STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: November 12, 2021]

RICHARD SOUTHWELL, et al.,	:	
	:	
Plaintiffs,	:	
v.	:	**C.A. No. PC-2021-05915**
	:	
DANIEL J. MCKEE, in his official capacity as the Governor of the State of Rhode Island; and NICOLE ALEXANDER-SCOTT, in her official capacity as the Director of the Rhode Island Department of Health,	:	
	:	
Defendants.	:	

DECISION

LANPHEAR, J. This matter is before the Court on Plaintiffs'[1] Motion for a Preliminary Injunction and the ensuing Objection by Defendants Daniel J. McKee, in his official capacity as the Governor of the State of Rhode Island (Governor McKee or the Governor), and Dr. Nicole Alexander-Scott, in her official capacity as the Director of the Rhode Island Department of Health (Director Alexander-Scott or the Director) (collectively, Defendants). Plaintiffs, the parents of children affected by the state's school mask mandate, seek a preliminary injunction against the

[1] In addition to Richard Southwell, the Plaintiffs are Jonathan Barrett, Scott Belford, Thomas Boylan, Orlando Braxton, Beverly Chatterley, Charles Chatterley, Maddalena Cirignotta, Bill Connell, Jr., Kiela Daley, Jill DiGiglio, Jeffrey DiStefano, Rebecca DiStefano, Daryl Evans, Danielle Ferguson, Melissa Fitzgerald, Meredith Fortune, Christina Geremia, Susan Graham, Cheryl Greathouse, Zachary Greathouse, Peter Lawrence, Jessica LeBlanc, Daniel Medeiros, Julie McKenney, Paul McKenney, Amy Miller, Carissa Moglia, Carolyn Moretti, Daniel Penengo, Rachel Penengo, Peter Phelps, Edward Quattrini, Lenix Ramos, Ana Roque, Aimee Sayers, Ellen Schaffer, Shanley Swain, and Lori Wycall. Verified Amended Compl.

Executive Orders and emergency regulation underlying the mandate. Jurisdiction is pursuant to G.L. 1956 §§ 8-2-13 and 9-30-1.

I

Findings of Fact

On September 30, 2021, the Court began its hearing on Plaintiffs' Motion for a Preliminary Injunction. After conducting a seven-day hearing on Plaintiffs' Motion, the Court makes the following findings of fact.

In March 2020, in response to the onset of the COVID-19 pandemic in Rhode Island, then-Governor Gina Raimondo declared a state of emergency by Executive Order. Exec. Order 20-02. The SARS-CoV-2 virus, which is responsible for COVID-19, was first identified in Rhode Island in February 2020. At that time, no one was known to be immune and no vaccine was available, so pursuant to the declaration the Governor ordered quarantines, stay-at-home orders, and the wearing of masks in public settings.

The COVID-19 infection is transmitted person-to-person, but not all of those infected have symptoms. The disease spreads primarily by respiratory droplets from the breath which can contain particles of the virus that causes COVID-19. These droplets can spread by talking, singing, and exhaling, and can project some six feet. Air circulation and humidity are factors which affect the droplets in the air. The disease may also spread, but to a lesser extent, through contact with droplets on objects.

As will be discussed in more detail below, multiple parents testified concerning the mask mandate's effects on their children's days at school. The Court finds that these children are suffering and reasonably infers that children across the state are suffering with the mask mandate. The parents discussed how their children's ability to learn has been affected, how uncomfortable

masks can be for the children through the day, and their concern for their children overall. There is no doubt that the parents who testified share the same concern for the quality of their children's lives as do other parents across the state.

Defendants' expert witness Dr. James McDonald serves as the Medical Director for the Rhode Island Department of Health (Department or DOH). He received his Baccalaureate degree at Siena College, and his M.D. at Loyola University. He interned with the National Naval Medical Center in Bethesda in pediatrics and has consistently practiced in pediatrics since 2003. He completed his residency in preventative medicine at the State University of New York and received his Master's Degree in public health from the University of North Carolina. He is a member of the faculty at the Brown University Schools of Medicine and Public Health. Board certified in both pediatrics and preventative medicine the Court found him to be qualified as an expert in both fields. Dr. McDonald's duties at the DOH include developing policy and dealing with stakeholders; he has also been the Medical Director of the COVID Leadership Team within the Department since November 2020.

In April 2020, Dr. McDonald and others approached then-Governor Raimondo to recommend masking in schools. In May 2021, after about 68% of the state's population was fully vaccinated against COVID-19 and as the number of infected people was declining, the mask mandate was lifted. In the summer of 2021, however, the Delta variant of the SARS-CoV-2 virus became the dominant strain in Rhode Island. Compared to the original strain of the virus, the Delta variant is more contagious, more transmissible, and makes those who have it more ill. The number of viral particles in an infected person is larger, making transmission more probable. On August 14, 2021, some 468 persons in the state were infected. As state officials hoped to return more children to school in the fall of 2021, social distancing would be reduced from six to three feet.

Therefore, the COVID Leadership Team recommended a school mask mandate. The Team, on which Dr. McDonald serves, met daily and made recommendations to the Governor. Dr. McDonald claimed that studies show that masking was effective, and so the Team followed Dr. McDonald's advice and recommended masking, ventilation, and then distancing, in that order, as priorities to protect students. Specifically, Dr. McDonald relied on:

> 1. A May 2021 Centers for Disease Control (CDC) science brief regarding masking (Exhibit B);
> 2. A March 2021 CDC study on the effect of mask mandates in a peer reviewed journal (Exhibit C);
> 3. A February 2021 peer-reviewed study on maximizing the fit of cloth and surgical masks (Exhibit E);
> 4. A May 2021 study on mask use and ventilation in elementary schools (Exhibit F);
> 5. A September 2021 peer-reviewed study of SARS outbreaks (Exhibit G).

On August 19, 2021, Governor McKee declared a state of disaster emergency for the Delta variant of the SARS-CoV-2 virus. Exec. Order 21-86. Originally set to expire after thirty days on September 18, 2021, that state of emergency has been extended by two additional Executive Orders and is currently in effect until November 13, 2021. Exec. Orders 21-97, 21-103. A school mask mandate was also instituted on August 19, 2021 through Executive Order 21-87, which ordered local educational agencies that had not adopted a universal indoor masking requirement to abide by a universal indoor masking protocol to be developed by the DOH. On August 20, 2021, the DOH issued that Protocol. Executive Order 21-87 has also been extended and is currently in effect until November 13, 2021. Exec. Orders 21-97, 21-103. There was no direct evidence submitted regarding the basis of the Governor's Orders.

On September 16, 2021, Plaintiffs filed suit against Governor McKee. In their Verified Complaint, Plaintiffs sought a declaratory judgment that the Governor exceeded his constitutional and statutory authority in issuing Executive Orders 21-86 and 21-87. Plaintiffs also filed a Motion

for a Preliminary Injunction restraining the enforcement of Executive Orders 21-86 and 21-87, any DOH emergency regulations or protocols issued pursuant to those Orders, and any other Executive Orders relating to the August 19, 2021 emergency declaration. On September 23, 2021, the DOH enacted 216-RICR-20-10-7, emergency regulations mandating masks in schools. Exhibit H. On September 28, 2021 Plaintiffs filed an Amended Verified Complaint naming additional Plaintiffs, adding Director Alexander-Scott as a Defendant, and seeking declaratory and injunctive relief against the enforcement of 216-RICR-20-10-7.

At the hearing on Plaintiffs' Motion, Mr. Richard Southwell testified how his children were learning in school pre-COVID, how they changed to distance learning when the pandemic began, and how they had done some home schooling. He was particularly concerned of a learning loss as children wore masks all days, were distanced, rooms were realigned, and breaks were limited. Desks face the same direction. This was a large change from summer programs where the children were not required to mask. As things grew worse, one child was withdrawn from high school as the Southwells tried to homeschool. Mr. Southwell assesses risks for his occupation as an actuary. He explained how he worked on models and his hypotheses were challenged regularly. He questioned whether Dr. McDonald used actuarial sciences for his conclusion.

Ms. Maddalena Cirignotta is a Spanish teacher with master's degrees in education and Spanish.[2] She described how her two children's classes went from distance learning to in-person learning to masking. As her children were enrolled but would not mask, they were released from school and she is applying for homeschooling. When masked, the children complained of headaches and nausea. Snacks were refused and her children became grumpy and lethargic. Ms. Cirignotta explained that parents were told there would be breaks but in practice talking is not

[2] The parents are from different communities.

allowed. Her children were in fear of getting caught without masks. Teachers were not allowed to be near the students for personal assistance.

Mr. Orlando Braxton and his wife have four children of various ages. With the children being masked, they were removed from school for homeschooling. He described how difficult it was for them to come home with dirty masks while complaining. His wife picked up the children at school to limit their time at school with masks. Some teachers gave breaks, others did not. The children were nervous of getting in trouble if masks were not worn properly. Masks were then worn at sports events after school. Talking was limited, even at lunch.

Ms. Julie McKenney has two children at school, is an active member of the PTO and participated in many meetings on the masking proposals. Prior to the state mandate, masks were recommended but optional. The children react differently to masking, sometimes concerned that the teacher won't hear them through the masks, sometimes withdrawing more. One child with allergies was sent home often because of the coughing. PCR tests were required. The children don't wear masks, except in school. Ms. McKenney has met with parents from across the state who object to masking.

Dr. Andrew Bostom testified as an expert witness for the Plaintiffs. While Dr. Bostom received his M.D. from the State University of New York in 1990, followed by a Master's Degree in epidemiology from Brown University, he acknowledged that he no longer maintains a practice. He has served at Pawtucket Memorial Hospital since 2013. At the hearing, he claimed to be working with Brown University Center for Primary Care and Prevention, though his present role became unclear during cross-examination. He specialized in cardiac intervention with epidemiology but does not appear to be currently certified in any field, having last been recertified in internal medicine in 2014. Dr. Bostom has studied raw data of tests involving COVID-19,

having used scientific methods for other afflictions. He has been qualified as an expert on vaccine mandates in other jurisdictions. The Court found him qualified to give expert testimony as an epidemiologist.

Dr. Bostom claimed that where there are more test results, there is a higher likelihood of positive test results, and explained it as a higher viral load. He then criticized several of the studies relied upon by Dr. McDonald, as they were not peer reviewed or not randomized control studies. Dr. Bostom testified that he examined hundreds of death certificates to review the causes of death and noted that COVID-19 was not usually listed as the primary cause. He acknowledged that people had died with COVID-19 but questioned whether it was the primary cause. He stated that as intensive care units are often filled to accommodate others in the hospital, it was not surprising that they were filled now. He suggested the total occupancy rate should be considered as a more reliable indicator of hospital overcrowding, and that the DOH's conclusions on overcrowding therefore relied on improper measures.

Dr. Bostom testified two months after the state needed to determine if masking in schools was necessary. While that may appear close in time, most of the studies noted by both physicians are recent, as COVID-19 only became a pandemic in 2020. For example, Dr. Bostom criticized Dr. McDonald's concern for the lingering symptoms in COVID-infected children but relied on a study in the Pediatric Infectious Disease Journal that noted the absence of a control group. Exhibit 13. Dr. Bostom prepared Exhibit 23 to support his conclusion that there was no relationship between the mask mandate and the continued transmission of the virus. He then noted the similarities of a 1918 study (for a different pandemic) by a Dr. Kellogg as a randomized control study which doubted the efficiency of masks.

Dr. Bostom also prepared Exhibit 27, which he claimed to be a pool of twelve randomized control trials on masking involving about 18,000 participants which were "meta-analyzed" to demonstrate that masking did not reduce transmission. Dr. Bostom then analyzed whether masks could be harmful and concluded that they may be, reviewing a variety of studies. He acknowledged that there were few randomized control studies for children under age eighteen. On cross-examination, Dr. Bostom noted that he had not been licensed to practice in Rhode Island since 2018 and does not currently see patients. He has never treated a COVID patient.

Defendants' expert witness Dr. McDonald testified that the mask mandate was imposed for children as they are in a fixed location in school for a long period of time, during a period of asymptomatic spread and in a high-risk setting. The Delta variant would make the spread easier. Adults are more likely to move about, can be vaccinated, and have more options for treatment if infected. It was Dr. McDonald's opinion that if masks were removed from schools, the incidence of COVID-19 transmission would increase as "SARS can be spread by aerosols," more people would be infected, and more people would need to be quarantined. Meanwhile, emergency hospital beds were still available, but did not need to open as the incidence of COVID-19 appeared to be stable.

Dr. McDonald explained that some COVID-19 treatments are now available for persons over twelve years old. He opined that the death rate from COVID-19 in Rhode Island is now relatively low because of the countermeasures the state has employed including vaccinations, masking, distancing, ventilation, hand washing, staying at home, and the like. The high quality of our state's health care also contributes to its success. Dr. McDonald also explained that children are prone to multi-system inflammatory symptomology. While rare, with twenty-three cases

identified in Rhode Island, it can be life-threatening. Vaccinations were not currently available for children under twelve years.[3]

Testifying after Dr. Bostom, Dr. McDonald agreed that double blind randomized controlled studies were an excellent means of scientific testing for medical treatments and were considered the "gold standard." Dr. McDonald noted that it could be difficult to find a control group to study masking on children as it would be unethical to place children at unprotected risk. Hence, he surmised that an independent research board would be unlikely to approve such a study. Observational studies, which look back at what has happened in similar situations (*e.g.*, Exhibit G) have been helpful in supplying information. Such studies which have been peer-reviewed have increased reliability.

Dr. McDonald testified that the DOH and the State continue to monitor the COVID pandemic by use of a COVID Data Dashboard, produced two times a week and containing a summary of critical data. Testing rates, the number of cases, laboratory times, hospital admissions, available beds, ventilators in use, and time in waiting rooms are all included. Dr. McDonald particularly focused on the Dashboards for August to demonstrate how the rates of infection were increasing after having declined in July. Exhibits N-Q. He reviewed the statistics in the dashboards at length. He noted the increased use of hospitals and their overcrowding. Dr. McDonald had telephone conversations with chief executives and medical officers of hospitals on August 21, 2021 where this overcrowding was discussed. Dr. MacDonald had also learned from the DOH laboratory that the rate of the Delta variant infection was increasing in the state, which

[3] COVID-19 vaccinations are now becoming available for children aged 5-11, after the close of evidence and well after the challenged regulations were promulgated.

he found "very concerning." From all of this he concluded that the Delta strain was more contagious, a return to school would increase risks, and masks were appropriate.

Dr. McDonald stated that three pediatric deaths in Rhode Island were related to COVID, although there may be multiple causes of death. On cross-examination he would minimize this, noting that of the three children, two of them had other significant causes of death.

Continuing his direct examination, Dr. McDonald discussed more studies which he seemed to reference (and possibly locate) after Dr. Bostom's testimony. Dr. McDonald relied on a document issued by the Journal of the American Medical Association (JAMA) (Exhibit T) to conclude that there were few or no adverse effects from masking children in school settings. He also discussed the Provincetown study (Exhibit S) which influenced him by showing that even vaccinated people can spread the variant, so they should continue to mask. He opined that all children should wear masks in a school setting.

On cross-examination, Dr. McDonald agreed that the state was not intending to impose a mask mandate on schools at the end of July but added that the situation had changed through the summer, so new regulations were issued. Dr. McDonald assisted in drafting the emergency regulations. He suggested that a full (non-emergency) regulation would take up to 120 days to establish, with the required hearing, but that there was insufficient time before the start of school. He considered there to be "imminent peril" as of July 21, 2021. He admitted he had not done a "cost-benefit analysis" when considering masking. He acknowledged that 65% of the kindergarten through twelfth grade students who were found to be infected, showed no symptoms of COVID-19. He added that the May 7, 2021 CDC publication was highly influential for him.

Dr. McDonald discussed independent review boards and the need to avoid risk for children. He discussed the various studies cited by Dr. Bostom but noted that he did not rely on them for

recommending a mask mandate for children. Dr. McDonald appears to have reviewed most of those studies for his cross-examination. Dr. McDonald testified that he relies on the many reports he reads to make conclusions, including those that favored and opposed masking, but concluded that masking was based on the best information available at the time, even though it was not always politically favored.

Dr. McDonald indicated that some other states' surgeon generals opposed masking and said he watched what other states were doing but studied Rhode Island far more closely. He noted that Rhode Island was more densely populated than other states. He discussed Exhibit 37 and was questioned on why it took so long to promulgate a regulation. He stressed that by mid-August 2021, there was not time for a full regulation, only an emergency regulation, which needed to be sufficiently detailed.

Dr. McDonald acknowledged that the Governor continued his Executive Order on October 15, 2021 (Exhibit 42), and that the extension had been discussed by the COVID Leadership Team. He also acknowledged that the positivity rate was more of a focus earlier in the pandemic. He explained and distinguished the multiple factors considered on the Dashboards. He admitted that the Dashboard did not detail the total occupancy of the hospitals and focused on intensive care beds. He acknowledged that infection trends, projected immunity, and total ICU occupancy were omitted from later Dashboard reports.

After the hearing concluded on October 19, 2021, both sides submitted additional briefs and this Court heard final arguments on November 3, 2021.

II

Standard of Review

A

Preliminary Injunction

Plaintiffs have asked this Court to issue a preliminary injunction that stays the enforcement of Executive Orders 21-86 and 21-87 and the DOH's emergency regulations and restrains the Governor from issuing any further executive orders related to COVID-19. Determining whether to grant a motion for a preliminary injunction requires this Court to consider:

> "'whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo.'" *Gianfrancesco v. A.R. Bilodeau, Inc.*, 112 A.3d 703, 708 (R.I. 2015) (quoting *Vasquez v. Sportsman's Inn, Inc.*, 57 A.3d 313, 318 (R.I. 2012)).

B

The Governor's Executive Powers

Article V of the Rhode Island Constitution provides that "[t]he powers of the government shall be distributed into three separate and distinct departments: the legislative, executive and judicial." R.I. Const. art. V. Under Article IX of the Rhode Island Constitution, "[t]he chief executive power of this state shall be vested in a governor" who "shall take care that the laws be faithfully executed." R.I. Const. art. IX, §§ 1, 2. "The executive power is the power to execute the laws, that is, to carry them into effect, as distinguished from the power to make the laws and the power to judge them." *In re Request for Advisory Opinion from House of Representatives (Coastal Resources Management Council)*, 961 A.2d 930, 940 (R.I. 2008) (citing 16A Am. Jur. 2d

Constitutional Law § 255 (2d ed. 2020)).[4] The legislative power of the state inheres in the General Assembly. *See* R.I. Const. art. VI, §§ 1, 2.

When the Governor acts pursuant to the express statutory authorization of the General Assembly, "'his authority is at its maximum, for it includes all that he possesses in his own right plus all that [the Legislature] can delegate.'" *Chang v. University of Rhode Island*, 118 R.I. 631, 638, 375 A.2d 925, 929 (1977) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). "If his act is held unconstitutional under these circumstances, it usually means that the . . . Government as an undivided whole lacks power." *Youngstown*, 343 U.S. at 636–37 (Jackson, J., concurring).

In analyzing the scope of legislation that empowers the Governor to act, the Rhode Island Supreme Court has followed its standard approach of attempting to discern and effectuate the Legislature's intent. *See Pontbriand v. Sundlun*, 699 A.2d 856, 866 (R.I. 1997); *see also In re State Employees' Unions*, 587 A.2d 919, 921-25 (R.I. 1991) (upholding decision of trial justice that General Assembly had empowered Governor to balance budget by shutting down state agencies). The "'best indicator'" of the Legislature's intent is the plain language of the statute. *DeMarco v. Travelers Insurance Co.*, 26 A.3d 585, 616 (R.I. 2011) (quoting *State v. Santos*, 870 A.2d 1029, 1032 (R.I. 2005)). In this area, the Supreme Court has also applied the rule of statutory construction that "favor[s] [the interpretation] which presents no potential constitutional difficulties." *Pontbriand*, 699 A.2d at 866.

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[4] *Coastal Resources Management Council*, 961 A.2d at 932, is one of several advisory opinions issued by the Rhode Island Supreme Court that analyze executive and legislative powers under the state constitution. While not binding as precedent, these advisory opinions may nonetheless be "highly persuasive[.]" *Woonsocket School Committee v. Chafee*, 89 A.3d 778, 792 (R.I. 2014).

One such potential constitutional difficulty is the nondelegation doctrine, which prohibits unconditional delegations of legislative authority to the executive branch. *See, e.g.*, *Almond v. Rhode Island Lottery Commission*, 756 A.2d 186, 191–92 (R.I. 2000). The General Assembly may, however, delegate "'limited portions of the legislative power, if confined in expressly defined channels[.]'" *Almond*, 756 A.2d at 192 (quoting *Opinion to the Governor*, 88 R.I. 202, 205, 145 A.2d 87, 89 (1958)). "'In sum, the delegation of legislative functions is not a per se unconstitutional action. Instead, it is the conditions of the delegation—the specificity of the functions delegated, the standards accompanying the delegation, and the safeguards against administrative abuse—that [are] examine[d] in determining the constitutionality of a delegation of power.'" *Almond*, 756 A.2d at 192 (quoting *Milardo v. Coastal Resources Management Council of Rhode Island*, 434 A.2d 266, 270-71 (R.I. 1981)).

Among the specific powers that may permissibly be delegated to the executive branch is the "quasi-legislative" authority to promulgate rules and regulations. *Coastal Resources Management Council*, 961 A.2d at 939 n.14. "The power of the state to regulate for the protection of public health, safety, and morals . . . [is] also known as the police power[.]" *Milardo*, 434 A.2d at 269. "'[W]here neither a suspect class nor a fundamental right is implicated,'" judicial review of such regulations is limited to ensuring that "'a rational relationship exists between the provisions of the statute [or ordinance] and a legitimate state interest.'" *Federal Hill Capital, LLC v. City of Providence by and through Lombardi*, 227 A.3d 980, 984–85 (R.I. 2020) (quoting *Riley v. Rhode Island Department of Environmental Management*, 941 A.2d 198, 206 (R.I. 2008)). "When the court finds that a statute is within a proper exercise of the police power it will not inquire into the wisdom, propriety or adequacy of such legislation, unless it plainly appears that the conclusion of the legislature in the matter was clearly not well founded, but was arbitrary and unreasonable."

Opinion to the Governor, 75 R.I. 54, 62, 63 A.2d 724, 729 (1949); *see also Berger v. State Board of Hairdressing*, 118 R.I. 55, 59, 371 A.2d 1053, 1055 (1977). As a result, and as will be described in more detail below, the Governor has broad powers under state law to respond to an emergency.

III

Analysis

A

Irreparable Harm

A party seeking a preliminary injunction "'must demonstrate that it stands to suffer some irreparable harm that is presently threatened or imminent and for which no adequate legal remedy exists to restore that plaintiff to its rightful position.'" *Nye v. Brousseau*, 992 A.2d 1002, 1010 (R.I. 2010) (quoting *National Lumber & Building Materials Co. v. Langevin*, 798 A.2d 429, 434 (R.I. 2002)). "Irreparable injury must be either 'presently threatened' or 'imminent'; injuries that are prospective only and might never occur cannot form the basis of a permanent injunction." *Id.* (quoting *National Lumber & Building Materials Co.*, 798 A.2d at 434).

This Court heard credible testimony from multiple Plaintiffs that their children were suffering adverse effects from the requirement that they wear masks throughout the school day. These adverse effects include physical and emotional discomfort and interference with the children's ability to interact with teachers and peers. Plaintiffs themselves experienced the distress of witnessing their children's discomfort, and some Plaintiffs made the difficult decision to homeschool their children rather than send them to school with masks. While not disputing Plaintiffs' testimony on those facts, Defendants point to the lack of medical evidence on the health risks of wearing masks and state that Plaintiffs are attempting to shift their burden of proof on that issue.

Regardless of the uncertainty surrounding potential long-term medical problems resulting from mask wearing, this Court finds that Plaintiffs' testimony regarding the ongoing impact of the mask mandate on their children suffices to establish a finding of irreparable harm. *See, e.g.*, *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021) ("Emotional injuries, [or] psychological distress . . . may constitute irreparable harm."); *Harris v. Board of Supervisors, Los Angeles County*, 366 F.3d 754, 766 (9th Cir. 2004) (finding that patients' increased pain and suffering if hospital closed constituted irreparable harm); *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 20 (D.D.C. 2005) ("[W]here the health of a legally incompetent or vulnerable person is at stake, irreparable harm can be established."); *Texas Health & Human Services Commission v. Advocates for Patient Access, Inc.*, 399 S.W.3d 615, 630–31 (Tex. Ct. App. 2013) (finding that "decline in [child's] condition and progress" due to interruption of speech-therapy services was irreparable harm).

B

Status Quo

> "'[T]he office of a preliminary injunction is not ordinarily to achieve a final and formal determination of the rights of the parties or of the merits of the controversy, but is merely to hold matters approximately in status quo, and in the meantime to prevent the doing of any acts whereby the rights in question may be irreparably injured or endangered.'" *DiDonato v. Kennedy*, 822 A.2d 179, 181 (R.I. 2003) (quoting *Fund for Community Progress v. United Way of Southeastern New England*, 695 A.2d 517, 521 (R.I. 1997)).

"[T]his status quo is the last peaceable status prior to the controversy." *E.M.B. Associates, Inc. v. Sugarman*, 118 R.I. 105, 108, 372 A.2d 508, 509 (1977). In the instant case, the parties dispute the proper point of reference for determining the status quo. Plaintiffs argue that the "last peaceable status" was the point in time just prior to August 19, 2021 when the challenged mask mandate was not in effect. Defendants argue that the relevant moment was the last peaceable status prior to the beginning of litigation on September 16, 2021, when the mask mandate was

already in effect. Defendants also note that schools were not in session in August 2021, and that masks were required throughout the 2020-2021 school year.

Preliminary injunctions undoing a defendant's prior actions may be awarded "when it is necessary to compel defendant to correct injury already inflicted by defining the status quo as 'the last peaceable uncontested status' existing between the parties before the dispute developed." 11A Wright & Miller, *Federal Practice and Procedure* § 2948 (3d ed. Apr. 2021 Update); *see also E.M.B. Associates, Inc.,* 118 R.I. at 108, 372 A.2d at 509 ("[A] restraining order is meant to preserve or restore the status quo and . . . this status quo is the last peaceable status prior to the controversy.").

At the same time, this Court cannot ignore that a statewide school mask mandate is currently in place and that the preliminary injunction, no less than the ultimate relief Plaintiffs seek, would change that state of affairs. A careful consideration of the equities at play is thus more important than precise identification of the "last peaceable status." *See Fund for Community Progress*, 695 A.2d at 521 (quoting *Coolbeth v. Berberian*, 112 R.I. 558, 564, 313 A.2d 656, 659 (1974)) ("In considering the equities, the hearing justice should bear in mind that 'the office of a preliminary injunction is . . . merely to hold matters approximately in status quo, and in the meantime to prevent the doing of any acts whereby the rights in question may be irreparably injured or endangered.'").

C

Balance of the Equities

To obtain a preliminary injunction, a moving party must have the "'balance of the equities . . . tip in its favor.'" *Gianfrancesco*, 112 A.3d at 708 (quoting *Vasquez*, 57 A.3d at 318). This inquiry requires this Court to weigh "the hardship to the moving party if the injunction is denied,

the hardship to the opposing party if the injunction is granted and the public interest in denying or granting the requested relief." *Fund for Community Progress*, 695 A.2d at 521.

Plaintiffs argue that the long-term physical and emotional well-being of their children is being sacrificed for a public health intervention of questionable efficacy. In this regard, they assert that COVID-19 presents minimal risks to children and those without underlying medical conditions. Plaintiffs also challenge the testimony of Dr. McDonald regarding the efficacy of masks in reducing COVID-19 transmission. In response, Defendants assert that because the primary benefit of masks lies in reducing the exhalation of contagious particles, removing the mask mandate would lead to adverse consequences for other children and families who suffer from underlying conditions. Defendants also assert that the public interest is best served by requiring universal school masking, as it balances the need to protect children and the public from COVID-19 and the Delta variant with the strong interest in allowing children to attend school in person.

The Court has no doubt that Plaintiffs are motivated by a legitimate desire to act in the best interests of their children. At the same time, the Governor and DOH are tasked with protecting the health and safety of **all** Rhode Islanders, and have presented substantial evidence that the mask mandate is a reasonable and appropriate means to minimize the serious risk posed by COVID-19. Each party presented significant medical testimony and studies. As this new affliction quickly spread to become a worldwide affliction, additional studies were conducted. Reports concerning this novel field were being released even as testimony was being taken, giving each side ample authority for their respective positions. While many scientific and medical issues related to masking are disputed by the parties, there is no question that COVID-19 is a deadly and contagious disease that has had dire consequences for the state. Even with the recognition that the wearing of masks creates some irreparable harm to students, that harm is significantly outweighed by the harm

caused by the unmasked spread of the disease, particularly among children. Children could not be vaccinated and there were few treatments available for younger patients. Even if students were not symptomatic, COVID-19 is highly transmissible. Given the strong public interest in maintaining a safe environment for in-school learning, and the fact that granting the preliminary injunction would interfere with the abilities of the Governor and the DOH to adequately respond to the rapidly changing dangers posed by COVID-19, the public interest weighs against granting the preliminary injunction. As a result, the Court concludes that the balance of equities tips against Plaintiffs.

D

Likelihood of Success on the Merits

To obtain a preliminary injunction, "[t]he moving party must . . . show that it has a reasonable likelihood of succeeding on the merits of its claim at trial." *Fund for Community Progress*, 695 A.2d at 521. This element has been described as the "sine qua non" of the preliminary injunction analysis. *New Comm Wireless Services, Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002). The moving party need not demonstrate "a certainty of success," but it must "make out a prima facie case." *Fund for Community Progress*, 695 A.2d at 521. "'Prima facie evidence is the amount of evidence that, if unrebutted, satisfies the burden of proof on a particular issue.'" *DiLibero v. Swenson*, 593 A.2d 42, 44 (R.I. 1991) (quoting *Paramount Office Supply Company, Inc. v. D.A. MacIsaac, Inc.*, 524 A.2d 1099, 1101 (R.I. 1987)).

Here, Plaintiffs assert that Executive Orders 21-86 and 21-87 are *ultra vires* because the Governor has neither statutory nor constitutional authority to promulgate the Orders. Specifically, Plaintiffs attack the Governor's authority under each of the legal bases cited in the Orders: Article IX of the Rhode Island Constitution and Title 23, Chapter 8 and Title 30, Chapter 15 of the Rhode

Island General Laws. In their post-hearing brief, Plaintiffs argue that strict scrutiny of the school mask mandate is necessary because the mandate implicates fundamental rights to bodily integrity and education. Plaintiffs also raise substantive and procedural challenges to the DOH's promulgation of emergency regulation 216-RICR-20-10-7 under the Administrative Procedures Act (APA). This Court will consider each argument in turn.

1

The Governor's Statutory Authority to Issue the Executive Orders

Plaintiffs challenge the Governor's authority to issue the Executive Orders under Title 23, Chapter 8 and Title 30, Chapter 15 of the Rhode Island General Laws. Pls.' Mem. at 3. First, they assert that nothing in Title 23, Chapter 8 could give the Governor the power to issue an executive order mandating mask wearing. *Id.* at 4-5. Plaintiffs also challenge the Governor's authority to issue the Orders under G.L. 1956 § 30-15-9, which they characterize as "the crux of this case[.]" Pls.' Mem. at 5. According to Plaintiffs, when the General Assembly amended that statute in July 2021 by adding two provisions addressing the expiration of emergency declarations, they prohibited the Governor from issuing any further executive order or proclamation of disaster emergency in connection with COVID-19. *Id.* Per Plaintiffs, the Governor's invocation of the "Delta Variant" in Executive Order 21-86 was an ineffective attempt to evade that prohibition. *Id.* at 5-6. Plaintiffs also assert that their reading of § 30-15-9 is necessary to avoid the constitutional non-delegation issue that would result if the Governor were able to exercise "unlimited" powers by declaring every variant of COVID-19 a "new pandemic." *Id.* at 6-7.

In response, the Governor argues that the Executive Orders are legitimate exercises of his authority under state law. Governor's Mem. 14. The Governor rejects the Plaintiffs' interpretation of the recent amendments to § 30-15-9 and asserts that Title 30, Chapter 15 charges him with the

primary responsibility for emergency management and delegates the expansive powers necessary to fulfill that responsibility. Governor's Mem. at 15-17. Specifically, the Governor argues that the Act allows him to declare a state of emergency in response to an extant or imminent disaster and that the determination of what qualifies as an emergency is a political question left to the legislative and executive branches of state government. Defs.' Mem. in Opp'n 12-13. If the emergency declaration is reviewed, the Governor points to evidence that the Delta Variant is a disaster that threatens the public health. *Id.* at 15. His Excellency also argues that the masking mandate was a legitimate exercise of his emergency powers and that the delegation of the masking protocol to DOH was valid under § 30-15-9(e)(13), which allows the Governor to "[d]o all other things necessary to effectively cope with disasters in the state not inconsistent with other provisions of law[.]"[5] Defs.' Mem. in Opp'n 19-21.

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The Governor's Authority Under Title 30, Chapter 15

Title 30, Chapter 15 of the Rhode Island General Laws is also known as the "Rhode Island Emergency Management Act." Section 30-15-1. The Emergency Management Act vests broad powers in the Governor, who "shall be responsible for carrying out the provisions of this [Act] and

[5] Executive Orders 21-86 and 21-87 also reference the Governor's powers under Title 23, Chapter 8 of the General Laws. This Chapter governs the imposition of quarantine; for example, G.L. 1956 § 23-8-18 states that "whenever the governor shall deem it advisable for the preservation of public health and the prevention of the spread of infectious diseases, he or she may, by proclamation, place under quarantine the whole state or that portion of the state that he or she may deem necessary, and he or she 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." Plaintiffs challenge the applicability of this statute, noting that neither the Orders nor the DOH's emergency rule reference a proclamation of quarantine. *See* Pls.' Post-Hearing Mem. at 20. In his post-hearing brief, the Governor relies primarily on his emergency powers under § 30-15-9(e). *See* Defs.' Mem. in Opp'n at 19. This Court will focus its analysis on Title 30, Chapter 15 of the General Laws, as that Chapter is dispositive of the issue of the Governor's statutory authority to issue the Orders.

shall be primarily responsible for emergency management in the state." Section 30-15-7. The plain text of the Act gives the Governor the express authority to "[i]ssue executive orders, proclamations, and regulations" that "have the force and effect of law." Section 30-15-7. The Act also specifically 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." Section 30-15-9. 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 . . . [an] [e]pidemic." Section 30-15-3(2)(vi).

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), "limited in scope and duration as is reasonably necessary for emergency response." These powers include the ability to "[u]tilize all available resources of the state government as reasonably necessary to cope with the disaster emergency and of each political subdivision of the state," to "[c]ontrol ingress and egress to and from a high risk area, the movement of persons within the area, and the occupancy of premises therein," and to "[d]o all other things necessary to effectively cope with disasters in the state not inconsistent with other provisions of law." Section 30-15-9(e)(2)(13).

From the plain text of the Emergency Management Act, it is apparent that the challenged Orders were enacted pursuant to the Governor's authority under state law to respond to an ongoing threat to public health and safety. In Executive Order 21-86, the Governor declared a state of emergency "due to the dangers to health and life posed by the Delta Variant and other emerging variants" of the SARS-CoV-2 virus. The Order begins by referencing the "dangers to health posed by the original strain of SARS-CoV-2, the virus that is responsible for COVID-19." It goes on to

note the increased risks of transmission and infection posed by the "Delta variant of the SARS-CoV-2," including the risk of "breakthrough infection" in those who have been fully vaccinated, the high level of community transmission of the Delta Variant in Rhode Island since August 11, 2021, and the concurrent rise in COVID-19 cases, including among children. After referencing DOH's statistical analysis that "without continued and improved mitigation measures, the Delta Variant may cause an increase in the rate of deaths by the end of September 2021," the Order logically concludes that "this increase in prevalence of the Delta Variant poses a significant and imminent risk to Rhode Islanders of increased symptomatic disease, hospitalization, and death."

While the Governor has argued that his decision to declare a state of emergency in response to those findings is a nonjusticiable political question, the Court need not go that far. A political question may exist 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; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion[.]" *Baker v. Carr*, 369 U.S. 186, 217 (1962); *see also City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995) (discussing "the absence of judicially discoverable and manageable standards" for claimed right to education under state constitution).

In support, the Governor cites to federal cases declining to review a President's declaration of a national emergency. *See, e.g.*, *Center for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 31-33 (D.D.C. 2020). But the National Emergency Act at issue in those cases provides "no guidance to help courts assess whether a situation is dire enough to qualify as an 'emergency.'" *Id.* at 33. By contrast, Rhode Island's Emergency Management Act contains definitions and policies that both direct the Governor and provide guideposts for potential review. *See, e.g.*, § 30-15-2 (purposes of Act include "reduc[ing] vulnerability of people and communities of this state to

damage, injury, and loss of life and property resulting from natural or man-made catastrophes[.]"); § 30-15-3 (defining a "disaster"); *see also Opinion to the Governor*, 75 R.I. at 62, 63 A.2d at 729 ("To justify recourse to [emergency] power, the declaration of an emergency must rest upon findings of fact by the legislature as to the existence of unusual circumstances which, unless temporarily relieved, would endanger the public health, safety or morals.").

In any event, assuming for the moment that judicial review of the Governor's decision to declare a state of emergency is appropriate, Plaintiffs have not established a likelihood of success on the merits of this issue. The findings set forth in Executive Order 21-86 and supported by the testimony of Dr. McDonald establish the Delta variant as a "disaster" 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]pidemic." Section 30-15-3(2)(vi). Having made those findings, the Governor had the statutory power to declare a state of emergency. *See* § 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. . . . 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.").

Once the state of emergency was declared, the Governor also had the powers, "limited in scope and duration as is reasonably necessary for emergency response," to "[c]ontrol ingress and egress to and from a high risk area, the movement of persons within the area, and the occupancy of premises therein," and "[d]o all other things necessary to effectively cope with disasters in the state not inconsistent with other provisions of law." Section 30-15-9(e)(7)(13). To that end, Executive Order 21-87 set forth findings to support enacting a school mask mandate. The Order

states that "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[,]" that "students benefit from in-person learning and safely returning to in-person instruction is a priority[,]" and that "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[.]" The Order also notes that "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" and that "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[.]" Accordingly, just fifteen days later, Executive Order 21-87 concluded:

> "LEAs[6] 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."

Against the Governor's findings in Executive Order 21-87, Plaintiffs have set forth evidence challenging the safety and efficacy of masks. In turn, Defendants offered Dr. McDonald's expert testimony and other evidence in support of the mask mandate.

In analyzing whether the Governor acted within his statutory authority in issuing Executive Order 21-87, which has "the force and effect of law[,]" the Court is mindful of the limits of its

[6] A LEA is a local educational agency, defined by 34 C.F.R. § 300.28 as "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools."