregoing paragraph

already authorized the General Assembly to end a state of emergency at any time by concurrent resolution.

To be sure, Plaintiff challenges the Governor's determination of a state of emergency – as well as the General Assembly's lack of action to terminate the state of emergency. But the sole basis for this challenge is that the Budget Amendment "meant that no new COVID-19 order could be issued." Plaintiffs' Memorandum, at 21-22. The plain language of the Budget Amendment proves this wrong.

Specifically, the Budget Amendment, codified in R.I. Gen. Laws § 30-15-9(g), provides:

> [p]owers 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.

(Emphasis added). By its own language, the Budget Amendment applies only to "subsection (e)."

Moreover, during the past legislative session, the General Assembly not only added R.I. Gen. Laws § 30-15-9(g), but it also amended "subsection (e)," *i.e.*, R.I. Gen. Laws § 30-15-9(e). As amended, this provision provides: "In addition to any other powers conferred upon the governor by law, the governor may exercise the following powers, subject to the provisions of subjection (g) of this section, limited

in scope and duration as is reasonably necessary for emergency response." (Emphasis represents 2021 legislative amendment). Thereafter, this subsection lists sixteen enumerated powers, including the authority to "[d]o all other things necessary to effectively cope with disasters in the state not inconsistent with other provisions of law." R.I. Gen. Laws § 30-15-9(e)(13). That the General Assembly would amendment subsection (e), but not subsection (b), makes sense.

As discussed, *supra*, even before March 2020, the Governor's subsection (b) powers – to declare a state of emergency – allowed the General Assembly to terminate a state of emergency upon a concurrent resolution. Prior to the 2021 Budget Amendment, however, the Governor's subsection (e) powers – the powers he may exercise after declaring a state of emergency – had no expiration date. That changed during the past legislative session when the General Assembly added a 180 day sunset provision, but according to its plain language, this 180 day time period applies only to the "[p]owers conferred upon the governor pursuant to the provisions of subsection (e) of this section." R.I. Gen. Laws § 30-15-9(e).

As applied to this case, after the Governor declared a state of emergency on August 19, 2021, the Governor thereafter issued Executive Order 21-87, entitled "Requiring Masks in Schools." In accordance with R.I. Gen. Laws § 30-15-9(g), Executive Order 21-87 "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, [i.e., August 19, 2021, as declared in Executive Order 21-86,] unless and until the general assembly extends the one hundred eighty (180) day period by concurrent resolution." This 180 day time period expires in February 2022. Executive Order 21-86, however, does not expire, provided it is renewed by the Governor within a 30 day period and provided the General Assembly does not terminate the state of emergency by concurrent resolution. *See* R.I. Gen. Laws § 30-15-9(b).

2. Declaring a New State of Emergency Due to the Delta Variant is Lawful

Plaintiffs adopt a parade of horrors scenario where if the 2021 legislative amendments are applied according to the plain language, a governor could adopt successive declarations of emergency and avoid the 180 day sunset provision set forth in subsection (g). In response to this hypothetical, Plaintiffs submit that the 2021 Budget Amendment must be read to mean that the Governor cannot re-declare a state of emergency based on similar disastrous events, such as successive hurricanes, floods, or diseases.

As already discussed, however, R.I. Gen. Laws § 30-15-9(g) in no way curtailed the Governor's powers relating to declaring a state of emergency. See R.I. Gen. Laws § 30-15-9(b). It is well-settled that when faced with statutory construction, courts must "construe them in a manner that attempts to harmonize [both statues] and that is consistent with their general objective scope." *Horn v. S.*

Union Co., 927 A.2d 292, 295 (R.I. 2007). Here, the plain language of the Budget Amendment makes clear – twice – that the General Assembly's actions were aimed at placing time limits on the issuance of certain executive orders arising out of a particular state of emergency.

Moreover, the fear that a governor could improperly re-declare successive declarations of emergency to avoid the 180-day sunset provision has a built-in check – one that existed prior to the 2021 Budget Amendment. In clear and plain language, "[t]he general assembly, by concurrent resolution, may terminate a state of disaster emergency at any time." R.I. Gen. Laws § 30-15-9(b). If the General Assembly believes that a Governor has overreached – or if the General Assembly for whatever reason wants to terminate a declaration of emergency – it may do so by concurrent resolution "at any time." R.I. Gen. Laws § 30-15-9(b). The General Assembly's decision not to exercise its termination powers provides no basis for this Court to exercise its equitable powers.

In this respect, Plaintiffs' invitation that this Court should step in and review the Governor's declaration of emergency (Executive Order 21-86), in the absence of the General Assembly exercising its powers to do so, injects this Court into a political question. A "controversy involves a political question where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards

for resolving it." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (quotation marks and alteration omitted). Our Supreme Court has held, for example, that because there were no "judicial manageable standards" by which to decide a case concerning state education funding, the issue was a non-justiciable political question, that is, "not a proper arena for judicial determination," and better left to the legislative and executive branches. *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58–59, 62-63 (R.I. 1995).

The same is true here. As mentioned above, the statutory scheme allows the General Assembly to terminate a state of emergency as quickly as the Governor can declare one, *see* R.I. Gen. Laws § 30-15-9(b), suggesting that this is an issue best hashed out between the "[m]embers of the legislative and executive branches [who] are directly accountable to the electorate." *City of Pawtucket*, 662 A.2d at 62. The courts, respectfully, are not the right place to decide questions such as: Are the flood waters high enough, is the fire wild enough, or, as here, does the Delta variant pose a risk to the health and safety of Rhode Islanders? *See Baker v. Carr*, 369 U.S. 186, 217 (1962) (noting that a political question exists when a court is faced with "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"). As in *City of Pawtucket*, this Court, "accustomed to the constraints implicit in adversary litigation[,] cannot feasibly by judicial mandate interfere . . . without creating chaos." *City of Pawtucket*, 662 A.2d at 63.

This, incidentally, is the conclusion reached in the analogous federal context. The National Emergency Act allows the President to declare a national emergency and, by doing so, avail himself of special statutory powers. 50 U.S.C. § 1621. Congress may terminate any such emergency by joint resolution. 50 U.S.C. § 1622(a)(1). Parties have sometimes challenged a President's emergency declaration as ultra vires. But every court faced with this issue has abstained, lest it wade into and decide a non-justiciable political question. *See, e.g.*, *United States v. Amirnazmi*, 645 F.3d 564, 581 (3d. Cir. 2011) ("[F]ederal courts have historically declined to review the essentially political questions surrounding the declaration or continuance of a national emergency." (citation and quotation marks omitted)); *Center for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 31 (D.D.C. 2020) ("Although presidential declarations of emergencies . . . have been at issue in many cases, *no* court has ever reviewed the merits of such a declaration."); *California v. Trump*, 407 F. Supp. 3d 869, 890 (N.D. Cal.) ("[T]here is no precedent for a court overriding a President's discretionary judgment as to what is and is not an emergency.").

Because the Rhode Island context is identical in all relevant respects—the chief executive unlocking powers by declaring a state of emergency that the legislature may revoke by joint resolution—this Court should follow the federal courts' lead and abstain on political-question grounds from deciding the issue of whether Delta constitutes an emergency and whether Executive Order 21-86 is

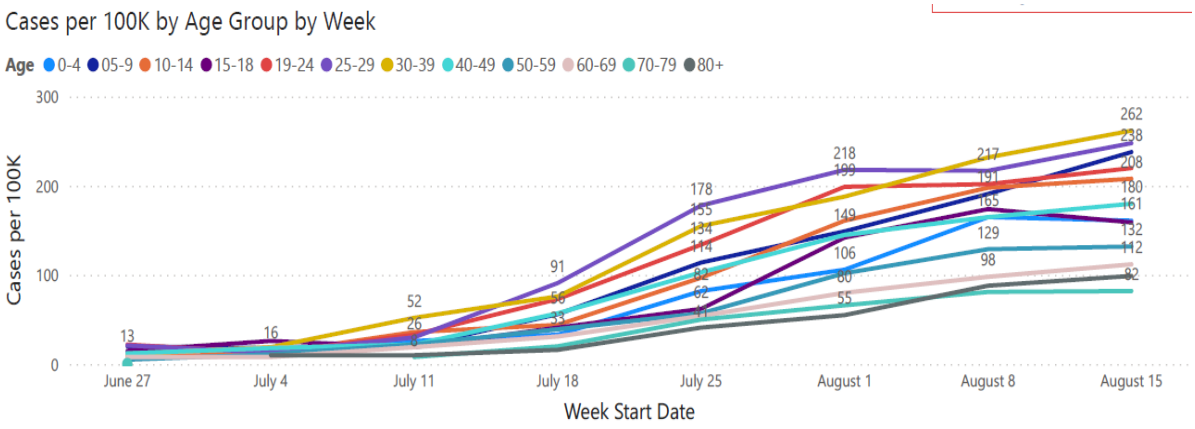
proper. This Court should do so because this authority rests exclusively with the Chief Executive and is already subject to Legislative termination, "at any time." R.I. Gen. Laws § 30-15-9(b).

3. The Delta Variant Represents a New Disaster and the Governor Properly Declared a State of Emergency

The sole requirement to issue a declaration of emergency is that the Governor find "a disaster has occurred or that this occurrence, or the threat thereof, imminent." R.I. Gen. Laws § 30-15-9(b). Executive Order 21-86 satisfies this prerequisite. In addition to the findings articulated within Executive Order 21-86, *see supra*, Dr. McDonald's testimony was clear that during the Spring of 2021, the number of COVID-19 cases decreased, the health care system was handling the demand, vaccines appeared to provide significant protection against contracting or spreading the virus, and it "seemed safe" to lift the general mask mandate. Dr. McDonald also testified that on or around July 4, 2021, when the Delta variant became the dominant strain in Rhode Island, this all changed.

The Delta variant is different from the original strain. The Delta variant has a viral load 1,000 times the original virus, meaning an infected person had 1,000 times more copies of the virus in their bodies. The Delta variant was also more contagious (6-8 times the original strain), vaccination seemed to be less protective against the Delta variant, and even during the summer months when people are more likely to be outside (and thus, the disease less likely to spread), the number of cases

increased. The charts below demonstrate the weekly trends in positive cases and that the disease had all but ceased to exist in Rhode Island in late June, but then – consistent with Dr. McDonald's testimony – on or around July 4, Rhode Island experienced a steady and dramatic increase in the number of COVID-19 related cases among all age groups. This lead to the declaration of emergency issued on August 19, 2021, due to the Delta variant.



CASES BY AGE GROUP

TOP 5 WEEKLY CASE RATE BY AGE GROUP

August 15 - August 21

Age Group	Cases/100k
30-39	262
25-29	248
5-9	238
19-24	220
10-14	208

A designation of more than 100 cases per 100,000 is classified by the Centers for Disease Control and Prevention as "High" Prevalence, the highest and most serious designation. https://covid.cdc.gov/covid-data-tracker/#cases_community (last visited October 28, 2021). Notably, children aged 5-14 averaged over 200 cases per 100,000 during this time period. The steady rise of COVID-19 cases due to a more contagious, more potent variant more than justifies the August 19, 2021 declaration of emergency and the requirement that the Governor find "a disaster has occurred or that this occurrence, or the threat thereof, is imminent." R.I. Gen. Laws § 30-15-9(b).

Dr. McDonald put the rise in cases in perspective because with the rise in the number of cases, one would expect – and Rhode Island realized – a simultaneous increase in COVID-19 related hospitalizations. Dr. McDonald recalled data that as of August 9, 2021, 7 of the 10 hospitals in Rhode Island were classified as dangerously or severely overcrowded.[3] Among the repercussions of this overcrowding is that patients needing medical care will have to wait longer and hospitals may go on diversion, meaning they would no longer accept additional patients. As Dr. McDonald explained, patients en route via ambulance to a hospital on diversion would need to re-route, meaning additional delays for the person being

[3] While not relevant to the determination to declare a state of emergency, Dr. McDonald testified that on August 26, 2021, 8 of the 10 hospitals in Rhode Island were classified as dangerously or severely overcrowded.

transported and additional possible delays for an ambulance to reach another person in need of medical services. While during the hearing, these considerations were largely reduced to color schemes, numbers, and charts, it should not be lost upon anyone that at bottom, these numbers, charts, and graphs represents someone's parents, partner, sibling, or friend. As Dr. McDonald related, health officials may not be able to prevent a motor-vehicle accident, but with proper measures, health officials can slow the spread of a contagious disease, ease the burden on hospital overcrowding, and provide timely and proper medical care.

By itself, the data reviewed by Dr. McDonald is compelling, but Dr. McDonald also related an August 12, 2021 telephone conversion he had with the CEOs of Rhode Island's hospitals. During this conversation, which occurred a week before the Governor declared a state of emergency, the hospital officials expressed the hospitals were "overwhelmed," "needed relief," "overcrowded," and had a shortage of staff. While Plaintiffs may dismiss these on-the-ground calls as warning flags, health officials – charged with protecting the public health – reasonably recommended declaring a state of emergency.[4] *See* R.I. Gen. Laws § 30-15-9(b).

4. The Governor Properly Issued Executive Order 21-87, Requiring Masks in Schools

[4] Plaintiffs attempted to mitigate this testimony by presenting a power point slide suggesting some hospitals were not overcrowded, but this exhibit was never authenticated, not admitted in full, and Dr. McDonald's testimony remained unrebutted.

Having issued a declaration of emergency, "the governor may exercise the following powers, subject to the provisions of subsection (g) of this section[.]" R.I. Gen. Laws § 30-15-9(e). Among these powers is to "[d]o all other things necessary to effectively cope with disasters in the state not inconsistent with other provisions of law[.]" R.I. Gen. Laws § 30-15-9(e)(13). Dr. McDonald's testimony ably satisfies this lone statutory prerequisite.

Because of the events and data described above, Rhode Island health officials knew that the current school year would be different than the prior school year. Unlike last year, a more contagious strain was dominant in Rhode Island and unlike last year, all children would be attending school full time. In other words, with no hybrid/remote learning, more children would be in school with a more contagious disease, which would inevitably lead to increased cases in the classrooms and community spread.

Dr. McDonald testified that last year, Rhode Island experienced a 5% spread of COVID-19 in the classroom, and given a more contagious variant and more students in the classroom – necessitating reducing social distancing from 6 feet to 3 feet – it was reasonable for health officials to be concerned about a higher than 5% spread rate this year. Moreover, although large parts of the population were eligible for vaccination or monoclonal antibodies (MABS) treatment, these measures were not (and at the time of this writing) still are not available for children under 12.

Additionally, unlike many other settings where people move about a room or building, the K-12 school setting largely presented a situation where children and faculty are indoors, in fixed locations, for extended periods of time. This confluence of events, Dr. McDonald testified, represented a high-risk setting, particularly considering that a student could be asymptomatic and still attend school. Given all these circumstances, Dr. McDonald testified – to a reasonable degree of medical certainty – that it made sense to do what the State had done successfully the prior school year and again require masks in school.

As explained during testimony, health officials have encouraged multiple layered measures to slow the spread of the disease, namely vaccination, masks, proper ventilation, social distancing, and hand washing. Dr. McDonald testified from a public health perspective these countermeasures were particularly important in a school setting because children under 12 could not be vaccinated. Removing masks from a population that was largely stagnant, completely unvaccinated, and indoors for extended periods of time would be a threat to public health. Dr. McDonald also testified that this recommendation was also consistent with the positions taken by the Center for Disease Control and Prevention, as well as the American Academy of Pediatrics. All of these considerations well satisfy the lone statutory requirement for the issuance of Executive Order 21-87: the Governor may

"[d]o all other things necessary to effectively cope with disasters in the state not inconsistent with other provisions of law[.]" R.I. Gen. Laws § 30-15-9(e)(13).

B. INDEPENDENT OF THE GOVERNOR'S POWERS, THE DEPARTMENT OF HEALTH PROPERLY PROMULGATED EMERGENCY REGULATIONS

Independent of the Governor's Emergency Management Powers, on September 23, 2021, the RI DOH issued an emergency regulation, 216-RICR-20-10-7 ("Regulation"). In relevant part, this Regulation effectuates Executive Order 21-87 and requires if a local education agency has not adopted a universal indoor masking requirement, all students, school personnel, visitors, and vendors "must wear a mask when entering and while inside school buildings." Exhibit H. Plaintiffs challenge the promulgation of this Regulation as improper.

Rhode Island General Laws § 42-35-2.10 provides, in relevant part:

> [i]f an agency finds that an imminent peril to the public health, safety, or welfare or the loss of federal funding for an agency program requires the immediate promulgation of an emergency rule and publishes in a record with the secretary of state and on its agency website reasons for that finding, the agency, without prior notice or hearing or on any abbreviated notice and hearing that it finds practicable, may promulgate an emergency rule without complying with §§ 42-35-2.7 through 42-35-2.9.

The Rhode Island Supreme Court and Rhode Island Superior Court have interpreted this – or a similar – provision.

For example, in *State ex. rel Town of Middletown v. Watson*, 698 A.2d 181 (R.I. 1997), the Court examined an emergency regulation adopted under a similar but prior version of R.I. Gen. Laws § 42-35-2.10. In reviewing the propriety of the emergency regulation, the Court's entire analysis related:

> [i]t is undisputed that the emergency rules were adopted in response to a ruling of the District Court that cast into doubt the department's procedure for certifying breathalyzer operators. In its 'Statement of Need for Emergency Action,' the department explained, 'Filing is necessary to establish approved preliminary breath testing instruments and procedures for testing breathalyzers, for reliable quantitative determinations and effective administrative practices to protect the safety and welfare of the public.' We are of the opinion that the department responded to a legitimate permit in accordance with the statue. Without doubt, the state's ability to enforce its drunk-driving laws is a matter of the highest concern for the health, safety, and welfare of the public.

Id. at 182-83.

Years later, the Court examined a similar issue in *Park v. Rizzo Ford, Inc*., 893 A.2d 216 (R.I. 2006), where the Department of Transportation passed an emergency regulation placing a $20.00 limit on title preparation fees charged by licensed motor vehicle dealers. The plaintiffs challenged the regulation on the ground that the statutory language evidencing that it was an emergency regulation was not contained in the regulation itself. The Supreme Court rejected this claim on three grounds.

First, the cover letter and the regulation both state that the DOT regulation was enacted pursuant the statutes that create the emergency regulation procedure.

Id. at 220. Second, the Court explained, the "cover letter, which reads '[t]he Department of Transportation finds that [there] is imminent peril to the public health, safety and welfare ***,' actually tracks the language of § 42-35-3(b), which reads '[i]f an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon less than thirty (30) days' notice ***.'" *Id*. And, third, the Court recognized, "the cover letter made the requisite finding of imminent peril: 'The consuming public would be without a forum to redress infractions of [Chapters 31-5, 31-5.1]. The industry would be unregulated and the Department would be powerless to combat unfair business practices that occur daily in the sale, manufacture and distribution of new and used automobiles.'" *Id*. Based on the foregoing, the Court held the motion justice properly determined that the DOT regulation was an emergency regulation. *Id*. at 220.

While neither *Town of Middletown* or *Park* examined the reasons or legitimacy of the promulgated emergency regulations – but rather examined only whether the statutory requirements were satisfied – a 2019 Superior Court took a slightly different, yet still highly deferential, approach. In *Vapor Technology Assoc. v. Raimondo*, PC 2019-10370 (R.I. Super, Nov. 5, 2019) (Stern, J.), the Court examined an emergency regulation promulgated by RI DOH that banned "[t]he manufacture, distribution, sale, or offer for sale of, or the possession with intent to manufacture, distribute, sell, or offer for sale flavored electronic nicotine-delivery

system products to consumers." *Id* at 1. RI DOH promulgated the emergency regulation about 10 days after Governor Raimondo issued Executive Order 19-09, directing the RI DOH to "promulgate emergency regulations to prohibit the sale of flavored [Electronic Nicotine Delivery Systems]." *Id*. at 1. While Plaintiffs advised this Court that the Superior Court granted a temporary restraining order in *Vapor Technology,* Plaintiffs' Memorandum, at 16, the opinion clearly states that: "the Court finds that the Plaintiffs have failed to carry their burden for a Temporary Restraining Order. Accordingly, Plaintiffs' Motion is denied." *Vapor Technology*, at 22.

The denial of injunctive relief in *Vapor Technology* is significant because similar to the present case, the plaintiffs in *Vapor Technology* challenge RI DOH's reasons for enacting the Emergency Regulation. *Vapor Technology*, at 16. Specifically, the plaintiffs argued that the Emergency Regulations were not supported by a finding of "imminent peril," as required by R.I. Gen. Laws § 42-35-2.10. *Vapor Technology*, at 16.

In reviewing this allegation, Judge Stern considered *Town of Middletown* and *Park* and observed, "the Court has seemingly given a great deal of deference to the agency's findings of 'imminent peril'" and that in "both cases, the Court concluded the agency had made the requisite finding of 'imminent peril' without undertaking

an exhaustive review of the agency's findings or determinations." *Vapor Technology*, at 17-18.

The court continued:

> [t]his deference to an agency's determination is consistent with Rhode Island's administrative agency jurisprudence. Under Rhode Island law, legislative rules – that is, rules 'promulgated pursuant to the specific statutory authority provided by the Legislature' – 'ha[ve] the force and effect of law.' *Town of Warren v. Bristol Warren Regional School District*, 159 A.3d 1029, 1039 (R.I. 2017). Thus, when reviewing a legislative rule, the Court is required to give it deference and cannot substitute its own construction of the statute for that of the agency. *** Here, the DOH promulgated the Emergency Regulations pursuant to § 42-35-2.10. Under the statute, the DOH – along with all agencies – is charged with enacting emergency rules upon a finding of 'imminent peril to the public health, safety, or welfare.' Section 42-35-1. In the statute the General Assembly failed to define the term 'imminent peril.' Thus, because the statue is silent, this Court 'must defer to a reasonable construction by the [DOH, as it is] charged with its implementation.' *See Labor Ready Northeast, Inc. v. McConaghy*, 849 A.2d 340, 346 (R.I. 2004).

Vapor Technology, at 18-19.

Thereafter, after reviewing the basis and reasons for the Emergency Regulation, the Court concluded that RI DOH reasonably interpreted what constitutes "imminent peril" and made the requisite findings to support that interpretation. *Vapor Technology*, at 20. Importantly, the court added that while it was "presented with numerous studies and affidavits submitted by the Plaintiffs which seemingly run counter to those cited in the Statement, the Court need only find some plausible rationale for the DOH and Director Alexander-Scott's

determination that an imminent peril exists; * ** and the Court cannot 'substitute its judgment for that of the [DOH].'" *Vapor Technology*, at 20. *See also id*. at 20-21 ("this Court accords deference to the DOH's determination and judgments when carrying out the functions statutorily prescribed to it and will only overturn the agency's decision if it is clearly erroneous").

Here, whatever may be said of the DOH's emergency regulation requiring masks indoors while at school, this determination is not clearly erroneous and the RI DOH determined the Regulation was necessary to address an "imminent peril." As described in the Regulation, the promulgation was necessary to "protect[] 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." Exhibit H.

Dr. McDonald explained that COVID-19 and the Delta variant spread through respiratory droplets. As an example, Dr. McDonald illustrated that if you think of a cold morning where one can see their breathe, Dr. McDonald explained what one sees are frozen respiratory droplets. The testimony was unrebutted that respiratory droplets spread when one exhales, sings, talks or breaths. The spread of the droplets occurs when one exhales and this occurs regardless of age; in other words, adults and children both exhale – which spreads respiratory droplets – and inhale – which is one of the main ways in which people are infected with COVID-19.

Since in the exhale and inhale of respiratory droplets is one of the main ways people are infected, Dr. McDonald further testified that certain pharmaceutical and non-pharmaceutical countermeasures help to slow the spread of the disease. Importantly, at the time of the hearing, vaccines and Monoclonal Antibodies had not been authorized or approved for children under 12. As such, for children under 12, only non-pharmaceutical measures were available. Dr. McDonald ranked (from most effective to less effective) the non-pharmaceutical measures available: masks, proper ventilation, social distancing, and handwashing. And, as Dr. McDonald explained, masks work because when a person wearing a mask exhales, the mask will prevent respiratory droplets from being emitted and inhaled by other persons. Dr. McDonald also explained that to some degree, masks also provide some protection from inhalation of respiratory droplets from other persons. These countermeasures work best in a layered approach; or stated differently, as mitigation measures are eliminated, the chance of contracting and spreading COVID-19 or the Delta variant, increases. To one degree or another, this multi-layer countermeasure approach has been much of Rhode Island's strategy to limit the spread of the disease since mid-March 2020. And, as Dr. McDonald testified, in his expert public health opinion, this approach has saved lives.

While it makes common sense that if a disease is spread through exhaling and inhaling, countermeasures aimed at limiting the spread of one's exhalation, such as

masks, can provide "some plausible rationale." During testimony, the State of Rhode Island introduced a plethora of scientific studies and authorities that supported this conclusion, all of which had been relied upon by one or more members of the DOH COVID-19 unit. For example, Dr. McDonald testified he relied upon and found persuasive a CDC publication entitled "Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2." Exhibit B. Not only did Dr. McDonald testify that he read and relied upon this study, but he explained that the report was of such significance he also read the 65 articles cited within the study. The Science Brief related that:

> [m]ulti-layer cloth masks block release of exhaled respiratory particles into the environment, along with the microorganisms these particles carry. Cloth masks not only effectively block most large droplets (i.e, 20-30 microns and larger) but they can also block the exhalation of fine droplets and particles (also often referred to as aerosols) smaller tan 10 microns; which increase in number with the volume of speech and specific types of phonation. Multi-layered cloth masks can block up to 50%-70% of these fine droplets and particles and limit the forward spread of those that are not captured. Upwards of 80% blockage has been achieve in human experiments that have measured blocking of all respiratory droplets, with cloth masks in some studies performing on par with surgical masks as barriers for source control. Exhibit B.

The Science Brief continued that:

> [r]esearch supports that mask wearing has no significant adverse health effects for wearers. Studies of healthy hospital workers, older adults and adults with COPD report no change in oxygen or carbon dioxide levels while wearing a cloth or surgical mask either during rest or physical activity. * * * Additionally, no oxygen desaturation or respiratory distress was observed among children less than 2 years of age when masked during normal play. While some studies have found

> an increase in reports of dyspnea (difficulty breathing) when wearing face masks, no physiologic differences were identified between periods of rest or exercise while masked or non-masked. Exhibit B.

In conclusion, this report summarizes that "[e]xperimental and epidemiological data support community masking to reduce the spread of SARS-CoV-2. The prevention benefit of masking is derived from the combination of source control and wearer protection for the mask wearer." Exhibit B.

Another report entitled "Association of State-Issued Mask Mandates and Allowing On-Premises Restaurant Dining with County-Level COVID-19 Case and Death Growth Rates – United States, March 1 – December 31, 2000" concludes that "[m]andating masks was associated with a decrease in daily COVID-19 case and death growth rates within 20 days of implementation." Exhibit C. A different report observed that "studies in K-12 school settings have found reduced SARS-CoV-2 transmission when masking is enforced even when 6 feet of physical distance cannot be maintained." Exhibit D. And another study observed that "[c]ontrolling SARS0CoV-2 transmission is critical not only to reduce the widespread effects of the COVID-19 pandemic on human health and the economy but also to slow viral evolution and the emergence of variants that could alter transmission dynamics or affect the usefulness of diagnostics, therapeutics, and vaccines. Until vaccine-induced population immunity is achieved, universal masking is a highly effective means to slow the spread of SARS-CoV-2 when combined with other protective

measures, such as physical distancing, avoiding crowds and poorly ventilated indoor spaces, and good hand hygiene." Exhibit E.

Dr. McDonald also recounted an observation study reported through Exhibit G, where a symptomatic continued to work in a classroom with students, sometimes removing her mask to read to the class aloud. Out of the 24 students in the classroom, half the students soon thereafter tested positive for COVID-19. Exhibit G. According to the report, the positivity rate in the two rows closest to the teacher was 80%. Exhibit G. Still another report, entitled "Pediatric COVId-19 Cases in Counties With and Without School Mask Requirements – United States, July 1 – September 4, 2021," concluded that the "results of this analysis indicate that increases in pediatric COVID-19 case rates during the start of the 2021-22 school year were smaller in U.S. counties with school mask requirements than in those without school mask requirements. School mask requirements, in combination with other prevention strategies, including COVID-19 vaccination, are critical to reduce the spread of COVID-19 in schools." Exhibit I. As this Court is well aware, additional studies reviewed by health officials in support of Executive Order 21-87 and the Regulation continued to be introduced during the hearing. See Exhibits J, K, R, S, T, and W.

The Plaintiffs response to this mountain of evidence was short and simple: we can't trust the CDC because these publications represent the official policy or

position of the CDC. Whatever the merit of this argument – and the State respectfully suggests its not much – RI DOH certainly had "some plausible rationale" for following CDC guidance and reports/studies published by the CDC. See Vapor Technology, at 19-20 (upholding RI DOH reliance on, among other entities, the CDC).

No doubt, the Plaintiffs relied heavily upon Exhibit 35, "An Experimental Study of the Efficacy of Gauze Face Masks," written by Dr. Kellogg. In particular, the exhibit was introduced into evidence without the opportunity for the witness or the State's attorneys to read the entire article and Plaintiffs' counsel highlighted the sentence stating "[t]he failure of the mask was a source of disappointment, for the first experiment in San Francisco, was watched with interest with the expectation that if it proved feasible to enforce the regulation the desired result would be achieved." Exhibit 35. Whatever the relevance to a study on the efficiency of a gauze mask might be – and again, the State submits its not much – the obvious fact is that in the approximate 100 years since this article, gauze masks are no longer used.

Even more so, Dr. Kellogg's article notes that in 1918 other articles were published concerning the protective value of masks. Dr. Kellogg related that "[o]ne of these by Weaver detailed his experiences in diminishing infections among the nursing staff at the Durand Hospital by the use of masks of two layers of gauze

(quality not mentioned). The incidence of scarlet fever and of the carriage of diphtheria seemed to be markedly lessened, although the results are somewhat diminished in value by the fact that the experiment was not a controlled one." Exhibit F. In another 1918 article, Dr. Kellogg noted that the author "gives no information as to the quality of gauze or number of layers and no figures or specific comparisons, and his conclusion are, that after masking, no cases of scarlet fever appeared in the wards whereas there had been just before a series of six consecutive cases." Exhibit F.

Other portions of Dr. Kellogg's article further supports Dr. McDonald's conclusions. For instance, in a passage just above the portion read during the hearing by Plaintiffs' counsel, Dr. Kellogg observed that "[i]f we grant that influenza is a droplet-borne infection, it would appear that the wearing of masks was a procedure based on sound reasoning and that the results should be expected from their application." Exhibit F.

Here, the "imminent peril" – increasing COVID-19 related cases and hospitalizations due to the Delta variant – is well established above. Nonetheless, Plaintiffs appear to raise several issues.

1. <u>The "imminent peril" is not undermined by the September 23, 2021 action</u>

Plaintiffs do not appear to contest that the rise of COVID-19 related cases and hospitalizations constituted an emergent situation. Rather, they assert that since

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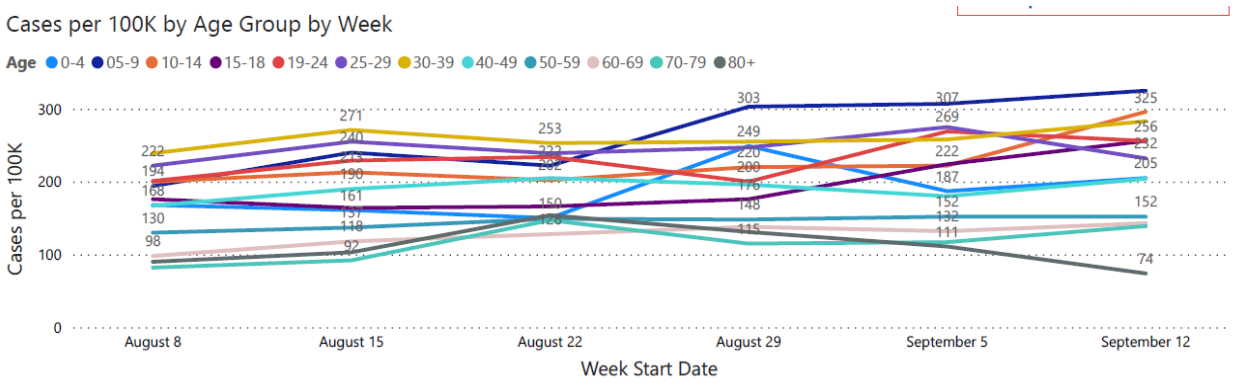
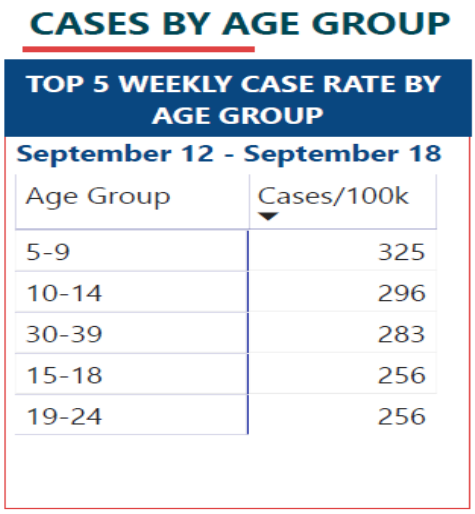
COVID-19 was first introduced in March 2020 – and since masks have been required in schools for over a year – RI DOH's Regulation issued on September 23, 2021 does not demonstrate "imminent peril." As Judge Stern noted, the Supreme Court has "seemingly given a great deal of deference to the agency's finding of 'imminent peril'" and the Court "need only find some plausible rationale for the DOH and Director Alexander-Scott's determination that an imminent peril exists." *Vapor Technology*, at 18, 20.

Plaintiffs simply ignore that during the prior school year, an Executive Order was already in place requiring that all students attending public schools wear a mask. There is no question that when schools closed for the 2020-2021 school year, and with the COVID-19 cases greatly diminishing during this time period, mask restrictions were lifted. But as detailed herein, this changed on or about July 4, 2021 when health officials were presented with information and data demonstrating a steady and sharp rise in COVID-19 related cases of all age groups. Even after the Governor's declaration of emergency, the number of cases continued to rise.



And, whereas just prior to the declaration of emergency, the 5-9 age group ranked third with 238 cases per 100,000 and the 10-14 age group ranked fifth, with 208 cases per 100,000, in the days leading to the promulgation of the Regulation, the 5-9 and 10-14 age groups ranked first and second, respectively, and the number of cases per 100,000 also rose dramatically.



CASES BY AGE GROUP

TOP 5 WEEKLY CASE RATE BY AGE GROUP

September 12 - September 18

Age Group	Cases/100k
5-9	325
10-14	296
30-39	283
15-18	256
19-24	256

Moreover, Dr. McDonald presented testimony that at the time of Exhibit M (September was not yet complete), 17 children under 18 years of age had already been admitted to the hospital with a positive COVID-19 test. Exhibit M. In the prior month (August 2021), 20 children under the age of 18 had been admitted to the hospital with a positive COVID-19 test. Exhibit M. These levels of pediatric hospitalization where the highest since 30 children under the age of 18 were hospitalized with a COVID-19 test in December 2020 and January 2021. Exhibit M. And, the 17 children hospitalized with a positive COVID-19 test through a

partial September 2021 (at the time of hearing), is significantly lower than the 10 children hospitalized with a positive COVID-19 test during September 2020.

As Dr. McDonald testified, the typical regulatory process takes approximately 120 days, and Plaintiffs' memorandum acknowledges that the typical regulatory process takes at least 60 days. *See* Plaintiffs' Memorandum, at 18. With Executive Order 21-87 being issued on August 19, 2021, with DOH protocol in place until September 18, 2021, given this data and circumstances, the RI DOH was well within its discretion to issue its Regulation on September 23, 2021.[5] *See Vapor Technology*, at 20 ("the Court need only find some plausible rationale for the DOH and Director Alexander-Scott's determination that an imminent peril exists * * * and the Court cannot 'substitute its judgment for that of the [DOH]."

2. The Regulation protects children and the general public.

Plaintiffs claim that "[i]t 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

[5] Plaintiffs' memorandum references School Health Regulations and Exhibit 47, but this document was never made a full exhibit. Indeed, Plaintiffs' counsel admitted in court that Exhibit 47 concerned an outdated version of the Regulation and that a more current version was found on the RI DOH website. Plaintiffs also mischaracterize Dr. McDonald's testimony that the School Health Regulations had not been revisited in quite a while, except to look at medical marijuana. Dr. McDonald testified that the last time he was involved in the School Health Regulations was concerning medical marijuana.

sick from COVID-19 any more than they do of the flu." Plaintiffs' Memorandum, at 23. Plaintiffs ignore the fact that children do die and do get sick from COVID-19, and that children infected with COVID-19 do spread the disease to other members of the community. Whether a child or an adult, the RI DOH "shall take cognizance of the interests of life and health among the peoples of the state[.]" R.I. Gen. Laws § 23-1-1.

Indeed, a Science Brief, entitled "Transmission of SARS-CoV-2 in K-12 Schools and Early Care and Education Programs," explains that "[c]hildren and adolescents can be infected with SARS-CoV-2, can get sick with COVID-19, and can spread the virus to others. In the United States through March 2021, the estimated cumulative rates of SARS-CoV-2 infection and COVID-19 symptomatic illness in children ages 5-17 were comparable to infection and symptomatic illness rates in adults ages 18-49 and higher than rates in adults ages 50 and older." Exhibit R. As illustrated above, Rhode Island's data supports this conclusion. Nationally, even Plaintiffs admit that children under 17 have died from COVID-19. Exhibit 15. And, Plaintiffs admit that there have been "approximately 500 COVID-19 deaths under the age of 18." Plaintiffs' Memorandum, at 5. Faced with these admissions, as well as the fact that children under 12 years of age cannot be vaccinated, it is unclear how or why Plaintiffs can challenge that the masking requirement does not

have "some plausible rationale for the DOH and Director Alexander-Scott's determination that an imminent peril exists." *Vapor Technology*, at 20.

While RI DOH is justifiably concerned with protecting the health and welfare of children, because "[c]hildren and adolescents can also transmit SARS-CoV-2 infection to others," Exhibit R, RI DOH is also justifiably concerned with limiting or preventing the unvaccinated children population (or vaccinated children population) from spreading COVID-19 to others. Plaintiffs rely upon Exhibit 15, purporting to show that for children 17 years and younger, the Flu has caused more deaths than COVID-19, but this ignores three points. First, the loss of any human life where preventable, should be avoided; second, the numbers relied upon by the Plaintiffs for seasonal flu deaths are "estimated" by the CDC; and third, non-pharmaceutical measurers – such as masking – were not in place for the flu, likely contributing to the discrepancy between COVID-19 statistics and estimated flu statistics. Exhibit 15.

For example, while the CDC estimated 803 seasonal flu deaths during 2014-2015, the CDC also states that "[a]s of February 1, 2016, a total of 148 laboratory-confirmed, influenza-associated pediatric deaths occurring during the 2014-2015 flu season were reported to CDC from 41 states and New York City."[6] https://www.cdc.gov/flu/pastseasons/1415season.htm (last visited October 29,

[6] It is unclear what qualifies as a "pediatric death."

2021). The RI DOH has satisfied its burden that "some plausible rationale for the DOH and Director Alexander-Scott's determination that an imminent peril exists." *Vapor Technology*, at 20.

III. IRREPARABLE HARM

In order to obtain injunctive relief, Plaintiffs must prove that they are "being threatened with some immediate irreparable injury" that is "either presently threatened or imminent." *In re State Employees' Unions*, 587 A.2d 919, 921 (R.I. 1991). "Irreparable injury is measured in terms of the harm arising during the interim between the request for an injunction and the final disposition of the case on the merits." *Vapor Technology*, at 4.

To be sure, Plaintiffs provided testimony concerning what they considered to be irreparable harm, but like a passenger who jumps onto a Long Island railroad train setting off a chain of events injuring a distant bystander, neither Executive Order 21-87, nor Regulation 216-RICR-20-10-7, is the cause of school teachers measuring social distancing with a pool noodle, asking children to remain silent during lunch, subjecting students to mask-related moments, or any other testimony concerning school-related happenings. None of these incidents involved state employees and school officials are doing their part to help curb community spread to protect all Rhode Islanders, even Rhode Islanders that are "elderly . . . with significant comorbidities," which Plaintiffs seem to dismiss as somehow less worthily of

protection from COVID-19. Plaintiffs' Memorandum, at 23. Respectfully, none of the school related events that Plaintiffs testified to can be considered "irreparable harm" caused by the State of Rhode Island. No doubt, some testified that masks are harmful, and their children are more lethargic, but whatever these parents' qualifications may be with respect to their own children, as a matter of law, they cannot (and did not) express an opinion on whether masks are harmful to children.

However, Dr. McDonald, did offer a medical opinion regarding and testified to the opposite. Dr. McDonald testified, to a reasonable degree of medical certainty, that masks are not harmful to children. Dr. McDonald testified that no known study established that masks reduce a child's ability to breathe or somewhere increase carbon monoxide levels and blood saturation levels. Plaintiff's assertions to the contrary, are beliefs, which is not science. Therefore, Plaintiff's assertion that "[n]o medical professional can say with any certainty that these children are not suffering harm" from masks, is simply untrue. Plaintiffs' Memorandum, at 26.

A mask mandate, in one form or another, has been in place for almost fifteen months, under both Governor Raimondo and now Governor McKee. If a child had the ability to attend school during the 2020-2021 school year, that child was required to wear a mask (excluding certain restrictions). Now the same is true for this current academic year. At worst, Governor McKee extended the requirement that masks be worn in schools. Given this, Plaintiffs are hard pressed to now allege that there is

immediate, irreparable harm in universal mask wearing that has been in use for over fifteen months. Indeed, one parent expressed frustration because her child's school sent one of her children home with a cough, which is also a symptom of COVID-19. If masks were eliminated, one can imagine that more students would be sent home or kept home.

Continuing a masking requirement in K-12 schools is done to help ensure our academic institutions remain in-person and operational. Universal masking is instrumental in preventing students from being subject to quarantine if exposed to COVID-19. Pursuant to Governor Daniel J. McKee Executive Order 21-94 (https://governor.ri.gov/executive-orders/executive-order-21-94) there is an exception to the quarantine requirements for the K-12 population, appropriate mutual mask wearing. A person does not have to quarantine if the person

(i) is a pre-K-12 student,
(ii) the infected person with whom the person was in close contact is also a pre K-12 student,
(iii) the close contact occurred inside a pre K-12 classroom,
(iv) both students wore face masks at all times while they were in close contact; and
(v) the students were at least 3 feet apart from each other at all times when they were in close contact". *Id*.

Therefore, if students are masked and exposed to COVID-19, masking ensures less disruption in learning in the K-12 setting and less likelihood of contracting the disease.

Moreover, the time lapse in bringing this action undermines any irreparable harm argument. As noted above, masks have been required in schools since the beginning of the 2020-2021 school year and much of the parents' testimony concerned events during the 2020-2021 school year. Despite the occurrence of these events, no lawsuit was filed during the 2020-2021 school year. While presumably the Plaintiffs – like most – believed that with a vaccine available and with diminishing COVID-19 cases, a return to normalcy was near, the delay in taking action the parents deemed to be irreparably harmful undermines the immediacy of the requested preliminary relief. *See Vapor Technology*, at 5 ("While it is recognized that a plaintiff's delay in seeking a temporary restraining order may indicate the absence of an immediate threat, the delay must be months or years, not merely weeks.").

IV. BALANCING OF EQUITIES WEIGHS IN THE STATE'S FAVOR

The balancing of the equities and consideration of public interest weigh strongly in favor of the State of Rhode Island, requiring Plaintiffs' request for a preliminary injunction be denied. Granting a preliminary injunction to remove the masking requirement – the mitigation measure Dr. McDonald testified was most important and in place since the beginning of the last school year – would lead to irreparable harm to the health, safety, and welfare of the children attending school as well as the general public of this State. In this respect, allowing masks to be

optional would result in some children not wearing masks. These students would exhale particles into the air and while masks provide some protection against inhalation of COVID-19 particles, the primary benefit of masks is in diminishing the exhalation of particles. Stated differently, children (and families) who have underlying conditions and/or otherwise choose to wear a mask, will be adversely affected by students (and families) who would choose not to wear a mask.

RI DOH's school masking regulations has been crafted to balance the need to protect school children and the public at-large from the effects of the COVID-19 virus and its Delta variant, while maintaining the strong public interest in keeping schools open and limiting the spread of this disease. The public interest is advanced in keeping schools open and having children attend schools, but doing so in as safe an environment as possible. The public interest is served by requiring universal mask wearing in a K-12 setting. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020) ("[s]temming the spread of COVID-19 is unquestionably a compelling state interest").

While the Plaintiffs take a contrary position and assert the interests expressed by their own children are paramount, it has been well-recognized that "in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable

regulations, as the safety of the general public may demand." *Jacobson*, 197 U.S. at 28-29. Here, it is RI DOH's statutory responsibility to "do all in its power to ascertain the causes and the best means for the prevention and control of diseases or conditions detrimental to the public health." R.I. Gen. Laws § 23-1-1.

The *Vapor Technology* Court recognized similar reasoning. Specifically, in that case, RI DOH argued that there is a "prevalent and emergent public health crisis associated with vaping," and noted that there had been "over 1,600 reported vaping-associated lung injuries and over 30 deaths reported nationwide since August 2019." *Vapor Technology*, at 7. Faced with the vaping public health crisis, the court concluded that the State of Rhode Island "decided that youth vaping is a national epidemic and there is a public interest in determining what is causing the rapid increase in vaping-related illnesses and death." *Id*. at 8. The public health crisis faced in this case pales in comparison to *Vapor Technology*.

In less than two years, COVID-19 and its variants have killed millions worldwide; 700,000 in the United States, and approximately 2,800 in Rhode Island. This Court may take judicial notice that the pandemic has altered nearly every aspect of daily living since March 2020. The public interest prong strongly favors the State.

V. MAINTAINING THE STATUS QUO

The final prong at issue is whether the issuance of a preliminary injunction will preserve the status quo. As this Court has expressed on a prior occasion, "[t]he

purpose of a preliminary injunction is to preserve the status quo – that is, the last peaceable status prior to the controversy." *Local 2334 v. Lombardi*, 2009 WL 5943110 (R.I. Super., Dec. 31, 2009) (Lanphear, J.). In *Local 2334*, this Court elucidated that during the preliminary injunction hearing, "it became clear to the Court that Station 3 had already been closed by the Town prior to the initiation of this litigation. The status quo, the last peaceful situation *prior to litigation*, was a closed fire station." *Id*. (Emphasis added).

Likewise, in this case, wearing masks had been the status quo for the entire 2020-2021 school year. Moreover, Executive Order 21-87, issued on August 19, 2021, required masks to be worn during the 2021 school year. Plaintiffs filed this lawsuit approximately a month after Executive Order 21-87, specifically on September 16, 2021.

Despite a requirement that masks be worn in schools for nearly a month before this lawsuit was filed, Plaintiffs assert that for purposes of this motion, the status quo existed on August 19, 2021, a point when children were not even in school and a month before they initiated litigation. To the contrary, the last peaceful situation prior to litigation was Executive Order 21-87 had already been issued and was in effect. Indeed, since the beginning of COVID-19, schools have either been closed/hybrid, or students have attended classes wearing masks. At no point since mid-March 2020, have students been allowed to attend schools in Rhode Island

without wearing a mask. Through this motion, Plaintiffs clearly seek to change the status quo.

VI. PLAINTIFFS' FAILED TO PLEAD A CONSTITUTIONAL CLAIM FOR BODILY INTEGRITY.

Although unclear, it appears that Plaintiffs are attempting to assert that the proper standard for analyzing the actions of the Governor and the Rhode Island Department of Health is one of strict scrutiny. Plaintiffs' Memorandum, at 14, 23. This is erroneous. Plaintiffs never pled a constitutional violation. Given this, Plaintiffs cannot now argue for the first time in their "brief in support of motion for preliminary injunction" that a constitutional violation is at issue before this Court.

VII. CONCLUSION

Based on the arguments raised above, and those raised at oral argument, Defendants ask this Court to deny Plaintiffs' motion for a preliminary injunction and maintain the status quo of Executive Orders 21-86 and 21-87, and Rhode Island Department of Health's Emergency Regulation 216-RICR-20-10-7, "Masking in Schools" to continue to protect the citizens of this State.

Respectfully submitted,

DEFENDANTS,
Daniel J. McKee, in his official capacity as the Governor of the State of Rhode Island,
Dr. Nicole Alexander-Scott, in her official capacity of Director of the Rhode Island Department of Health

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 1st of November 2021, I electronically filed the within document through the electronic filing system. The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Taylor O'Brien