STATE OF RHODE ISLAND PROVIDENCE, S.C.		SUPERIOR COURT
RICHARD SOUTHWELL, et. al	:	
Plaintiffs,	:	
vs.	:	C.A. No. PC-2021-05915
DANIEL J. MCKEE, in his official capacity as the Governor of the State of Rhode Island, et al.	:	
Defendants.	:	

DEFENDANTS' MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

Months ago, the First Circuit Court of Appeals examined an Executive Order issued by Massachusetts Governor Charles Baker imposing a COVID-19 related restriction that was lifted by a subsequent Executive Order. Since the relief requested in the lawsuit had been achieved – albeit outside the litigation – the Court aptly began its opinion that "[t]ime and events have overtaken this case, making it (in law-speak) 'moot.'" *Boston Bit Labs, Inc. v. Baker*, 11 F.4th 3, 6 (1st Cir. 2021). The Plaintiffs in this case, who seek to eliminate state requirements that children wear face masks in schools – meet the same fate.

Since the beginning of the pandemic, schools have struggled with identifying the safest path to continue to educate children in the midst of a highly-contagious virus that has sickened and killed millions in this country and around the world. As schools shifted from remote learning, to hybrid models, to in-person with masks, schools in Rhode Island have followed the guidance of the Centers for Disease Control and Prevention and the Rhode Island Department of Health. That

guidance was further reflected in a series of executive orders issued by Governors Raimondo and McKee. This face mask-wearing requirement will soon change as the Governor has publicly announced that a state requirement to wear mask in schools will end on March 4, 2022, at 5:00 pm. Moreover, unless the General Assembly passes another Joint Resolution, all executive orders issued pursuant to the August 19, 2021 state of emergency will expire after March 31, 2022.

The scheduled ending to the state school-masking requirement and the executive orders issued pursuant to the August 19, 2021 declaration of emergency is legally significant and dispositive of this Motion for Judgment on the Pleadings. The reason for this significance is because the focus of this lawsuit is Executive Order 21-87 and Emergency Regulation 216-RICR-20-10-7 ("Emergency Regulation"), the former of which required the Department of Health ("RIDOH") to adopt a universal indoor face mask protocol for students and staff attending school districts that have not adopted a mandatory face-masking policy and the latter of which effectuates Executive Order 21-87. But, as just noted, Executive Order 21-87 and the Emergency Regulation are scheduled to expire on March 4, 2022, at 5:00 pm, and after they do, the "events occurring after the filing [will] have deprived the litigant[s] of a continuing stake in the controversy." *State v. Medical Malpractice Joint Underwriting Ass'n*, 941 A.2d 219, 220 (R.I. 2008). In other words, the relief Plaintiffs seek will have been achieved outside of this litigation. On the merits, and aside from being rendered moot, Plaintiffs' statutory interpretation concerning the lawfulness of Executive Order 21-87 and the Emergency Regulation has already been rejected by this Court as incorrect. As such, this Motion for Judgment on the Pleadings should be granted and Judgment should enter for the Defendants.

II. OVERVIEW OF LEGAL AUTHORITY

Throughout this memorandum, five sources of legal authority are referenced.

1. Executive Order 21-86: This declared a state of emergency for the Delta variant and was issued on August 19, 2021. A declaration of emergency may be renewed by the Governor every 30 days, and assuming a declaration of emergency is renewed – and in the absence of the General Assembly terminating a state of emergency by joint resolution – the declaration of a state of emergency will continue. *See* R.I. Gen. Laws § 30-15-9(b). Exhibit A.[1]

2. Executive Order 21-87: After a state of emergency is declared, the Governor may issue executive orders pursuant to R.I. Gen. Laws § 30-15-9(e). Executive Order 21-87 is one such directive and was issued on August 19, 2021. Exhibit B. This Executive Order directed the RIDOH to implement an indoor school masking protocol applicable to any

[1] While typically consideration of extrinsic documents is not appropriate on a motion to dismiss or a motion for judgment on the pleadings, the Supreme Court has:

> recognized a "narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." *Mokwenyei*, 198 A.3d at 22 (quoting *Chase v. Nationwide Mutual Fire Insurance Company*, 160 A.3d 970, 973 (R.I. 2017)). "To be more precise, if 'a complaint's factual allegations are expressly linked to—and admittedly dependent upon—a document (the authenticity of which is not challenged), then that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6).' " *Id.* (brackets omitted) (quoting *Jorge v. Rumsfeld*, 404 F.3d 556, 559 (1st Cir. 2005)).

Doe v. Brown Univ., 253 A.3d 389, 395 (R.I. 2021). The documents referenced within this Motion fall within this exception, and in fact, Plaintiffs' Amended Complaint references and/or attaches Exhibits A, B and C. Exhibits D, E, and F are susceptible to judicial notice and official public records.

.

local education agency that had not adopted a universal indoor masking requirement. Pursuant to R.I. Gen. Laws § 30-15-9(g), as amended during the prior General Assembly Session in 2021, Executive Order 21-87 expires 180 days after the declaration of a state of emergency issued on August 19, 2021, i.e., on or about February 14, 2022, unless the General Assembly extends the 180-day time limit by Joint Resolution. As explained below, the General Assembly extended the 180-day time limit by Joint Resolution; the Governor has also publicly stated that Executive Order 21-87 will end on March 4, 2022, at 5:00 pm.

3. Emergency Regulation 216-RICR-20-10-7: This is an emergency regulation promulgated by RIDOH pursuant to R.I. Gen. Laws § 42-35-2.10 on September 23, 2021, in accordance with Executive Order 21-87. Pursuant to the Emergency Regulation, "[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." The Emergency Regulation expires "45 days from [its] promulgation or when Executive Order 21-87 (Requiring Masks in Schools) or its successor is terminated, whichever is later." Exhibit C. As such, the Emergency Regulation can last no longer than Executive Order 21-87, which the Governor has announced will end on March 4, 2022, at 5:00 pm.

4. The Joint Resolution: As noted above, executive orders issued pursuant to the August 19, 2021 state of emergency, such as 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, unless and until the general assembly extends the one hundred eighty (180) day period by concurrent resolution." R.I. Gen. Laws § 30-15-9(g). On February 10, 2022, the General Assembly, by Joint Resolution, extended the 180-day

expiration date for executive orders issued under the current state of emergency through March 31, 2022. Exhibit D. As such, notwithstanding the Governor's public statement that Executive Order 21-87 will end on March 4, 2022, at 5:00 pm, all executive orders will end on April 1, 2022.

5. Executive Order 22-19: Entered on February 15, 2022, this extends Executive Order 21-87 until March 4, 2022, at 5:00 pm. Exhibit E.

III. BACKGROUND

To meet the dangers posed by emergencies, the General Assembly promulgated Chapter 15 of Title 30, entitled "Emergency Management Act." Among the express purposes of Chapter 15 is to "clarify and strengthen the roles of the governor, state agencies, and local governments in prevention of, preparation for, and response to and recovery from disasters," to "prepare for emergency health threats . . . that require the exercise of extraordinary government functions," and to "provide the state with the ability to respond rapidly and effectively to potential or actual public health emergencies or disaster emergencies." R.I. Gen. Laws § 30-15-2(4), (9), and (10). This delegation of authority is particularly apt considering the part-time status of our General Assembly.

Consistent with its expressed goals, the Rhode Island General Assembly delegated to the Chief Executive the responsibility to respond to emergencies: "[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 defined to include, among others, an "[e]pidemic." R.I. Gen. Laws § 30-15-3(2)(vi). It is important to recognize that the Emergency Management Act provides two distinct gubernatorial powers: (1) the authority to declare a state of emergency due to a "disaster" and (2) the authority to issue executive orders pursuant to a declared state of emergency.

The authority to declare a state of emergency is set forth in R.I. Gen. Laws § 30-15-9(b) and provides 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). This section continues, in relevant part, that:

> [t]he 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*. . . . 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. R.I. Gen. Laws § 30-15-9(b) (emphasis supplied).

After a state of emergency is declared, a governor may issue executive orders. This gubernatorial authority is set forth in R.I. Gen. Laws § 30-15-9(e), which provides, "[i]n addition to any other powers conferred upon the governor by law, the governor may exercise the following powers, **subject to the provisions of subsection (g) of this section**, limited in scope and duration as is reasonably necessary for emergency response[.]" (Bold represents 2021 Amendment).[2] Thereafter, paragraph (e) enumerates powers the governor may invoke, including but not limited to, the authority to "[d]o all other things necessary to effectively cope with disasters in this state not inconsistent with other provisions of law[.]" R.I. Gen. Laws § 30-15-9(e)(13). This interpretation accords with this Court's conclusion. *See e.g.*, Decision on Motion for Preliminary Injunction, issued November 12, 2021 ("Decision"), at 22 ("When a state of emergency is in effect, the Governor may exercise the sixteen additional powers that are specifically enumerated in § 30-15-9(e).").

[2] Certain legislative amendments made in July 2021 loom large throughout this appeal. For consistency and ease of reference, these amendments will be in bold throughout this memorandum.

Last year, the General Assembly passed – and the Governor signed – an amendment to the Emergency Management Act, which serves as the basis for the instant lawsuit. These amendments provide, in relevant part:

> **(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.**
>
> **(h) Nothing contained in subsection (g) of this section shall be construed to apply to the following executive orders issued by the governor that shall remain in effect and may be extended by further executive order up to, but not beyond, September 1, 2021:**
>
> **(1) 20-06;**
> **(2) 20-19;**
> **(3) 20-37;**
> **(4) 20-46 as amended by 21-60;**
> **(5) 20-72;**
> **(6) 21-26;**
> **(7) 21-67; and**
> **(8) 21-68, limited to paragraph 8.** (Bold represents 2021 Amendment).

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. Exhibit A. Among the authorities upon which Executive Order 21-86 was issued was Chapter 15 of Title 30, *i.e.*, the Emergency Management Act. Executive Order 21-86 recognized, among other findings:

- 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 among those who are not vaccinated and breakthrough infection in some people who are fully vaccinated;

- both unvaccinated and vaccinated people can spread the Delta Variant; and
- 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. Exhibit A.

Executive Order 21-86 further illustrated the threat to Rhode Island by comparing the number of COVID-19 cases in July (before the Delta variant became dominant) to the number of COVID-19 cases in the days preceding the declaration of emergency (when the Delta variant was the dominant variant):

- 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 A.

On the same day as Executive Order 21-86 declaring a state of emergency issued, *i.e.*, August 19, 2021, Governor McKee issued Executive Order 21-87. Exhibit B. That Executive Order issued pursuant to, among other provisions, Chapter 15 of Title 30. According to Executive Order 21-87, all Local Education Agencies ("LEA") that had not adopted a universal indoor masking requirement must abide by a universal indoor masking protocol developed by RIDOH. Exhibit B. Executive Order 21-87 added that the RIDOH protocol "shall require universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools." Exhibit B. As Plaintiffs note in their Amended Complaint, on or about August 19, 2021, RIDOH issued a masking protocol consistent with Executive Order 21-87. Amended Complaint, ¶ 49. After the masking protocol expired, on September 23, 2021, RIDOH issued Emergency Regulation 216-RICR-20-10-7 ("Emergency Regulation"), 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." Exhibit C. According to the Emergency Regulation, it expires "45 days from [its] promulgation or when Executive Order 21-87 (Requiring Masks in Schools) or its successor is terminated, whichever is later." Exhibit C. As such, when Executive Order 21-87 is terminated, the Emergency Regulation also automatically ends.

On or about September 16, 2021, Plaintiffs initiated this litigation, and thereafter, on or about September 28, 2021, filed an Amended Complaint. As amended, the Plaintiffs claim (in Count I) that the "Governor exceeded his statutory and constitutional powers when he issued Executive Orders 21-86 and 21-87." Amended Complaint, ¶ 90. The Plaintiffs further contend (in Count III) that the Emergency Regulation was improperly issued and/or improperly promulgated, and therefore, RIDOH exceeded its powers. Amended Complaint, ¶ 118. With respect to Counts I and III, Plaintiffs seek declaratory relief declaring Executive Orders 21-86, 21-87, and the Emergency Regulation void. (Count II seeks a temporary, preliminary, and permanent injunction, and therefore is not an independent cause of action.).[3]

Contemporaneously filed with the original complaint was a motion for a preliminary injunction. After seven days of hearing – spread out over several weeks – this Court issued a 47-page Decision denying the motion for preliminary injunction. Of significance to the instant

[3] *See e.g., Hanover Ins. Grp. v. Singles Roofing Co*., 2012 WL 2368328, at *8 (N.D. Ill. June 21, 2012) ("'[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held'—it is a procedural device, not a cause of action.)." In the absence of a live controversy regarding a cognizable cause of action, this Court has no authority to issue an injunction.

motion, among the reasons for this Court's Decision was the conclusion that the Plaintiffs were not likely to succeed on the arguments that the Governor and/or the RIDOH acted without legal authority in issuing Executive Orders 21-86, 21-87, and/or the Emergency Regulation.

IV. STANDARD OF REVIEW

A judgment on the pleadings under Rule 12(c) of the Superior Court Rules of Civil Procedure "provides a trial court with the means of disposing of a case early in the litigation process when the material facts are not in dispute after the pleadings have been closed and only questions of law remain to be decided." *Nugent v. State*, 184 A.3d 703, 706 (R.I. 2018).

When reviewing the decision of a hearing justice on a motion for judgment on the pleadings pursuant to Rule 12(c), this Court utilizes the Rule 12(b)(6) motion-to-dismiss test. *Id.* Thus, a judgment on the pleadings "may be granted only when it is established beyond a reasonable doubt that a party would not be entitled to relief from the defendant under any set of conceivable facts that could be proven in support of its claim." *Id.* at 707.

Here, there are no material facts in dispute and the documents attached to Plaintiffs' complaint (namely, Executive Order 21-86 and 21-87) establish the basis for Governor's and the RIDOH's actions. This Court need only apply legal principles to these facts.

V. LEGAL ARGUMENT

POINT ONE - MOOTNESS

A. The Relief Sought – Enjoining the Mask-Wearing Requirements –Teeters on Mootness

In the Amended Complaint, Plaintiffs only seek to enjoin the requirement that students wear a face mask in schools and declare it unlawful. For example, in Count I, Plaintiffs request a

declaratory judgment that Governor McKee's actions in issuing Executive Order 21-86[4] and 21-87 are "in violation of the laws and Constitution of the State of Rhode Island." Amended

[4] The State Defendants submit that independent of Executive Order 21-87, Plaintiffs lack standing to challenge Executive Order 21-86, which declared a state of emergency. In other words, without Executive Order 21-87, Plaintiffs cannot articulate a particularized injury they have sustained on the basis of Executive Order 21-86.

In *Bowen v. Mollis*, this Court examined a lawsuit seeking a declaratory judgment concerning whether the 2008 election was a general election within the meaning of the Rhode Island Constitution. 945 A.2d 314, 316 (R.I. 2008). Such a determination was important because constitutional amendments are required to be "submitted to the electors at the next general election." *Id*. (quoting R.I. Const. Article XIV, § 1). Although the trial justice determined the plaintiff had standing, the Rhode Island Supreme Court reversed and explained:

> [w]hen confronted with a request for declaratory relief, the first order of business for the trial justice is to determine whether a party has standing to sue. A standing inquiry focuses on the party who is advancing the claim rather than on the issue the party seeks to have adjudicated. *** Indeed, the 'party seeking relief must have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'

Id. at 317. Applying these principles, the Court concluded that "Mr. Bowen's putative interests are indistinguishable from the interest of the general public, and he has failed to allege a particularized injury or demonstrate that he has a stake in the outcome that distinguishes his claims from the claims of the public at large." *Id*.

Similarly, in *Watson v. Fox* – a case in which certain legislators in their individual capacities challenged the legislative grant process as unconstitutional – the Court further recognized "the necessity of [demonstrating] a 'concrete' injury has been the subject of particular emphasis in this jurisdiction." 44 A.3d 130, 135 (R.I. 2012). The Court continued that it has "held fast to the notion that a plaintiff's injury must be 'particularized' and that he must 'demonstrate' that he has a stake in the outcome that distinguishes his claims from the claims of the public at large." *Id*. at 136. The Court re-affirmed that "[i]n this jurisdiction, generalized claims alleging purely public harm are an insufficient basis for sustaining a private lawsuit." *Id*.

Based on the foregoing, the Supreme Court had "little trouble concluding … that if this Court's longstanding principles of standing are applied to the circumstances of this case, then his suit must fail." *Id*. The Court summarized, "[t]he plaintiff sought a declaratory judgment as a private taxpayer" and "plaintiff has complained of no concrete, particularized harm; to the degree he can point to any injury, it is the same, indistinguishable, generalized wrong allegedly suffered by the public at large." *Id*. at 137. In this case, Plaintiffs cannot articulate a particularized injury

Complaint, Count I. Count II asks that the Court enjoin or restrain the Governor from "issuing any further executive orders related to COVID-19, that Executive Orders 21-86 and 21-87 be declared ultra vires and void, and that any and all actions of any state agency pursuant to said executive orders be declared void and unenforceable." Amended Complaint, Count II. Lastly, Count III demands that the Emergency Regulation issued by RIDOH be declared ultra vires and void, and that this Court restrain or otherwise prohibit the RIDOH from "enforcing the Emergency Rule." Amended Complaint, Count III.

While the requested relief presented an actual controversy at the time this lawsuit was initiated, the Rhode Island Supreme Court has "consistently held … a case is moot if the original complaint raised a justiciable controversy, but events occurring after the filing have deprived the litigant of a continuing stake in the controversy." *Medical Malpractice Joint Underwriting Ass'n*, 941 A.2d at 220. The rule requiring an actual justiciable controversy at all times applies equally to actions seeking a declaratory judgment. *See Providence Teachers Union v. Napolitano*, 690 A.2d 855, 856 (R.I. 1997) ("the party seeking declaratory relief must present the court with an actual controversy"). Here, events have overtaken the actual controversy and by the time this case is argued, Plaintiffs will have received the relief sought and this case will be moot.

Executive Order 21-87, issued on August 19, 2021, directed the RIDOH to issue a face-masking protocol. Exhibit B. After the expiration of the original protocol, RIDOH issued the Emergency Regulation on September 23, 2021, which directed all students and staff (not already subject to a local face mask requirement) to wear a face mask while indoors at schools. But the issues presented by Plaintiffs – the Governor's authority to issue Executive Order 21-87 and the

without Executive Order 21-87 and/or the Emergency Regulation, and therefore, lack standing to challenge Executive Order 21-86 alone.

RIDOH's authority to issue the Emergency Regulation – have been rendered moot with the passage of time. Indeed, the Governor has already issued Executive Order 22-19, which extends Executive Order 21-87 until March 4, 2022, at 5:00 pm, at which point Executive Order 21-87, and by extension the Emergency Regulation, will terminate. The Governor has publicly announced that after March 4, 2022, the decision to implement a mask-wearing requirement will be left to the cities and town. It is axiomatic that if the Plaintiffs challenge the authority to issue Executive Order 21-87 and the Emergency Regulation – and if Executive Order 21-87 and the Emergency Regulation have expired – this case will be moot and the relief Plaintiffs seek will have been achieved through non-litigation measures.

In *Boston Bit Labs*, the First Circuit Court of Appeals confronted this issue when it examined an Executive Order from Massachusetts Governor Charles Baker. At issue was Governor Baker's Executive Order reopening the Commonwealth in phases and the classification that arcades would be part of a Phase IV re-opening, meaning other arguably similar enterprises, such as casinos, may open up earlier during Phrase III. Boston Bit Labs sought a declaration that its classification violated the United States Constitution. 11 F.4th at 6. Days after the lawsuit was filed, however, Governor Baker issued Order 50, which restored arcades to Phase III, thus achieving the relief sought. *Id*. at 7. Later – after the district court declared the case moot based upon Order 50's reclassification and while the case was pending before the Court of Appeals – Governor Baker publicly announced that through Order 69 he had terminated the COVID-19 state of emergency, which "ended his authority 'to impose any COVID-19 related restrictions.'" *Id*. Based upon these events, the Court of Appeals framed the issue as "whether the relief sought would, if granted, make a difference to the legal interests of the parties (as distinct from their

psyches, which might remain deeply engaged with the merits of the litigation)." *Id*. at 8. The First Circuit answered this question in the negative.

> With an analysis equally applicable in this case, the Court of Appeals explained:
>
> > Bit Bar (we repeat) basically asked the judge to enjoin Governor Baker from treating its arcade more restrictively than casinos during the declared COVID-19 state of emergency. And Bit Bar (we also repeat) explicitly targeted Order 43, which put arcades in "Phase IV" but kept casinos in "Phase III." But then (remember) came Order 50, which returned arcades to "Phase III." And then (remember too) came Order 69, which eventually ended the COVID-19 orders issued under the Civil Defense Act since the start of the (now-cancelled) emergency declaration. Given this concatenation of events, there is simply "no ongoing conduct to enjoin," thus mooting Bit Bar's injunctive-relief claim.

Id. at 8-9. As the Court summarized, "[t]o put it again in blunt terms, with the offending executive order wiped away, there is nothing harming Bit Bar and thus nothing left for us to do that would make a difference to its legal interests." *Id*. at 9.

The Plaintiffs here stand in a similar posture, and for reasons similar to *Boston Bit Labs*, by the time this Court hears arguments, this case will be moot. For starters, the Governor has already issued Executive Order 22-19, directing that Executive Order 21-87 will continue in force and effect until March 4, 2022, at 5pm. Exhibit E. The Governor's public statements support the language of Executive Order 22-19 – after March 4, 2022, local school districts will make the decision whether to require face masks in schools. Moreover, the Emergency Regulation provides that it will expire, "45 days from [its] promulgation or when Executive Order 21-87 (Requiring Masks in Schools) or its successor is terminated, whichever is later." Exhibit C. Thus, similar to Governor Baker's order re-classifying arcades as part of the "Phase III" re-opening, after March 4, 2022, neither Executive Order 21-87 nor the Emergency Regulation will be effective or provide any authority to require students or staff to wear face masks at schools.

Independent of the Governor's public statements and Executive Order 22-19, after March 31, 2022, this case will reach a separate mootness milestone. According to the plain language of R.I. Gen. Laws § 30-15-9(g), as amended during the last General Assembly Session, any executive order issued pursuant to the August 19, 2021 declaration of emergency, including Executive Order 21-87, expires 180 days after the declaration of emergency issued on August 19, 2021. This date – February 14, 2022 – has already passed. *See* R.I. Gen. Laws § 30-15-9(g) (180-day time limit on executive orders issued pursuant to R.I. Gen. Laws § 30-15-9(e) "unless and until the general assembly extends the one hundred eighty (180) day period by concurrent resolution"). On February 10, 2022, the General Assembly approved a Joint Resolution extending the executive orders issued pursuant to the August 19, 2021 state of emergency. Exhibit E. Rather than expiring on February 14, 2022, pursuant to the Joint Resolution, these executive orders, including Executive Order 21-87, will expire after March 31, 2022. Exhibit E. Absent another Joint Resolution, Executive Order 21-87 – as well as the Governor's authority to issue executive orders pursuant to the August 19, 2021 declaration of emergency – will expire after March 31, 2022. As such, regardless of whether the Governor voluntarily chooses to terminate Executive Order 21-87 and the Emergency Regulation on March 4, 2022, at 5:00 pm, by operation of law (the Joint Resolution), Executive Order 21-87 and the Emergency Regulation will expire after March 31, 2022. This expiration provides a second basis for mootness.

POINT TWO – STATUTORY CONSTRUCTION

A. Executive Orders 21-86 and 21-87 are Consistent with Chapter 15 of Title 30, as Amended

The Plaintiffs challenge Executive Order 21-86 (declaration of emergency) and Executive Order 21-87 (masks in schools) focuses upon R.I. Gen. Laws § 30-15-9(g), an amendment passed in July 2021. Plaintiffs claim that the intent of this amendment was that "the General Assembly

terminated the Governor's statutory right to issue any further executive order or proclamations of disaster emergency related [to] COVID-19." Amended Complaint, ¶ 96. Four problems confront this argument: first, this is not what the amendment says; second, the 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), which concerns the authority of the Governor to declare a state of emergency; third, this Court has already rejected Plaintiffs' statutory interpretation and agreed with the State's statutory interpretation; and fourth, on February 10, 2022, the General Assembly passed a Joint Resolution extending (not restricting) the executive orders issued pursuant to the August 19, 2021 declaration of emergency. A review of Chapter 15 of Title 30 makes this pellucid.

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, in relevant part:

> *[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. (Emphasis supplied)

The General Assembly's 2021 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. Since the General Assembly did not amend R.I. Gen. Laws § 30-15-9(b) during the last legislative session, it is axiomatic that the 2021 amendments – namely to R.I. Gen. Laws § 30-15-9(e) and (g) – could not have affected the Governor's section (b) powers to declare a state of emergency.

To be sure, Plaintiffs challenge the Governor's determination of a state of emergency, but the sole basis for this challenge is that the amendment "terminated the Governor's statutory right to issue any further executive order or proclamations of disaster emergency related [to] COVID-19." Amended Complaint, ¶ 96. The plain language of the amendment proves this wrong.

Specifically, the 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, bold represents 2021 amendment). By its own language, the 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 subsection (g) of this section**, limited in scope and duration as is reasonably necessary for emergency response." (Bold represents 2021 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 amend subsection (e) by adding an expiration date for executive orders, but not amend 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 "at any time." Prior to the 2021 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). This Court has already agreed with this statutory construction.

During the preliminary injunction phase, this Court considered and rejected Plaintiffs' statutory construction argument, concluding: "[t]he clear and unambiguous language of those amendments precludes Plaintiffs' interpretation." Decision, at 27. In a clear rejection of Plaintiffs' arguments that the 2021 amendment curbed the Governor's powers to declare a state of emergency or issue executive orders relating to COVID-19, this Court quoted R.I. Gen. Laws § 30-15-9(g) and observed that "[s]ubsection (g) makes no mention of COVID-19 or any specific orders relating to COVID-19." Decision, at 27. This Court elucidated:

> [b]y its terms, this subsection does not affect the Governor's authority and responsibility to declare a state of disaster emergency and exercise emergency powers as necessary. The only restriction it imposes is a 180-day temporal limit on any exercise of the Governor's emergency powers under § 30-15-9(e), regardless of the nature of the emergency and subject to the General Assembly's ability to extend the 180-day period.

Decision, at 27-28. This Court added that "as with subsection (g), nothing in the text of subsection (h) limits the Governor's authority and responsibility to act prospectively, whether in response to COVID-19 or any other form of disaster." Decision, at 28.

Moreover, after this Court issued its Decision that the 2021 Legislative Amendments did not restrict the Governor's authority to issue COVID-19 related executive order, but rather only provided a 180-day limitation subject to a General Assembly concurrent resolution extending the timeframe, the General Assembly exercised its concurrent resolution power. Pursuant to R.I. Gen. Laws § 30-15-9(g), as amended, executive orders issued under the August 19, 2021 declaration of emergency were due to expire on February 14, 2022. On February 10, 2022, the General Assembly passed a Joint Resolution. The language of this Joint Resolution is consistent with the State Defendants' statutory interpretation arguments and this Court's Decision. In relevant part, the Joint Resolution provided:

> RESOLVED, That this General Assembly of the State of Rhode Island, without waiving its powers pursuant to § 30-15-9(b) to terminate a state of disaster emergency at any time, hereby adopts this concurrent resolution extending the Governor's additional powers contained in § 30-15-9(e) of the General Laws with respect to Executive Order 21-86, as superseded by Executive Order 21-109 together with extensions thereof and additional Executive Orders related therein, through March 31, 2022; and be it further
>
> RESOLVED, That after March 31, 2022, powers conferred upon the Governor pursuant to the provisions of § 30-15-9(e) as they relate to the Declaration of Disaster Emergency for New COVID-19 Variants shall expire, unless further extended by concurrent resolution of the General Assembly[.]

Exhibit E. There can be no clearer rejection of the Plaintiffs' argument that "the General Assembly terminated the Governor's statutory right to issue any further executive order or proclamations of disaster emergency related [to] COVID-19," Amended Complaint, ¶ 96, than the General Assembly's Joint Resolution extending the executive orders Plaintiffs claim were unlawfully issued.

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, unless and until the general assembly extends the one hundred eighty (180) day period by concurrent resolution." This 180-day time period was due to expire on February 14, 2022, but was extended through March 31, 2022 by Joint Resolution. 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). The Governor's actions in declaring a state of emergency on August 19, 2021, *see* Executive Order 21-86 (Exhibit A), and issuing a directive to implement masks in schools, *see* Executive Order 21-87 (Exhibit B), was consistent with Chapter 15 of Title 30, as amended. Additionally, the Joint Resolution, essentially, ratifies and extends the Governor's executive actions.

B. The 2021 Amendment Places No Limitations on a Declaration of Emergency

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). Plaintiffs then submit that the 2021 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 statutes] 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 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, not on placing time limits on the declaration of a state of emergency.[5]

Moreover, the fear that a governor could 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 amendment. In clear and unambiguous 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) (emphasis added). 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 displace the authority of the legislative branch and exercise 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

[5] The Joint Resolution also makes this clear and distinguishes between R.I. Gen. Laws §§ 30-15-9(b) and 30-15-9(e). Exhibit E ("without waiving its powers pursuant to § 30-15-9(b) to terminate a state of disaster emergency at any time").

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), that is, the General Assembly has reserved to itself the sole authority to terminate a state of emergency, indicating that this is an issue to be resolved 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 have neither the responsibility nor the authority 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 serious enough 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*, courts, "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 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.").

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).

C. The Governor's August 2021 Declaration of Emergency Due to the Delta Variant was Lawful

The sole requirement to issue a declaration of emergency is that the Governor "finds a disaster has occurred or that this occurrence, or the threat thereof, is imminent." R.I. Gen. Laws § 30-15-9(b). Executive Order 21-86 satisfies this prerequisite. The findings set forth in Executive Order 21-86 establish that the Governor "found" that a disaster had occurred or its threat was imminent, and as such, had the authority to declare a state of emergency due to the Delta variant given the "occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including, but not limited to … [an] [e]pedemic." R.I. Gen. Laws § 30-15-3(2)(vi)).

Among the Governor's findings set forth in Executive Order 21-86 were:

- the Delta variant of the SARS-CoV-2 ("Delta Variant") is now sweeping the country and has become the dominant strain in Rhode Island and nationally;
- 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 among those 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, which is more likely to affect children than the original strain;
- this increase in prevalence of the Delta Variant poses a significant and imminent risk to Rhode Islanders of increased symptomatic disease, hospitalization, and death; and
- a serious threat to public health exists because of the Delta Variant and the State needs to take additional measures to limit the spread of the Delta Variant and other new variants of concern. Exhibit A.

Moreover, Executive Order 21-86 illustrated how the prevalence of COVID-19 increased in the weeks and months preceding the August 19, 2021 declaration of emergency:

- since August 11, 2021, Rhode Island has 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;
- 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 persons;
- as of July 4, 2021, there were 22 hospitalized COVID-19 patients in the hospital, while on August 16, there were 103 hospitalized COVID-19 patients;
- on June 6, 2021, Rhode Island reported only 2 cases of COVID-19 in long term care facilities, while on August 16, 2021 there were 34 cases of COVID-19 in long term care facilities. Exhibit A.

The above findings aptly demonstrate that after experiencing a summer where COVID-19 waned and restrictions were lifted, the Delta Variant caused a resurgence of COVID-19 cases in late July-early August. As this Court has already observed, "[h]aving made those findings, the Governor had the statutory power to declare a state of emergency." Decision, at 24 (citing R.I. Gen. Laws § 30-15-9(b) ("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.")). Accordingly, the Governor's August 19, 2021 declaration of emergency satisfied R.I. Gen. Laws § 30-15-9(b).

D. Executive Order 21-87 was Authorized by Chapter 15 of Title 30

Having properly issued a declaration of emergency, "the governor may exercise the following [sixteen] powers, **subject to the provisions of subsection (g) of this section**[.]" R.I. Gen. Laws § 30-15-9(e) (bold represents 2021 amendment). 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). Pursuant to R.I. Gen. Laws § 30-15-9(e)(13), on August 19, 2021, the Governor issued Executive Order 21-87, directing that all Local Education Agencies that:

> have not adopted a universal indoor masking requirement shall be required to abide by a universal indoor masking protocol developed by the Rhode Island Department of Health (RIDOH). The RIDOH protocol shall require universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools. Exhibit B.

Because Executive Order 21-87 was issued under the umbrella of Executive Order 21-86, was authorized pursuant to R.I. Gen. Laws § 30-15-9(e)(13), and is "limited in scope and duration as is reasonably necessary for emergency power," R.I. Gen. Laws § 30-15-9(e), Executive Order 21-87 was lawful. The Gubernatorial findings accompanying Executive Order 21-87 further support this conclusion:

- on August 19, a state of emergency was declared due to the dangers to health and life posed by new COVID-19 variants;
- the use of masks and cloth face coverings is an important public health approach to slow the transmission of COVID-19, including the Delta and other variants;
- students benefit from in-person learning and safely returning to in-person instruction is a priority;
- a significant portion of the student population is still not eligible for vaccination;
- it is critically important to protect unvaccinated students from COVID-19 and to reduce transmission of the new COVID-19 variants in the school setting and beyond;

- in July 2021, the American Academy of Pediatrics (AAP) recommended that all children over the age of 2 wear masks regardless of vaccination status when returning to school this fall;
- as of August 4, 2021, due to the circulating and highly contagious Delta variant, the Centers for Disease Control and Prevention (CDC) updated its guidance to recommend universal indoor masking for all students (ages 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status;
- the majority of LEAs have now taken action to protect students, teachers and other school personnel and to support safe in-person learning by following the AAP and CDC guidance by requiring universal masking on school premises; and
- time is of the essence to take measures to limit the spread of the highly contagious COVID-19 and its variants in schools. Exhibit B.

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). *See* Decision, at 24 ("Executive Order 21-87 set forth findings to support enacting a school mask mandate."). As such, Executive Order 21-87 was lawfully issued and consistent with Chapter 15 of Title 30.

E. The Delegation of Emergency Powers to the Governor Does Not Violate the Non-Delegation Doctrine

Plaintiffs suggest that the delegation to the Governor of broad emergency powers violates the non-delegation doctrine. In particular, Plaintiffs take issue with the State's statutory interpretation – as well at this Court's conclusion – that R.I. Gen. Laws § 30-15-9(g)'s 180-day limitation on executive orders applies only to executive orders issued pursuant to R.I. Gen. Laws § 30-15-9(e), not a declaration of emergency issued pursuant to R.I. Gen. Laws § 30-15-9(b). According to Plaintiffs, the failure to adopt their statutory interpretation violates the non-delegation doctrine.

The Rhode Island Constitution forbids unrestricted delegations of legislative power by the General Assembly. *See Marran v. Baird*, 635 A.2d 1174, 1179 (R.I. 1994). This prohibition,

known as the nondelegation doctrine, is found in Article 6, Sections 1 and 2, which provides that the Rhode Island Constitution "shall be the supreme law of the state and that the legislative power thereunder shall be vested in the two houses of the Legislature." *Id*. The Supreme Court has recognized, however, that "because the General Assembly must confront modern problems of ever-increasing complexity, strict adherence to the nondelegation doctrine would detrimentally inhibit the Legislature's ability to execute its constitutional duties." *Id*. "In carrying out its duties, the General Assembly can engage the expertise and assistance of administrative agents to effectuate the beneficial purpose of legislation." *Id*. As such, the Supreme Court permits "reasonable" delegations of legislative power to administrative bodies and agents. *Id*.

Our Supreme Court has elucidated that a "delegation is reasonable, and thus constitutional '[a]s long as the Legislature that creates the agency demonstrates standards or principles to confine and guide the agency's power.'" *Id*. In making this determination, "we must read the act as a whole." *Id*. The Court has also warned that "[i]t 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." *Id. See also Bourque v. Dettore*, 589 A.2d 815, 818 (R.I. 1991) ("[t]he delegation of legislative power will be upheld if the statute 'declares a legislative purpose, establishes a primary standard for carrying out the use, or lays out an intelligent principle to which an administrative officer or body must conform"). Here, consideration of the enumerated factors demonstrates a constitutional delegation.

First, the legislative purpose is clear. Among the stated purposes of Chapter 15 of Title 30 is to "clarify and strengthen the roles of the governor, state agencies, and local governments in prevention of, preparation for, and response to and recovery from disasters," to "prepare for

emergency health threats . . . that require the exercise of extraordinary government functions," and to "provide the state with the ability to respond rapidly and effectively to potential or actual public health emergencies or disaster emergencies." R.I. Gen. Laws § 30-15-2(4), (9), and (10). Moreover, Chapter 15 of Title 30 makes clear at the outset, "[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). This delegation of legislative authority and the goal to entrust responding quickly to disasters with the Chief Executive is particularly appropriate given the General Assembly's part-time status; moreover, the Chief Executive is able to deploy "the expertise and assistance of administrative agents to effectuate the beneficial purposes of legislation." *Marran*, 635 A.2d at 1179.

Second, Chapter 15 of Title 30 sets forth intelligible principles that direct when and how the emergency powers may be exercised. As a threshold matter, before the Chief Executive may exercise any emergency powers set forth in R.I. Gen. Laws § 30-15-9(e), the Governor must declare a state of emergency. Pursuant to R.I. Gen. Laws § 30-15-9(b), a state of emergency may be declared if the Governor "finds a disaster has occurred or that this occurrence, or the threat thereof, is imminent." A "disaster" is defined as the "occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including but not limited to," enumerated examples. R.I. Gen. Laws § 30-15-3. Among the non-exclusive examples, a "disaster" includes, an "[e]pidemic." R.I. Gen. Laws § 30-15-3(2)(vi). Additionally, any executive order or proclamation wherein a state of emergency is declared "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." R.I. Gen. Laws § 30-15-9(b).

After the Governor declares a state of emergency, the Governor may exercise through executive order the powers enumerated within R.I. Gen. Laws § 30-15-9(e). These powers are "limited in scope and duration as is reasonably necessary for emergency response." R.I. Gen. Laws § 30-15-9(e). Among the enumerated powers is 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).

Third, while the Governor's emergency powers are broad, strong legislative safeguards provide appropriate checks and balances on executive power. For example, a state of emergency may continue only 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[.]" R.I. Gen. Laws § 30-15-9(b). Even then, "no state of emergency may continue for longer than thirty (30) days unless renewed by the governor" and "[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). While a declared state of emergency allows a governor to exercise the powers set forth in R.I. Gen. Laws § 30-15-9(e), these powers also contain safeguards and "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." R.I. Gen. Laws § 30-15-9(g).

Viewing the legislative purpose, the intelligible principles, and the legislative safeguards as a whole, Chapter 15 of Title 30 "set[s] forth an intelligible principle that directs when and how the emergency powers may be exercised." Decision, at 31. As such, the delegation of emergency powers does not contravene the non-delegation doctrine. This conclusion is inescapable when compared to Supreme Court precedent examining even broader delegations of authority.

For example, in *Davis v. Wood*, 427 A.2d 332, 336 (R.I. 1981), the Supreme Court held that the General Assembly's "directive that activities relating to the management of solid waste be conducted 'in an environmentally sound manner' creat[ed] a sufficiently intelligible standard" to confine and guide the Department of Environmental Management's authority. *See Marran*, 635 A.2d at 1180. In *J.M. Mills, Inc. v. Murphy*, 352 A.2d 661, 666 (R.I. 1976), the requirement that the director of the then-Department of Natural Resources act only in the 'best public interest' was deemed a sufficient standard to confine and guide the agency's discretion. *See Marran*, 635 A.2d at 1180. And, in *Thompson v. Town of East Greenwich*, 512 A.2d 837, 842 (R.I. 1986), the Court held that the power of local licensing boards was sufficiently restricted by the requirement that they act "reasonably." *See Marran*, 635 A.2d at 1180.

Here, the emergency powers delegated to the Governor allow for the Chief Executive to respond to all types and durations of emergencies with the urgency these situations necessitate. This leeway is particularly appropriate given the General Assembly's part-time status and the Supreme Court's recognition that "the adequacy of legislative standards may best be measured against their intended purposes." *J.M. Mills, Inc*., 352 A.2d at 665. As this Court has observed:

> a key purpose of the Emergency Management Act is to 'provide the state with the ability to respond rapidly and effectively' to disasters of every stripe. Section 30-15-2(10). The open-ended definition of a disaster indicates the General Assembly's recognition that it would be impossible to foresee every conceivable hazard that the state might face. For that reason, the Governor 'must have flexibility to effectuate the purposes of legislation' by mounting an adequate response to the specific disaster at hand. *Town of East Greenwich v. O'Neil*, 617 A.2d 104, 113 (R.I. 1992). Similarly, because a rapid response is often crucial in a crisis, preventing the delegation of emergency powers to the Governor would 'unduly hamper the Legislature's exercise of its constitutionally vested powers.' *Id*. at 112; *see also Almond*, 756 A.2d at 192 ('Moreover, the nature and scope of the duties of the Lottery Commission are such as to demand that the Legislature be permitted to delegate authority to operate such a massive enterprise.').

Decision, at 31-32. For these reasons, the delegation of emergency powers to the Governor does not violate the non-delegation doctrine.

F. The Department of Health Properly Promulgated the Emergency Regulation

The RIDOH properly promulgated the Emergency Regulation based upon two related legal authorities. First, Executive Order 21-87 directed the RIDOH to do so. Plaintiffs acknowledge this authority and the Amended Complaint pleads that "Executive Order 21-87, requires public schools in the state to abide by a universal indoor masking protocol developed by the Rhode Island Department of Health (RIDOH). The RIDOH protocol shall require universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools." Amended Complaint, ¶ 48. Because Executive Order 21-87 was properly issued, *see supra*, the Gubernatorial directive to RIDOH to implement an indoor masking protocol – and RIDOH's implementation of this directive – is also lawful. *See also* R.I. Gen. Laws § 30-15-9(e)(13).

Second, Plaintiffs correctly recognize that pursuant to Executive Order 21-87, "RIDOH has developed a protocol requiring all public school students to wear a mask 'when entering and while within' school, with the only exception being for medical reasons based upon a disability." Amended Complaint, ¶ 49. After the expiration of the protocol, Plaintiffs aver that "on September 23, 2021, RI DOH issued Emergency Regulation 216-RICR-20-10-7, 'Masking in Schools' ('Emergency Regulation')." Amended Complaint, ¶ 107. Similar to the RIDOH protocol, the Emergency Regulation provides, in relevant part: "[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." 216-RICR-20-10-7 § 7.3A. Exhibit C. Despite Executive Order 21-87's directive that RIDOH implement an indoor masking protocol for schools, Plaintiffs charge that the Emergency Regulation exceeds RIDOH's authority since: (1) there is no statutory

basis that authorizes RIDOH to issue a public school mask requirement and (2) there is no "imminent peril" that justifies the Emergency Regulation. Amended Complaint, ¶ 118. Plaintiffs also contend RIDOH failed to properly publish its Emergency Regulation. Amended Complaint, ¶ 122.

1. The Emergency Regulation – Substantive Requirements

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. (Emphasis added).

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

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 peril in accordance with the statute. 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 to the statutes that created 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.

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 RIDOH 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. RIDOH promulgated the emergency regulation about 10 days after

Governor Raimondo issued Executive Order 19-09, directing the RIDOH to "promulgate emergency regulations to prohibit the sale of flavored [Electronic Nicotine Delivery Systems]." *Id*. at 1.

Vapor Technology is significant because similar to the present case, the plaintiffs in *Vapor Technology* challenge RIDOH's reasons for enacting the Emergency Regulation. *Vapor Technology*, at 16. Specifically, the plaintiffs argued that the Emergency Regulation was 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 statute 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 Superior Court concluded that RIDOH 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 (emphasis added). *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 Emergency Regulation requiring masks indoors while at school, RIDOH has clearly set forth a "plausible rationale," which RIDOH determined was necessary to address an "imminent peril." First, RIDOH was directed to do so through Executive Order 21-87, and this Gubernatorial directive – along with the findings made therein – satisfies the "plausible rationale" standard. As this Court recognized in already examining this issue, in:

> Executive Orders 21-86 and 21-87, the Governor declared a state of emergency for the Delta variant, explicitly ordered the DOH to institute a universal indoor masking protocol for schools and set forth sufficient findings to support both actions. [The Emergency Regulation], which differs from the original August 20, 2021 protocol by allowing several exceptions to the mask mandate, nonetheless complies with Executive Order 21-87's directive to DOH to develop a universal indoor masking protocol. *The Executive Orders and their renewals have the force of law, and the specific findings they incorporate demonstrate a plausible rationale for DOH's determination of imminent peril*.

Decision, at 45 (emphasis added). *See id*. ("while Executive Order 21-87 remains in effect, the DOH would have the legal obligation to immediately promulgate an additional masking protocol").

Second, the findings associated with Executive Orders 21-86 and 21-87, *see* Exhibits A & B, establish that in the weeks leading up to the Emergency Declaration (and the reopening of schools), Rhode Island had gone from very few COVID-19 cases to high transmission. For example, Executive Order 21-86 details that on July 4, 2021, Rhode Island had only 11.2 new cases of COVID-19 per 100,000 people in the prior seven days, but on August 16, 2021 – three days before the state of emergency and the masking directive was issued (and weeks away from schools reopening) – Rhode Island experienced 195.6 new cases of COVID-19 per 100,000 persons. *See* Exhibit A. On July 4, 2021, there were 22 hospitalized COVID-19 patients, whereas on August 16, 2021, this number grew to 103 hospitalized COVID-19 patients. *See* Exhibit A. Executive Order 21-86 also reveals that "since August 11, 2021, Rhode Island has 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. *See* Exhibit A.

In addition to the wide and rapid spread of a more contagious and more potent COVID-19 variant, Executive Order 21-87 recognizes "students benefit from in-person learning and safely returning to in-person instruction is a priority." Exhibit B. Executive Order 21-87 also recognizes at that time a significant portion of students (those under 12) were not even eligible for vaccination. Exhibit B. Executive Order 21-87 also noted that in July 2021, the American Academy of Pediatrics, and as of August 4, 2021, the Centers for Disease Control and Prevention, both recommended that all children over the age of 2 wear masks when returning to school in the fall. Exhibit B. While the Plaintiffs surely take issue with RIDOH's conclusion, requiring all students, teachers, and visitors to wear a mask while indoors and in relatively close proximity to each other (since education had returned to in-person learning), based on Executive Orders 21-86 and 21-87, RIDOH clearly had, at least, a "plausible rationale" for the Emergency Regulation. *See also Vapor*

Technology, at 20 (noting the court 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]).'"

In addition to the Executive Orders, the Statement of Imminent Peril that must accompany the Emergency Regulation further supports RIDOH's "plausible rationale." It must be remembered that in September 2021 when the Emergency Regulation was promulgated, the Delta variant was a highly transmissible virus, all students were returning full-time to the classroom for the first time in over a year (meaning maintaining six feet of separation between students would be difficult if not impossible), and children under 12 years of age were still not eligible for vaccination. The Statement of Imminent Peril issued in September 2021 encapsulates these concerns and the basis for finding an "imminent peril": specifically "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." 216-RICR-20-10-7.1A. Exhibit C. This Statement of Imminent Peril accords with other statements the Supreme Court has determined to be adequate. *See Park*, 893 A.2d at 220 ("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."); *Town of Middletown*, 698 A.2d at 182-83 ("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.").

Even more so, while RIDOH submits that Executive Orders 21-86 and 21-87, as well as the Statement of Imminent Peril published on September 23, 2021, provide an ample "plausible rationale" for RIDOH to conclude the Emergency Regulation was necessary to address "an imminent peril to the public health, safety, or welfare," R.I. Gen. Laws § 42-35-2.10, RIDOH further submits that the more comprehensive Statement of Imminent Peril published after this Court's Decision provides additional support for RIDOH's conclusion. This Statement of Imminent Peril is attached as Exhibit F and contained on the Secretary of State's and RIDOH's websites. *See infra*.

Plaintiffs do not appear to contest that the rise of COVID-19 related cases and hospitalizations constituted an emergent situation. Rather, they maintain that since COVID-19 was first introduced in March 2020 – and since masks have been required in schools for over a year – RIDOH's Regulation issued on September 23, 2021 does not demonstrate "imminent peril." But this argument ignores Executive Order 21-86's findings that Rhode Island experienced a resurgence in COVID-19 cases starting in early July 2021. Exhibit A. Plaintiffs also ignore their own Amended Complaint, which similarly recognized that in May 2021, many mask wearing directives were lifted, *see* Amended Complaint, ¶ 58, and that in late June 2021, Rhode Island had issued guidance that when schools reopened for the Fall of 2021, mask wearing would not be required. *See* Amended Complaint, ¶¶ 52-54. As this Court has recognized in examining this precise issue, "Plaintiffs' arguments regarding the DOH's purported delay in issuing the emergency rule ignore how the circumstances of the COVID-19 pandemic have changed over time." Decision, at 51 (relying on, in part, Executive Order 21-86).

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. Executive Orders 21-86 and 21-87, as well as the original and the updated Statement of Imminent Peril, easily pass this deferential standard. On this point, even Plaintiffs' Amended Complaint avers that promulgating a regulation through the typical notice and comment requirements would have taken at least 60 days. *See* Amended Complaint, ¶ 112 (at least 30 days before filing of final rule, publish notice of proposed rulemaking) and ¶ 114 (30-day public comment period). Once Rhode Island experienced the high level of community transmission on August 11, 2021, "the 30-day public comment period alone would appear to have prevented the DOH from finalizing the rule before the start of the school year." Decision, at 42. For all these reasons, the Emergency Regulation complied with the substantive requirements of R.I. Gen. Laws § 42-35-2.10.

2. The Emergency Regulation – Posting Requirements

In addition to the requirements discussed, *supra*, R.I. Gen. Laws § 42-35-2.10 requires an agency adopting an emergency regulation to "publish[] in a record with the secretary of state and on its agency website reasons for that [imminent peril] finding[.]" This Court previously recognized that the September 23, 2021 Emergency Regulation and Statement of Imminent Peril was properly posted on the Secretary of State's website. Decision, at 40. While this Court also indicated it was unable to locate the Emergency Regulation and the Statement of Imminent Peril on the RIDOH website, to the extent that this may have been an issue, it is no longer an issue. The Emergency Regulation and the updated Statement of Imminent Peril can be found on both the Secretary of State's website and the RIDOH's website. https://rules.sos.ri.gov/regulations/part/216-20-10-7; https://health.ri.gov/#reg05. RIDOH has complied with the posting requirements.

VII. CONCLUSION

Based on the arguments raised above, and those raised at oral argument, Defendants ask this Court to grant its Motion for Judgment on the Pleadings.

Respectfully submitted,

DEFENDANTS,
Daniel J. McKee, in his official capacity as the Governor of the State of Rhode Island, Dr. James McDonald, MD, MPH, in his official capacity of Interim Director of the Rhode Island Department of Health

By:

PETER F. NERONHA
ATTORNEY GENERAL

/s/ Michael Field
Michael W. Field, Bar No. 5809
Assistant Attorney General
150 South Main Street
Providence, Rhode Island 02903
Tel: (401) 274-4400, Ext. 2380
Fax: (401) 222-3016
mfield@riag.ri.gov

/s/ Chrisanne Wyrzykowski
Chrisanne Wyrzykowski, Bar No. 7565
Assistant Attorney General
150 South Main Street
Providence, Rhode Island 02903
Tel: (401) 274-4400, Ext. 2235
Fax: (401) 222-3016
cwyrzykowski@riag.ri.gov

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 23rd day of February, 2022, 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/ Karen M. Ragosta