UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

DR. STEPHEN T. SKOLY, Jr.

Plaintiff,

vs. : C.A. 1:22-cv-00058-JJM-LDA

DANIEL J. MCKEE, in his individual and official capacity as the Governor of the State of Rhode Island, *et al*.

:

Defendants.

<u>DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS</u> <u>MOTION TO DISMISS</u>

Now come the Defendants and respectfully file this supplemental memorandum. This memorandum is intended to supplement and advise the Court of developments that have occurred after the State filed its last memorandum. All of these developments are susceptible to judicial notice and/or are being brought to this Court's attention consistent with counsels' duty to inform the Court of relevant developments. This memorandum is not intended to supplement the legal arguments that have already been made.

- 1. On or about May 11, 2023, the COVID-19 federal Public Health Emergency ("PHE") ended.
- 2. On or about May 11, 2023, the COVID-19 state of emergency in Rhode Island ended. https://governor.ri.gov/executive-orders/executive-order-23-05.

- 3. On June 5, 2023, the Centers for Medicare and Medicaid Services (CMS), Department of Health and Human Services (HHS), published a proposed rule. See 88 FR 36485. The proposed rule withdraws the CMS vaccine requirement set forth in 86 FR 61555. The proposed rule will be effective August 4, 2023. https://www.federalregister.gov/documents/2023/06/05/2023-11449/medicare-and-medicaid-programs-policy-and-regulatory-changes-to-the-omnibus-covid-19-health-care#sectno-citation-491.8. CMS has indicated that prior to the August 4, 2023 effective date, it will no longer enforce the CMS vaccine requirement set forth in 86 FR 61555. See 88 FR 36490 ("Since facilities are no longer operating under PHE circumstances, and considering the lower policy priority of enforcement within the remaining time, we will not be enforcing the staff vaccination provisions between now [June 5, 2023] and August 4, 2023.").
- 4. Because CMS no longer enforces its vaccine requirement, RI DOH will not and does not enforce the CMS vaccine requirement set forth in 216-RICR-20-15-7.6.1.B.3. Additionally, RI DOH advises the Court that it expects to issue a proposed rule that would amend 216-RICR-20-15-7. The proposed rule will, inter alia, repeal Section 7.6.1.B.3 and will continue to not require healthcare workers or healthcare providers to vaccinate for COVID-19.

Respectfully submitted,

Daniel J. McKee, in his individual and official capacity as the Governor of the State of Rhode Island; Nicole Alexander-Scott, MD, MPH, in her individual and official capacity as former RI DOH Director; James McDonald, MD, MPH, in his individual and official capacity as former Interim RI DOH Director; Utpala Bandy, MD, MPH, in her individual and official capacity as Interim RI DOH Director; State of Rhode Island; and RI DOH.

Defendants,

BY:

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I filed the within via the ECF filing system and that a copy is available for viewing and downloading. I have also caused a copy to be sent via the ECF System to counsel of record on this 14th day of July, 2023.

/s/ Michael W. Field