STATE OF RHODE ISLAND SUPERIOR COURT
PROVIDENCE, SC

RICHARD SOUTHWELL, et al.	:	
	:	
Plaintiffs	:	
	:	
vs.	:	C.A. No. PC2021-05915
	:	
DANIEL J. MCKEE, et al.	:	
	:	
Defendants	:	

PLAINTIFFS' POST-HEARING MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

BACKGROUND:

Since this complaint in this case was filed, the State's position as to the legality of the mandating masks in schools has evolved. First, it appears from the State's initial memorandum in opposition to the motion for injunctive relief, that the Governor has abandoned any argument that the Rhode Island Constitution provides an independent authority for his issuance of an executive order.

Second, on September 23, 2021, the Rhode Island Department of Health (RIDOH) issued Emergency Regulation 216-RICR-20-10-7, "Masking in Schools" ("Emergency Regulation or Rule"). RIDOH purported to issue this regulation under its general statutory authority conferred to it under R.I. Gen. Laws §§ 23-1-1, 23-1-17 and 23-1-18(4). In doing so, RIDOH circumvented the normal regulatory procedure for issuing school health regulations, instead issuing the regulation pursuant to the Emergency Rule provisions of R.I. Gen. Laws § 42-35-2.10.

Third, the State argues that the Governor signed a "Proclamation of Quarantine" under R.I. Gen Laws § 23-8-18, which he claims provides some basis for mandating masks in schools.

Lastly, the State argues that the Governor properly exercised his authority under the recently amended R.I. Gen. Laws § 30-15-9(e) to issue an emergency order mandating masks.

Of the three state mandates, the only one to expressly cite to any factual basis is the Executive Order. Neither the Emergency Rule nor the Quarantine Proclamation references facts or data to support their issuance, presumably relying upon EO 21-86. But this is fraught with issues:

1. The Executive Order requiring masks 21-87 (Exh. 5) requires that RIDOH issue a mask "protocol" (attached hereto and also referenced as Exh. D to Defendants' Memorandum in Opposition).[1] That protocol was issued on August 19, 2021, expired on September 18, 2021, and was never renewed.
2. The Executive Order was renewed twice, once on September 17, and again on October 15. (Exh. 42) Neither order references any data or facts to support it, and neither references the RIDOH Emergency Rule.
3. When asked what metric will be used to end the Emergency Order, Dr. McDonald could not give a clear answer, just vague references to cases and hospitalizations being down, and vaccine approval for children. He even testified that when the COVID team met to discuss renewal of the order, there was in fact no discussion; everyone just nodded in approval to continue along.
4. Finally, to the extent the original order makes a number of assertions, upon closer review these claims are neither based on science or facts, nor are evidence of any true emergency.

1 The State's memo suggests that the protocol was issued pursuant to the Proclamation of Quarantine. It was not.

Since the only evidence to support masking is referenced in the Executive Order, a review of that evidence is determinative of this case.

1. The Executive Order:

First, the order claims that Delta variant has become dominant, and is maybe has a viral load 1000 times greater than the original strain of SARS CoV-2, and is 3-4 times more contagious than the original strain.

Whether Delta is the current dominant strain of COVID is irrelevant, given that it is of no greater concern than other strains, according to the CDC.[2] As for the scare quote of 1000x the viral load, Dr. McDonald referenced some unnamed China study to suggest that was possible. Again, there is no actual evidence that this is true. In any event, as Dr. Boston testified without contradiction, the Delta strain is significantly less contagious than the original Wuhan COVID-19 strain and the Alpha variant. (Exh. 6)

Second, the Order notes that unvaccinated people can spread the Delta variant. But that is true of all COVID-19 variants, as Dr. McDonald admitted. The vaccine does not prevent someone from getting the virus, or spreading it, it only lessens the severity of the infection. The CDC didn't always agree with that statement, when in May of this year the CDC Director stated

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

a. Genetic variants of SARS-CoV-2 have been emerging and circulating around the world throughout the COVID-19 pandemic.
b. Viral mutations and variants in the United States are routinely monitored through sequence-based surveillance, laboratory studies, and epidemiological investigations.
c. The US government SARS-CoV-2 Interagency Group (SIG) developed a Variant Classification scheme that defines three classes of SARS-CoV-2 variants:
    i. Variant of Interest
    ii. Variant of Concern
    iii. Variant of High Consequence
d. The Alpha (B.1.1.7), Beta (B.1.351, B.1.351.2, B.1.351.3), Delta (B.1.617.2, AY.1, AY.2, AY.3), and Gamma (P.1, P.1.1, P.1.2) variants circulating in the United States are classified as variants of concern.
e. To date, no variants of high consequence have been identified in the United States.

that vaccinated people could go without masks. But that thinking changed after an outbreak in Provincetown MA among vaccinated men. (Exh. S) The fact that the CDC got this wrong permeates this case. The State relies almost exclusively on CDC pronouncement to support its claim that masks work and are not harmful to children, yet the CDC has gotten so much wrong about this pandemic one wonders why anyone would put such unquestioning faith in their opinions.

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

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

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

Finally, in its most alarmist language, the Order states: "RIDOH's modeling team of statisticians and public health professionals reports that, based on statistical analysis, without continued and improved mitigation measures, the Delta Variant may cause an increase in the rate

of deaths by the end of September 2021." There was no evidence to support this claim presented by the State, even though the order has been renewed twice already.

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

Dr. Bostom proved that point. There have been no COVID-19 deaths of anyone under age 24 in Rhode Island. (Exh. 22) Nationally, there have been approximately 500 COVID-19 deaths under age 18, however, that number is likely inflated given the liberal definition of dying "with COVID" as a review of death certificates show about 35% of COVID-19 recorded deaths in children had no plausible chain of event or significant underlying condition. (Exh 19, Table 1).

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

In fact, COVID-19 is a disease that harms the elderly and those with significant comorbidities: 80% of deaths in Rhode Island are in those over 70 years old (Exh. 21). Nationally, 99.1% of deaths involved those with a least one underlying condition (hypertension, and lipid metabolism being the most common, and obesity, diabetes and anxiety disorders the

strongest risk factors (Exh. 24). Moreover, 64% of deaths were in people with at least 6 underlying conditions (Ex. 24, Table 1)

Nor do scare mongering about pediatric COVID-19 hospitalizations bear scrutiny. There has been an average of about one pediatric hospitalization in the state since the Executive Order was issued. (Exh. 8)[3] There have been no pediatric hospitalizations either "with" or "because of" COIVD-19 since October 4 as testified to by Dr. Bostom. Dr. McDonald could not dispute this fact since he admitted he has not looked at pediatric hospitalizations for a couple of weeks.

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

In an effort to bolster its case, the State introduced evidence to support its claim that Delta is really bad, and that masks are really good. None shows evidence to support the executive order.

2. <u>The Dashboard:</u>

Dr. McDonald testified that the Dashboard was a very important data set that he consulted frequently to monitor the impact of COVID-19 on the state. The State noted the

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

following metrics it felt supported their case: Estimated Prevalence of Infection; Community Transmission; Projected Community Immunity; 14 Day Projected Hospitalizations; and Hospital Overcrowding and the NEDOCS Score. Yet each of these metrics suffers from incomplete or outdated data, and changing definitions. When confronted about this, Dr. McDonald backtracked and claimed this was not the only data he reviewed, but never mentioned what the other data was.

a. Estimated Prevalence of Infection

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

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

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

b. Projected Community Immunity

As with community spread, this data is incomplete and confusing. Does it include natural immunity; Dr. McDonald initially suggested it did. But when asked why the State does not test

for natural immunity, he deflected and claimed there was no evidence natural immunity lasted past 90 days.[4]

c. 14 Day Projected COVID Hospitalizations

This metric appears in the dashboard from June 30 through August 9, after which it is "under development" through September 9, and then disappears completely. Why? Is it because as of August 9, there was no projected surge?

d. Hospital Overcrowding and the NEDOCS Score

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

3. The MMWRs

Nearly every study cited by the State to support its claim that masking works is contained in a Morbidity and Mortality Weekly Report (MMWR). (Exhs. C, D, E, F, G, I, J, K, S and W), or Science Briefs put out by the CDC (Exh. B and R). All of these studies suffer from

4 After the close of testimony, the State published data to show that 89.8% of adults in Rhode Island are now vaccinated. https://ri-department-of-health-covid-19-vaccine-data-rihealth.hub.arcgis.com/ This is the 90 % herd immunity often cited as what is needed to end the pandemic. While it does not include children, the evidence is conclusive that children do not need herd immunity since they are not at risk. Moreover, there is no evidence to show what the natural immunity rate is among children, because the State refuses to gather that evidence.

confounders, as Dr. McDonald called them: confirmation or recall bias, and an inability to generalize or prove a causal relationship between the findings and the conclusions suggested.

For example, the Marin County study was used to suggest that a teacher who removed her masked caused an outbreak of COVID-19 among her students. But "challenges in testing acceptance among possible contacts from outside the school led to difficulty in characterizing the outbreak's actual spread into the community, as is evidenced by later discovery of additional community cases with sequences indistinguishable from those in the school outbreak." (Exh. G) The Georgia study which is cited in paragraph 74 of our Complaint states clearly that there was no statistical difference in COVID-19 incidences among students between schools mandating masks and those that did not. (Exh. F) A Saint Louis University study suggests that "Compared with masked exposure, close contacts with any unmasked exposure had higher adjusted odds of a positive test result." The problem is, "contact tracing were self-reported, which could introduce social desirability and recall bias or inaccurate data regarding mask use." (Exh. D) An "ecological" study comparing counties with mask mandates and those without stated bluntly: "causation cannot be inferred". (Exh. I)

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

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

The problem lies with the weight given these MMWR reports by the State. As is made clear in the 50 year history of the MMWR, these reports are not "peer-reviewed", but instead are go through a "clearance process" to ensure the report conforms to CDC policy. (Exh. 31) These are not independent studies; they are glorified house organs. As such, they are subject to political interference. Even Dr. McDonald had to admit that politics is affecting COVID-19 policy, although he thinks it only affects states like Florida. Yet, he would not acknowledge the political pressure placed on the Governor by teachers unions in this state. (Exh. 40)

4. <u>Randomized Control Trials (RCT)</u>

Dr. McDonald agreed with Dr. Bostom that RCTs are the gold standard for making recommendations, let alone mandates. (Exh. 26) The reason is clear, the major threat to the validity of observational and other non-RCT studies are "intractable biases" which are attempted to be controlled for after the fact, with limited success.

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

Which lead to one of the more incredible assertions by Dr. McDonald that randomized control trials of masking children would be unethical. A rather remarkable statement given that children right now are being experimented upon with an unproven vaccine which could have unknown long-term consequences.[5] But more directly, Dr. McDonald could not cite and was not even aware of the regulations regarding the use of children as research subjects (Exh 32). Dr. McDonald also asserted quite forcefully that as a member of the Independent Review Board, no such RCT would be permitted on children, yet he failed to note that RIDOH's IRB is on one of many thousands of such boards across the country, and he could not even remember the names of the members of his IRB, or when they even last met. (Exh. 33)

In a rare moment of candidness, when asked if he may suffer from his own confirmation bias in wanting to believe masks work, he admitted he might. That is certainly borne out by the complete lack of interest he had in reviewing data and studies which went against his preference for masks. For example, his boss Dr. Nicole Alexander Scott, referenced in a letter to School Districts on August 18, 2021, that southern states without mask mandates for school, "that have recently opened schools without these mitigation measures have seen their children's hospitals capacities pushed to the limits." (Exh. 37) When asked about the dramatic decrease in hospitalizations in these states since schools have reopened (Florida is down 85% since schools opened[6]), the Doctor expressed no interest in researching these facts. He wanted to just focus on Rhode Island, seemingly disavowing the very prominent point his boss made in the letter. The new facts fail to fit his narrative.

The same was true of experiences in other countries like Sweden. When confronted with potential evidence that Sweden had no child deaths and very few hospitalizations from COVID-

5 And ignores that RCT on masking children is being done now in other countries (Exh. 34)
6 https://www.nytimes.com/interactive/2021/us/florida-covid-cases.html

19 where there is no mask mandate, (Exh. 41), again the Doctor expressed no interest in a country with a different health care system. Yet he had no problem analogizing to Rhode Island observational studies from counties in Arizona and California, making no attempt to compare the demographics and health care systems in those counties to Rhode Island. And he eagerly cited an unnamed study from China to suggest kids just love wearing masks.

Dr. McDonald toward the end of his testimony let his mask slip somewhat. He stated that "culturally" this country is not quite ready for permanent masking of kids in school, as is done in some other countries. This is a horrific comment; the state is using an emergency to get children used to being masked in perpetuity, so as to change us culturally?

Masking has become dogma. As one preeminent epidemiologist and biostatistician and professor of medicine at Harvard Medical School, Martin Kulldorff has stated: "As scientists, we must now acknowledge that 400 years of scientific enlightenment may be coming to an end. It started with Brahe, Kepler, Galilei and Descartes. It would be tragic if it ends up as one of many casualties of this pandemic." [7]

ARGUMENT:

In Iggy's Doughboys, Inc. v. Giroux, 729 A.2d 701, 705, the Rhode Island Supreme Court set forth the four factors that this Court must consider when it reviews a trial court's grant of 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

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7 https://brownstone.org/articles/the-decay-of-science-in-the-age-of-lockdowns/ Dr. McDonald claims that he has never heard of Dr. Kulldorff or Dr. Jay Bhattacharya, a professor of health from Stanford. A simple google search would reveal their prominent voices in opposition to mask mandates, and that they consult with states like Florida. As a public health official, it is incredible to claim such ignorance. As an expert witness, it is akin to a constitutional law expert stating he does not know who Clarence Thomas is, since he only reads Supreme Court decisions by Elena Kagan.

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. Id.

Before reaching these four elements, the standard of review this Court gives to the Executive Orders and Emergency Rule needs to be determined.

1. Standard for Executive Order:

In the state's initial brief, it cites the case of Roman Catholic Diocese of Brooklyn, New York v. Cuomo, 141 S. Ct. 63, 67 (2020), for the proposition that "“[s]temming the spread of COVID-19 is unquestionably a compelling state interest." That abbreviated quote is highly misleading, since the Court concluded that sentence as follows:

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

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

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

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

> out of step with our country's present understanding of the Bill of Rights. Extending it too far could lead to disastrous results- as demonstrated by the U.S. Supreme Court's use of *Jacobson* to justify forced sterilization in one infamous case. *See Buck v. Bell*, 274 U.S. 200, 207, 47 S. Ct. 584, 585, 71 L. Ed. 1000 (1927) (citing *Jacobson* and holding: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.").

Patrick Morrisey, West Virginia Attorney General, AGO 09102021 (September 10, 2021) (attached hereto). Justice Oliver Wendell Holmes, Jr.'s infamous last line in his *Buck* decision read: "Three generations of imbeciles are enough." Is this the precedent the State of Rhode Island's Attorney General wants to rely upon?

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

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

There can be no doubt that the forcible masking of children implicates a fundamental right to bodily integrity. For example, the U.S. Supreme Court recognizes that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." Washington v. Harper, 494 U.S. 210, 229 (1990). *See also*, Sell v. United States, 539 U.S. 166 (2003) (anti-psychotic drugs); Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261 (1990) (life-sustaining treatment); Winston v. Lee, 470 U.S. 753 (1985) (surgery under anesthesia); Vitek v. Jones, 445 U.S. 480 (1980) (transfer to mental hospital); Rochin v. California, 342 U.S. 165 (1952) (stomach-pumping). This long line of cases grows from the "well established, traditional rights to bodily integrity and freedom from unwanted touching." Vacco v. Quill, 521 U.S. 793, 807 (1997).

Attending public school in Rhode Island is a fundamental right. (See R.I. Constitution ARTICLE XII OF EDUCATION, Section 1. Duty of general assembly to promote schools and libraries. "The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools and public libraries, and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education and public library services.") And the failure to send a child to school, or to engage in an approved home school program, is punishable by fines and jail. R.I. Gen. Laws § 16-19-1. As many parents testified or swore in the complaint, home schooling is not an option for them, so they must send their children to school with masks.

One should avoid the heated hyperbole which is endemic in the State's brief (Comparing COVID-19 to two world wars and Vietnam; a "ruthless" disease that has "wreaked havoc on the world"; "Restrictions began to ease. A glimpse of 'normal' reappeared. Then, Delta struck."; "There is no irreparable harm caused as a result of wearing a piece of cloth over one's face, but there is when someone gets sick and dies from the refusal by others to do so;" "Removing the mask requirements will put 130,000 Rhode Island children directly in harm's way. Children will become infected. Children will become gravely ill. Hospitalizations will soar and hospitals will become overburdened. **Children will die**. **This is not speculation**.") Certainly wearing a mask is not akin to forced sterilization, but it is hard to glean from the State's brief what the limiting principal is on government medical mandates (and wearing a mask is undoubtedly a medical mandate). To suggest that the legislature is the only check on the Governor's power is of little comfort; Carrie Buck was sterilized pursuant to a legislatively enacted statute.

Also in its brief, the State asks whether a Court should get involved in determining what constitutes an emergency under the Title 30 Chapter 5. It is one thing to declare an emergency as

a hurricane approaches, and mandate the temporary evacuation of the coastline. It is quite another to declare the entire hurricane season an emergency and force people from their waterfront homes for unlimited duration.

To suggest that City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995) limits this Court from ruling in this case is equally absurd. That case was about establishing a state funding formula for education, a classically legislative issue about tax and spending. As a subsequent case involving school funding noted:

> In *Sundlun*, we concluded that the plaintiffs' legal and factual claims had urged a violation of the separation of powers in two respects: they asked us to "interfere with the plenary constitutional power of the General Assembly in education"; and they "urg[ed] that we order 'equity' in [educational] funding sufficient to 'achieve learner outcomes.'" *Sundlun*, 662 A.2d at 58. The plaintiffs in that case had specifically asked the court to "devise, enact, and implement a system of aid to education that would fairly levy the taxes necessary to provide equal educational opportunities to students and that would assign educational resources as uniformly as was practical." Id. at 43. We were deeply troubled by the trial justice's resolution of the plaintiffs' claims, which consisted of adopting a judicially unmanageable standard--"the right to receive an 'equal, adequate, and meaningful education.'" Id. at 58.

Woonsocket School Committee v. Chafee, 89 A.3d 778, 793 (R.I. 2014). There is only one issue to decide in this case: may the Governor by executive order, or RIDOH by emergency rule, mandate masks in school? The answer is yes or no, the easiest of manageable standards for a Court to decide.

2. Emergency Rule 216-RICR-20-10-7

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

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

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

In deciding the issue of whether "imminent peril" existed at the time of the Emergency Rule, this Court cannot ignore the fact that 18 months transpired since the issuance of the original emergency order in March of 2020, and one year since schools returned with mandatory masking in September of 2020. There are School Health Regulations which have been in existence since at least 1964. (Exh. 47) They govern every conceivable health issue that could arise in a school setting: vision, hearing and scoliosis screening; medication administration; school records; immunization requirements; school construction standards; even a ban on hundreds of chemicals in schools.

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

seemed to blame State lawyers for why the mask rule was not promulgated through the school health regulations.

Perhaps the real reason is that it would never pass muster under normal rule making procedures. For example under § 42-35-2.6, the agency must give a concise explanatory statement of the reasons for creation of the rule, including the agency's reasons for not accepting arguments made in testimony and comments.

Under § 42-35-2.7, at least thirty (30) days before the filing of a final rule with the secretary of state, an agency shall publish the notice of the proposed rulemaking on the agency's website and with the secretary of state. The notice must also be published in a newspaper or newspapers having aggregate general circulation throughout the state. The notice must include, *inter alia*, "Where, when, and how a person may comment on the proposed rule and request a hearing, including the beginning and end dates of the public comment period." And "a citation to each scientific or statistical study, report, or analysis that served as a basis for the proposed rule, together with an indication of how the full text of the study, report, or analysis may be obtained."

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

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

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

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

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

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

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

3. Proclamation of Quarantine

It is a curious thing that the Governor decided that he would issue such a proclamation of quarantine the same day as he issued his executive order declaring a new state of emergency on

August 19, 2021. First, it was never "proclaimed" as defined by Black's Law Dictionary in the sense of "causing some state matters to be published or made generally known." There has been no public pronouncement by the Governor that he issued this proclamation; I doubt anyone knew of it prior to the State's filing of its memorandum.

As for the legal effect of declaring a "quarantine", and then not ordering a quarantine but ordering a mask mandate instead, it defies any logical reading of the statute. There is the phrase in R.I. Gen. Laws § 23-8-18, that the Governor "shall authorize and empower the state director of health to take any action and make and enforce any rules and regulations that may be deemed necessary to prevent the introduction and to restrict the spread of infectious diseases in the state." This phrase clearly relates back to the issuance of a quarantine, not any other act by the Department of Health. To the extent that the statute authorizes the Director of Health to issue any such "rules and regulations" that part of the statute has been superseded by the Administrative Procedures Act.

It appears the quarantine statute, § 23-8-18, was last amended in 1939. The APA was enacted in 1962 and took effect on January 1, 1964. R.I. Gen. Laws § 42-35-18. There can be no dispute that it applies to the Department of Health. R.I. Gen. Laws § 42-35-1.1. Thus, any rules or regulations promulgated by the Director of Health must be in accordance with its statutory authority and subject to the APA, including but the normal rule making procedures, the emergency rule making statute, and the ability of this Court to review such regulations.

Most importantly, when RIDOH issued its emergency rule, it never even cited this Proclamation of Quarantine. It seems a waste of time even to argue this point.

Turning now to the four elements for a preliminary injunction in this case:

4. **The Four Elements for a Preliminary Injunction Favor Its Issuance Banning Enforcement of the Executive Order and Emergency Rule.**

   a. **Plaintiffs will likely succeed on the merits.**

The Executive Order

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

> When engaged in statutory construction, this Court is directed to give effect to the plain meaning of a statute that is clear and unambiguous. *Western Reserve Life Assurance Co. of Ohio v. ADM Associates, LLC*, 116 A.3d 794, 798 (R.I. 2015) (*quoting Hough v. McKiernan*, 108 A.3d 1030, 1035 (R.I. 2015)). The ultimate goal of statutory construction "'is to give effect to the purpose of the act as intended by the Legislature.'" *Lang v. Municipal Employees' Retirement System of Rhode Island*, 222 A.3d 912, 915 (R.I. 2019) (*quoting Bluedog Capital Partners, LLC v. Murphy*, 206 A.3d 694, 699 (R.I. 2019)). "'When the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.'" *Town of Exeter, by and through Marusak v. State*, 226 A.3d 696, 700 (R.I. 2020) (quoting Lang, 222 A.3d at 915). Additionally, this Court must "'consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections.'" *5750 Post Road Medical Offices, LLC v. East Greenwich Fire District*, 138 A.3d 163, 167 (R.I. 2016) (*quoting ADM Associates, LLC*, 116 A.3d at 798).

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

So what does the Emergency Powers statute, as amended, mean? The amendment reads:

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

Clearly, the intent of the amendment was to terminate the existing Emergency Orders issued by Governor Raimondo some 487 days earlier. It also meant that no new COVID-19 order could be

issued. Finally, to avoid the non-delegation issue which arose when the Governor issued unending extensions of the emergency order, the General Assembly capped any new orders at 180 days.

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

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

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

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

> Viruses constantly change through mutation, and new variants of a virus are expected to occur. Sometimes new variants emerge and disappear. Other times, new variants persist.

> Numerous variants of the virus that causes COVID-19 are being tracked in the United States and globally during this pandemic.

See https://www.cdc.gov/coronavirus/2019-ncov/variants/variant.html

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

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

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

The Emergency Rule:

Perhaps aware of the shaky legal ground the Governor has for issuing his executive orders, the State discovered another statute to invoke, the Emergency Rule. R.I. Gen. Laws § 42-35-2.10. When asked why RIDOH waited to find "imminent peril" some two and one-half months after the Delta variant became a concern around the beginning of July, Dr. McDonald's answer was the agency did have time to go through normal rulemaking procedures. Nor could he answer why RIDOH never followed the school health regulations procedures for the past 18

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

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

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

In summary, neither the Executive Order, nor the Emergency Rule which flows therefrom, is a valid exercise of governmental power. They are unenforceable as a matter of law.

b. Irreparable Harm:

Dozens of parents in this case, from all over the State, have proven the harm their

children are suffering because of the mask wearing in school: Struggle breathing; headaches; sore throats; face rashes; heat causing moist masks and itchiness; anxiety, mood swings, exhaustion, anger, withdrawal and depression; struggles with home schooling and the loss of in school experiences; speech impaired children failing to get adequate instruction by seeing their teacher speak, and being able to respond clearly; children with breathing difficulty, such as asthma (not a recognized disability which would exempt them from wearing a mask) having their respiration impaired; loss of interest in school; confusion over why only they have to wear masks in school and not anywhere else; abusive behaviors by teachers, principals, nurses and aides demanding strict adherence to mask wearing without breaks, "hurry up" face forward", silent lunches akin to Dickensian scenes out of Oliver Twist; inconsistent enforcement of the mask mandate where some staff is understanding and others militant enforcers; lack of learning time as teachers and staff focus time on constantly monitoring masking and social distancing; difficulty understanding teachers or peers when they talk.

There are many more parents, some afraid to come forward publicly to be subject to abuse which some of these parents have already been subjected to.

After the powerful scolding certain parents gave to the State's attorneys, we hope that the State has abandoned its cruel dismissal of the harm being suffered by the children in this case. The State tried to challenge the parents' evidence of harm, claiming they were not medical professionals; ironic, since so many of the studies cited by the State involve people who self-report the effects of wearing masks. Certainly not all children complain of wearing masks, and some may actually enjoy it, a potential future problem in itself that anyone can see coming, as some parents have complained their children are too attached to their masks, even wearing them at home and outside. But however grudgingly, Dr. McDonald had to admit there is at least some harm to kids, albeit not enough that he would consider significant.

No medical professional can say with any certainty that these children are not suffering harm. There have been no studies to that effect. What we do know is that many countries will not allow their school children to be masked for an entire school day, given the emotional and physical harm it presents.

If there is one single takeaway from the seven days of hearing in this case it is that the State Medical Director in charge of COVID-19 response is more willing to give credence to some unnamed study in China he read over the weekend that child are not harmed by masks, than he is to parents and children in this State who are expressing real concerns. Dr. McDonald and the State Health Department should be ashamed of themselves.

c. Balance of the Equities and public interest:

Are liberty and the rule of law in the public interest, or just the need to feel safe? That is an age old concern as some people are willing to trade away freedom for security. The United States in not built on such a compromise. As the U.S. Supreme Court noted in Cuomo:

> Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure.

In what culture do we sacrifice the long-term physical and emotional well-being of children to make the old, obese or neurotic *feel* safe? Not *be* safe, because there is no evidence that masking children makes anyone at risk of a serious COVID-19 reaction safer. It is performance art.

Dr. McDonald had to acknowledge that he cannot stop emergency rooms being overcrowded because of other illnesses and accidents, but he arrogantly proclaimed that he could stop them from being overrun by COVID-19 patients. Yet there is not one study which causally relates masking children in schools with lowering emergency room overcrowding. The one

study the State introduced (Exh. W) attempted to correlate vaccination rates with an increase in COVID-19 cases, hospitalizations, and ED visits. But again the study cited as a limitation that "data used to quantify COVID-19 cases, ED visits and hospital admissions are subject to reporting inconsistencies." Also, the study did could not characterized the reason for the visit; it could be for anything and the child just happened to test positive. It is a useless study, certainly for masking.

d. Status quo ante:

In this case, it is clear that the *status quo ante* was what was announced by the RIDE, RIDOH and the Governor on June 29: there would be no mask mandate in public schools. (Exh. 46) As this Court has stated in the case of Hebert v. City of Woonsocket, C.A. (PC 2013-3287, Super. Ct R.I., February 4, 2016, Lanphear, J., *rev'd on other gro*unds Hebert v. City of Woonsocket, 213 A.3d 1065 (R.I. 2019)) at footnote 24: "In considering the status quo, the Court considers the status prior to the changes first made by the defendant." *See also*, Foster Glocester Regional School Bldg. Committee v. Sette, 996 A.2d 1120, 1128 (R.I. 2010) (trial justice properly found status quo to be maintaining Committee member in office). The *status quo* on August 19, the day of the executive order, was no mask mandate.

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

CONCLUSION:

For all of the foregoing reasons, Plaintiffs request that this Court issue a preliminary injunction prohibiting the Governor from enforcing Executive Orders 21-86 and 21-87, and prohibiting the Rhode Island Department of Health from enforcing its universal mask mandate for public schools. Plaintiffs also request that this Court issue a preliminary injunction prohibiting the Rhode Island Department of Health from enforcing Emergency Regulation 216-RICR-20-10-7, "Masking in Schools".

Respectfully submitted
Plaintiffs,
By their Attorneys,

/s/Gregory P. Piccirilli, Esquire #4582
148 Atwood Avenue, #302
Cranston, RI 02920
(401) 578-3340
gregory@splawri.com

CERTIFICATION

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

Michael W. Field, Assistant Attorney General
150 South Main Street
Providence, Rhode Island 02903
mfield@riag.ri.gov

Chrisanne Wyrzykowski, Assistant Attorney General
150 South Main Street
Providence, Rhode Island 02903
cwyrzykowski@riag.ri.gov

Jonathan Whitney, Special Assistant Attorney General
150 South Main Street
Providence, Rhode Island 02903
jwhitney@riag.ri.gov

Morgan A. Goulet, Executive Office of Health and Human Services
Rhode Island Department of Health
Three Capitol Hill – Cannon Building
Providence, Rhode Island 02908
morgan.goulet@ohhs.ri.gov

/s/Gregory P. Piccirilli, Esquire #4582