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.

[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.

a

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."

review. Section 30-15-7. Through the Emergency Management Act, the General Assembly gave the Governor the power and responsibility to determine what steps are "reasonably necessary for emergency response." Section 30-15-9(e). By its nature, the Governor is acting on the cusp of an emergency using the best information available to him or her at that critical moment. The Governor has the statutory authority to make the "hard choices" about how best to deal with an ongoing emergency. *In re State Employees' Unions*, 587 A.2d at 925 ("Plainly, the legislature did not pass but the hilt of the sword to the Governor and, at the same moment, retain its blade."). As an exercise of the Governor's statutory authority to protect the public health, unless Executive Order 21-87 implicates a "suspect class or a fundamental right," this Court's review is limited to ensuring that "a rational nexus exists between the [Order] and a legitimate state interest."[7] *Federal Hill Capital, LLC*, 227 A.3d at 985; *see also Opinion to the Governor*, 75 R.I. at 62, 63 A.2d at 729 ("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.").

Demonstrating that a law bears no rational relation to a legitimate state interest is "a very high bar," and Plaintiffs have not shown a reasonable likelihood of success. *Federal Hill Capital, LLC*, 227 A.3d at 991. In addition to the findings set forth in Executive Orders 21-86 and 21-87, Defendants point to Dr. McDonald's expert opinion regarding the need for masks in school settings due to the Delta variant and the data and studies underlying his opinion. In turn, Plaintiffs' expert

[7] In their post-hearing brief, Plaintiffs raised the argument that strict scrutiny of the mask mandate is appropriate because it implicates fundamental rights to bodily integrity and education. The Court finds those arguments unavailing. *See infra* Section III.D.2.c.

witness Dr. Bostom offered a contrary opinion and cited to competing studies. But Plaintiffs' evidence and arguments, while sufficient to establish "a reasonable, good-faith policy disagreement with [the state's] approach to combating COVID-19," do not change the fact that the Governor could reasonably conclude that the school mask mandate was necessary in light of the Delta variant. *Let Them Play MN v. Walz*, 517 F. Supp. 3d 870, 884–85 (D. Minn. 2021); *see also Casey v. Lamont*, 258 A.3d 647, 673 (Conn. 2021) ("It is likely that reasonable minds may differ as to when each restriction should be lifted, but . . . it is not the job of this court to second-guess those policy decisions."); *Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 891 (Pa. 2020) ("[T]he policy choice in this emergency was for the Governor . . . to make and so long as the means chosen to meet the emergency are reasonably necessary for the purpose of combating the ravages of COVID-19, it is supported by the police power.").

b

Effect of the July 2021 Amendments

Despite the foregoing, Plaintiffs contend that the July 2021 amendments to § 30-15-9 enacted by the General Assembly operate to strip the Governor of his ability to declare states of emergency, and thus to exercise emergency powers, in connection with COVID-19. The clear and unambiguous language of those amendments precludes Plaintiffs' interpretation.

In July 2021, the General Assembly enacted § 30-15-9(g), which provides that:

> "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."

Subsection (g) makes no mention of COVID-19 or any specific orders relating to COVID-19. By its terms, this subsection does not affect the Governor's authority and responsibility to declare a

state of disaster emergency and exercise emergency powers as necessary. The only restriction it imposes is a 180-day temporal limit on any exercise of the Governor's emergency powers under § 30-15-9(e), regardless of the nature of the emergency and subject to the General Assembly's ability to extend the 180-day period. In the instant case, as Defendants note, subsection (g) thereby provides an expiration date for the Governor's exercise of emergency powers in connection with the August 19, 2021 emergency proclamation.

In July 2021, the General Assembly also enacted § 30-15-9(h), which carved out an limited exception to § 30-15-9(g) as to eight enumerated executive orders that "shall remain in effect and may be extended by further executive order up to, but not beyond, September 1, 2021[.]" The plain language of this amendment sets a specific end date for certain executive orders. While all the named executive orders stem from the COVID-19 state of emergency in effect from March 2020, they do not comprise an exhaustive list of all Executive Orders issued in connection with COVID-19. Moreover, as with subsection (g), nothing in the text of subsection (h) limits the Governor's authority and responsibility to act prospectively, whether in response to COVID-19 or any other form of disaster. Accordingly, there is no basis for interpreting either subsection to have any such effect. *See Coastal Resources Management Council*, 961 A.2d at 935 n.7 ("Repeals by implication are disfavored by the law."). As a result, Plaintiffs have not established a reasonable likelihood of success on the merits of their argument that the Governor lacked statutory authority to issue the Executive Orders.

2

Constitutional Challenges

Plaintiffs assert that under the Rhode Island Constitution, the Governor has no general police power and may only exercise those powers either delegated by the General Assembly or

specifically enumerated in the Constitution. Pls.' Mem. at 4. They argue that the Governor exceeded the permissible scope of the authority delegated by the Legislature and that without their interpretation of the July 2021 amendments to § 30-15-9 that statute is an unconstitutional delegation of legislative power. *Id.* at 5-7. In their post-hearing brief, Plaintiffs also argue for strict scrutiny of the school mask mandate because it implicates fundamental rights to bodily integrity and education. Pls.' Post-Hearing Mem. at 13-15. In response, the Governor argues that the challenged Executive Orders were valid exercises of his constitutional authority to faithfully execute state law. Governor's Mem. at 14-15. Defendants also note that Plaintiffs did not raise their fundamental rights arguments in their Complaint. Defs.' Mem. in Opp'n 45.

a

The Governor's Authority

Article IX of the Rhode Island Constitution provides that "[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. In support of his authority to issue the Executive Orders, the Governor relies on his statutory powers under the Emergency Management Act. As this Court has explained, the Governor's Executive Orders were within the scope of the statutory authority delegated by the General Assembly through the Emergency Management Act. As a result, the Orders were also within the scope of the Governor's constitutional authority to carry the Act into effect.

b

Plaintiffs' Nondelegation Challenge

The nondelegation doctrine prohibits unconditional delegations of legislative authority to the executive branch. *See Almond,* 756 A.2d at 191-92. In reviewing Plaintiffs' nondelegation challenge, this Court must examine '"the specificity of the functions delegated, the standards

accompanying the delegation, and the safeguards against administrative abuse[.]"' *Id.* at 192 (quoting *Milardo*, 434 A.2d at 271). "[t]he delegation of legislative power will be upheld if the statute 'declares a legislative purpose, establishes a primary standard for carrying out the use, *or* lays out an intelligent principle to which an administrative officer or body must conform.'" *Bourque v. Dettore*, 589 A.2d 815, 818 (R.I. 1991) (emphasis added) (quoting *Davis v. Wood*, 427 A.2d 332, 336 (R.I. 1981)). Conducting this inquiry requires the Court to "read the act as a whole; the provision[s] in question should not be isolated, but must be construed with reference to the entire act." *Davis*, 427 A.2d at 336. The Supreme Court "has consistently held that the stated purposes of a legislative enactment are relevant to the issue of whether the delegation was adequately cloaked with standards." *J.M. Mills, Inc. v. Murphy*, 116 R.I. 54, 63, 352 A.2d 661, 666 (1976).

While the emergency powers vested in the Governor under G.L. § 30-15-9(e) are broad, their expansive scope is consonant with the vital purposes of the Emergency Management Act. *See* § 30-15-19 ("This chapter shall be construed liberally, but those charged with the exercise or enforcement of its great powers are directed to act with restraint and moderation and with strict regard to the rights of the people."). The enumerated purposes of the Act are, *inter alia*, to "reduce vulnerability of people and communities of this state to damage, injury, and loss of life and property resulting from natural or man-made catastrophes," to "clarify and strengthen the roles of the governor, state agencies, and local governments in prevention of, preparation for, and response to and recovery from disasters," and to "provide the state with the ability to respond rapidly and effectively to potential or actual public health emergencies or disaster emergencies." Section 30-15-2(1)(4)(10). The threshold limitation on the exercise of the emergency powers of § 30-15-9(e) is the existence of a state of emergency, which "shall be declared by . . . 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(b). 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" fifteen enumerated types of calamity. Section 30-15-3.

Taken together, the above provisions set forth an intelligible principle that directs when and how the emergency powers may be exercised. Briefly, the Act assigns to the Governor both the responsibility "for meeting the dangers to the state and people presented by disasters" and the ability to fulfill that weighty mandate. Section 30-15-9(a). Once an emergency is declared, the powers enumerated under § 30-15-9(e) are "limited in scope and duration as is reasonably necessary for emergency response[.]" In addition to this overarching limitation, each of the provisions listed under § 30-15-9(e) is limited either by the scope of the specific power granted, the addition of a purpose or standard for guiding the exercise of the power, or both. For example, under the "catch-all" provision of § 30-15-9(13), the Governor may also "[d]o all other things necessary to effectively cope with disasters in the state not inconsistent with other provisions of law."

Although the "reasonably necessary" standard used in § 30-15-9(e) does not provide the Governor with fine-grained guidance, the Supreme Court has recognized that "the adequacy of legislative standards may best be measured against their intended purposes." *J.M. Mills, Inc.*, 116 R.I. at 62, 352 A.2d at 665. A key purpose of the Emergency Management Act is to "provide the state with the ability to respond rapidly and effectively" to disasters of every stripe. Section 30-15-2(10). The open-ended definition of a disaster indicates the General Assembly's recognition that it would be impossible to foresee every conceivable hazard that the state might face. For that reason, the Governor "must have flexibility to effectuate the purposes of legislation" by mounting

an adequate response to the specific disaster at hand. *Town of East Greenwich v. O'Neil*, 617 A.2d 104, 113 (R.I. 1992). Similarly, because a rapid response is often crucial in a crisis, preventing the delegation of emergency powers to the Governor would "unduly hamper the Legislature's exercise of its constitutionally vested powers." *Id.* at 112; *see also Almond*, 756 A.2d at 192 ("Moreover, the nature and scope of the duties of the Lottery Commission are such as to demand that the Legislature be permitted to delegate authority to operate such a massive enterprise.").

The Emergency Management Act also contains temporal limitations that serve as "safeguards against administrative abuse[.]" *Milardo*, 434 A.2d at 271. A state of emergency "shall continue until the governor finds that the threat or danger has passed or the disaster has been dealt with to the extent that emergency conditions no longer exist," but must be renewed by the Governor every thirty days in order to remain in effect. Section 30-15-9(b). As previously discussed, § 30-15-9(g) now limits the exercise of the emergency powers in § 30-15-9(e) to 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." The General Assembly also retains legislative oversight of the Governor's emergency powers, as "by concurrent resolution" it "may terminate a state of disaster emergency at any time." Section 30-15-9(b).

While our Supreme Court has not had occasion to apply the nondelegation doctrine to the Emergency Management Act, high courts of other states have considered and rejected nondelegation challenges to emergency statutes in the context of COVID-19. For example, the Supreme Court of Connecticut upheld a broad grant of emergency powers to that state's governor because "the General Assembly was as precise as it could be in defining the contours of the governor's authority given that there are myriad serious disasters that could arise and the actions

the governor would be required to take could vary significantly from one serious disaster to another." *Casey*, 258 A.3d at 667. The Supreme Court of Kentucky approved the "necessarily broad and result-oriented" standards of Kentucky's emergency statute "[g]iven the wide variance of occurrences that can constitute an emergency, disaster or catastrophe[.]" *Beshear v. Acree*, 615 S.W.3d 780, 811 (Ky. 2020).

Conversely, the Supreme Court of Michigan held in a divided opinion that that state's Emergency Powers of the Governor Act was an unconstitutional delegation of legislative powers. *In re Certified Questions From United States District Court, Western District of Michigan, Southern Division*, 958 N.W.2d 1, 24 (Mich. 2020). Applying a test that balanced the subject matter and duration of the delegated powers against the standards governing their exercise, the majority held that the delegation was unrestrained because "the standards governing the Governor's exercise of emergency powers include only the words 'reasonable' and 'necessary.'" *Id.* at 22. The majority's analysis was challenged in a concurrence and dissent by the Chief Justice, who contended that the majority failed to recognize that the challenged statute did "not use 'reasonable' or 'necessary' in a vacuum[,]" but in connection with further limitations on the scope and intended purposes of the governor's emergency powers. *Id.* at 28 (McCormack, C.J., concurring and dissenting) ("The particular standards in the [Act] are as reasonably precise as the statute's subject matter permits."). *Id.* at 53.

The Chief Justice's approach is better aligned with Rhode Island Supreme Court precedent on the nondelegation doctrine, which indicates that "the stated purposes of a legislative enactment are relevant to the issue of whether the delegation was adequately cloaked with standards." *J.M. Mills, Inc.*, 116 R.I. at 63, 352 A.2d at 666; *see also Town of East Greenwich*, 617 A.2d at 112 ("As a practical matter, rigid adherence to doctrinaire notions of the nondelegation doctrine would

unduly hamper the Legislature's exercise of its constitutionally vested powers."). Also relevant to whether Plaintiffs have established a likelihood of success on this issue is that they must establish the unconstitutionality of the statute "beyond a reasonable doubt." *Federal Hill Capital, LLC*, 227 A.3d at 984. As a result, given the intelligible principles, standards, and safeguards that channel the Governor's exercise of his admittedly broad emergency powers, Plaintiffs have not established a reasonable likelihood of success on the merits of their nondelegation challenge.

c

Substantive Due Process

In their post-hearing brief, Plaintiffs argue that strict scrutiny is the proper standard of review for the Executive Orders. Pls.' Post-Hearing Mem. at 13-14. Plaintiffs' argument is based on their contention that the mask mandate implicates fundamental rights to bodily integrity and education. *Id.* at 14-15. In response, Defendants note that Plaintiffs did not allege constitutional violations in their pleadings. Defs.' Mem. in Opp'n 45. Nevertheless, the Court will touch upon Plaintiffs' arguments. *See Kaveny v. Town of Cumberland Zoning Board of Review*, 875 A.2d 1, 10 (R.I. 2005) (addressing constitutional arguments waived by appellants).

i

Bodily Integrity

By arguing that "the forcible masking of children implicates a fundamental right to bodily integrity[,]" Plaintiffs raise a substantive due process challenge to the mask mandate. Pls.' Post-Hearing Mem. at 14. The United States Supreme Court has held that the Due Process Clause of "the Fourteenth Amendment 'forbids the government to infringe [certain] 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting

Reno v. Flores, 507 U.S. 292, 302 (1993)). While the United States Supreme Court has recognized protected liberty interests in the area of "bodily integrity," it has also "'been reluctant to expand the concept of substantive due process' . . . lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences" of the Court. *Id.* at 720 (quoting *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992)); *see also State v. Germane*, 971 A.2d 555, 583 (R.I. 2009) ("This Court is similarly reluctant to recognize heretofore unarticulated fundamental rights.").

Accordingly, "fundamental" rights are only those "which are, objectively, 'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed[.]'" *Glucksberg*, 521 U.S. at 720-21 (1997) (first quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977); then quoting *Palko v. State of Connecticut*, 302 U.S. 319, 325-26 (1937)). The United States Supreme Court has also required a "careful description" of the particular right asserted. *Id.* at 721 (quoting *Flores*, 507 U.S. at 302 (1993)); *see also Federal Hill Capital, LLC*, 227 A.3d at 988 ("We have held that the United States Supreme Court's explication of fundamental rights also applies to [the Rhode Island] Constitution."). Properly framed, Plaintiffs' claimed interest in bodily integrity is their children's right to refrain from wearing a mask.

Given the lack of proffered evidence that such a right is "objectively, 'deeply rooted in this Nation's history and tradition,'" Plaintiffs have not met the stringent standard required to establish the existence of a fundamental right. *Glucksberg*, 521 U.S. at 721 (quoting *Moore*, 431 U.S. at 503). Other courts confronted with substantive due process challenges to mask mandates have come to the same conclusion. *See, e.g.*, *Oberheim v. Bason*, No. 4:21-CV-01566, 2021 WL 4478333, at *7 (M.D. Pa. Sept. 30, 2021) ("[Plaintiffs'] children do not have a fundamental right

to attend school without masks on."); *Klaassen v. Trustees of Indiana University*, CAUSE NO. 1:21-CV-238 DRL, 2021 WL 3073926, at *38 (N.D. Ind. July 18, 2021) (collecting recent federal cases for proposition that "there is no fundamental constitutional right to not wear a mask.").[8] Nor does the Rhode Island Constitution provide any additional protection in this regard. *See Federal Hill Capital, LLC*, 227 A.3d at 989 (R.I. 2020) ("In essence, while it remains this Court's prerogative to interpret the Equal Protection and Due Process Clauses of the Rhode Island Constitution in a manner that diverges from, and is more protective than, the Supreme Court's interpretation of the United States Constitution, we would need to be presented with a good reason to do so.").

ii

Education

Plaintiffs also assert that "[a]ttending public school in Rhode Island is a fundamental right." Pls.' Post-Hearing Mem. at 15. The Rhode Island Supreme Court has explicitly stated that "the Rhode Island Constitution does not provide a fundamental right to education[.]" *Woonsocket*

[8] In cases addressing an individual's "general liberty interest in refusing medical treatment[,]" the United States Supreme Court has considered procedural due process challenges to the imposition of invasive medical interventions. *Cruzan by Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 278 (1990) (artificial nutrition and hydration of comatose patient); *see also Washington v. Harper*, 494 U.S. 210, 236 (1990) (forced administration of antipsychotic drugs); *Vitek v. Jones*, 445 U.S. 480, 494 (1980) (involuntary psychiatric treatment). These cases do not indicate recognition of an overarching fundamental right to bodily integrity in the substantive due process context, which requires "carefully formulating the interest at stake." *Glucksberg*, 521 U.S. at 722 (citing *Cruzan*, 497 U.S. 261 at 279) ("For example, although *Cruzan* is often described as a 'right to die' case, . . . we were, in fact, more precise: We assumed that the Constitution granted competent persons a 'constitutionally protected right to refuse lifesaving hydration and nutrition.'"). In that regard, the Court notes that in comparison with cases such as *Cruzan* and *Harper*, the state's challenged intrusion is minimal. *See Klaassen*, 2021 WL 3073926, at *41 ("In other contexts, the government has lawfully mandated wearing protective gear, like a mask, when it also provides benefits to the public—like mandated bicycle helmets, hair nets, ear plugs, and any number of personal protective equipment.").

School Committee, 89 A.3d at 794; *see also City of Pawtucket*, 662 A.2d at 60 ("The United States Supreme Court has long held that the right to an education is a not a fundamental right afforded protection under the Federal Constitution, . . . and as discussed *supra*, education is not generally a judicially-enforceable right under article 12, section 1, of our State Constitution. . . . Therefore, the proper standard of review by this court is minimal scrutiny.") (citations omitted); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458 (1988) ("Nor have we accepted the proposition that education is a 'fundamental right,' like equality of the franchise, which should trigger strict scrutiny when government interferes with an individual's access to it."). Obviously, the courts recognize education as an important function of the state that is key to the development of our children, but it has not been recognized as a fundamental right.

iii

Rational Basis Review

"[W]hen no fundamental right is at issue, a party seeking to establish a substantive due process violation must show that the challenged statute or action is 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" *Woonsocket School Committee*, 89 A.3d at 794 (quoting *East Bay Community Development Corp. v. Zoning Board of Review of Town of Barrington*, 901 A.2d 1136, 1150 (R.I. 2006)).

"This is a very high bar and one that [Plaintiffs] must prove [they have] overcome beyond a reasonable doubt[.]" *Federal Hill Capital, LLC*, 227 A.3d at 991. As previously discussed, under

this standard of review, Plaintiffs are unable to establish a likelihood of success on the merits.[9] *See supra* Section III.D.1.a.

3

Plaintiffs' APA Challenges to Emergency Rule 216-RICR-20-10-7

Finally, Plaintiffs mount both procedural and substantive attacks on 216-RICR-20-10-7, the DOH's emergency rule mandating universal masking in schools. Procedurally, Plaintiffs challenge DOH's compliance with the publication requirements of § 42-35-2.10, the APA's emergency rule provision. Verified Am. Compl. 47. Substantively, Plaintiffs challenge DOH's finding that "an imminent peril to the public health, safety, or welfare" necessitated an emergency rule. G.L. 1956 § 42-35-2.10; Pls.' Post-Hearing Mem. 17.

Under the APA, an agency seeking to promulgate a rule or regulation must normally follow a set of specific procedures that include provision of public notice, a public comment period, and preparation of a detailed regulatory analysis of the proposed rule. *See* §§ 42-35-2.7 to 42-35-2.9. In certain situations, however, an agency can bypass these ordinary procedures and promulgate an emergency rule instead:

> "If an agency finds that an imminent peril to the public health, safety, or welfare or the loss of federal funding for an agency program requires the immediate promulgation of an emergency rule and publishes in a record with the secretary of state and on its agency website reasons for that finding, the agency, without prior notice or hearing or on any abbreviated notice and hearing that it finds

[9] In contesting the proper standard of review, parties have disputed the applicability of the United States Supreme Court's decision in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), which applied a deferential standard of review to a mandatory vaccination law. *See, e.g.*, *Hopkins Hawley LLC v. Cuomo*, 518 F. Supp. 3d 705, 710-13 (S.D.N.Y. 2021) (discussing *Jacobson* standard and its application to COVID-19 cases). Plaintiffs' fundamental rights challenges cannot succeed under the traditional constitutional framework; accordingly, they would also not succeed under a more deferential standard of review. *See id.* at 713; *Delaney v. Baker*, 511 F. Supp. 3d 55, 74 (D. Mass. 2021).

> practicable, may promulgate an emergency rule without complying with §§ 42-35-2.7 through 42-35-2.9." Section 42-35-2.10.

For emergency rules to take effect, they must be signed by both the head of the promulgating agency and the Governor or the Governor's designee. Section 42-35-2.10. The agency must also "file with the secretary of state a rule created under this section as soon as practicable given the nature of the emergency and publish the rule on its agency website." Section 42-35-2.10. Emergency rules promulgated under this statute "may be effective for not longer than one hundred twenty (120) days, renewable once for a period not exceeding sixty (60) days." Section 42-35-2.10.

In the instant case, the history of the challenged regulation complicates matters. The DOH promulgated 216-RICR-20-10-7 as an emergency rule on September 23, 2021. Prior to that, DOH had issued a "universal indoor masking protocol" for schools on August 20, 2021; in turn, creation of such a protocol was expressly mandated by the Governor in Executive Order 21-87. Executive Order 21-87 has been renewed twice and is currently in effect until November 13, 2021. Exec. Orders 21-97, 21-103. By its own terms, the August 2021 protocol was to remain in effect "through September 18, 2021 unless renewed, modified, or terminated by a subsequent Executive Order or Protocol." Verified Complaint (Exhibit F). In their final arguments, the DOH represented that the August 2021 protocol had expired and that 216-RICR-20-10-7 was now the "universal indoor masking protocol" called for by Executive Order 21-87. The text of 216-RICR-20-10-7 states that, "[s]ubject to the provisions of R.I. Gen. Laws § 42-35-2.10, these regulations shall terminate 45 days from their promulgation or when Executive Order 21-87 (Requiring Masks in Schools) or its successor is terminated, whichever is later." Accordingly, the rule cannot remain in effect "longer than one hundred twenty (120) days, renewable once for a period not exceeding sixty (60) days," per § 42-35.2.10. The rule may also expire before that period ends, when and if

Executive Order 21-87 or its successor is terminated; if that contingency occurs before 45 days from the promulgation of the rule, the rule will remain in effect until those 45 days have passed.

a

Procedural Requirements

To promulgate an emergency rule, an agency must "publish[] in a record with the secretary of state *and* on its agency website reasons for [its] finding" of imminent peril. Section 42-35-2.10 (emphasis added). As counsel for the Department noted at final arguments, the Secretary of State's website currently displays a "Brief statement of Reason for Finding Imminent Peril" in connection with 216-RICR-20-10-7. *Masking in Schools*, Rhode Island Department of State, https://rules.sos.ri.gov/regulations/part/216-20-10-7 (as of Nov. 4, 2021) ("To protect students, a significant portion of whom are still ineligible for vaccination, against COVID-19 and reducing transmission of the new COVID-19 variants in the school setting and beyond."). The website also indicated that the rule was properly signed and submitted to the Secretary of State. *Id.*

But the Department has not indicated—and this Court has been unable to locate—where that statement may be found on the DOH's own website. In fact, the DOH's website also does not currently appear to display the text of the emergency rule. *See* § 42-35-2.10 (stating that agency must "publish the rule on its agency website."). Instead, under the headings of "COVID-19 Rhode Island Emergency Regulations" and "Rhode Island Department of Health Regulations," the DOH website's "Regulations" page contains links directing users to the Secretary of State's website, where the rule and the statement of reasons are available. *Regulations*, State of Rhode Island Department of Health, https://health.ri.gov/regulations/ (last visited Nov. 4, 2021). This method does not satisfy the procedural requirements of § 42-35-2.10. *See Vapor Technology Association v. Raimondo*, No. PC-2019-10370, 2019 WL 5865900, at *7 (R.I. Super. Nov. 05, 2019) ("Here,

while DOH posted the press release and link on its website, it failed to announce to the public, through posting on its website, the Statement. Accordingly, DOH failed to comply with the procedural requirements of § 45-35-2.10.").

b

"Imminent Peril" Requirement

To publish an emergency rule, an agency must first find that "an imminent peril to the public health, safety, or welfare . . . requires the immediate promulgation" of the rule. Section 42-35-2.10. In attacking the DOH's determination that an imminent peril exists, Plaintiffs focus on the fact that the emergency rule was issued on September 23, 2021, 18 months after the initial emergency declaration due to COVID-19 in March 2020 and one year after Rhode Island schools opened with mandatory masking in September 2020. Pls.' Post-Hearing Mem. at 17. Plaintiffs also argue that DOH should have followed the APA's regular rule-making procedures, which include a public comment period and preparation of a regulatory analysis and speculate that the agency's failure to do so was motivated by a desire to avoid public scrutiny. *Id.* at 18-19. Defendants respond that the DOH's determination of imminent peril is entitled to considerable deference and that the evidence supports the DOH's conclusion. Defs.' Mem. in Opp'n at 26-30, 35.

Plaintiffs' arguments regarding the DOH's purported delay in issuing the emergency rule ignore how the circumstances of the COVID-19 pandemic have changed over time. As Plaintiffs themselves point out, during the summer of 2021 the DOH initially believed a statewide school mask mandate would not be necessary for the 2021-2022 school year. Pls.' Post-Hearing Mem. 27. Dr. McDonald confirmed this in his testimony. During July and August 2021, however, the outlook changed due to the spread of the Delta variant and the resulting increase in cases. As

Executive Order 21-86 states, the number of COVID-19 cases per 100,000 people over a seven-day period increased from 11.2 on July 4, 2021 to 195.6 on August 16, 2021. On August 11, 2021, Rhode Island passed the threshold for a high level of community transmission, which is defined as more than 100 cases per 100,000 people over a seven-day period. Executive Order 21-86.

At that point, according to Dr. McDonald's testimony, there was no longer time to complete the typical rulemaking process before the beginning of the 2021-2022 school year. Based on his experience with the rulemaking process at the DOH, Dr. McDonald testified that promulgation of a non-emergency regulation could take up to 120 days. While Plaintiffs dispute that figure, once the high level of community transmission was reached on August 11, 2021, the 30-day public comment period alone would appear to have prevented the DOH from finalizing the rule before the start of the school year. Similarly, when 216-RICR-20-10-7 was promulgated on September 23, 2021, schools were already in session.

Plaintiffs' arguments that the DOH should have followed the regular rulemaking procedure due to the increased scrutiny it would have provided are also unavailing. Without denying the important benefits that a detailed public discussion can provide, the fact is that the DOH has the legal authority to promulgate an emergency rule as long as the statutory requirements of § 42-35.2.10 are met. In reviewing the emergency rule, this Court can only enforce the specific provisions of the APA, not its preference for which course an agency should have followed.

Turning to the DOH's determination of imminent peril itself, the parties dispute the level of scrutiny that the Court should apply. Defendants argue that the DOH's conclusion should be upheld so long as this Court can "find some plausible rationale" to support it. Defs.' Mem. in Opp'n at 25 (quoting *Vapor Technology Association*, 2019 WL 5865900, at *9). Plaintiffs argue that that level of deference is inappropriate given the high stakes of the school mask mandate and

the "disgraceful ineptitude" displayed by the DOH in promulgating the rule. Pls.' Post-Hearing Mem. at 17, 24 (quoting *Park v. Rizzo Ford, Inc.*, 893 A.2d 216, 222 (R.I. 2006)).

This Court agrees with the conclusion of *Vapor Technology Association* that deference to an agency's reasonable determination of imminent peril is appropriate. In that case, the Superior Court discussed the proper level of judicial scrutiny when reviewing an emergency regulation and a finding of imminent peril and noted that "[o]n the few occasions our Supreme Court has addressed the validity of an emergency regulation, the Court has seemingly given a great deal of deference to the agency's finding." 2019 WL 5865900, at *8. For example, in *State ex rel. Town of Middletown v. Watson*, the Supreme Court upheld a DOH emergency rule that served as a stopgap measure to ensure the proper certification of breathalyzer operators. 698 A.2d 181, 182–83 (R.I. 1997). Noting that "the state's ability to enforce its drunk-driving laws is a matter of the highest concern for the health, safety, and welfare of the public[,]" the Supreme Court approved the DOH's "'Statement of Need for Emergency Action,' [which] explained, 'Filing is necessary to establish approved preliminary breath testing instruments and procedures for testing breathalyzers, for reliable quantitative determinations and effective administrative practices to protect the safety and welfare of the public.'" *Id.*

In *Park*, which involved a Department of Transportation rule capping title fees at twenty dollars, the Supreme Court concluded that the regulation at issue was an emergency rule because its "cover letter made the requisite finding of imminent peril: 'The consuming public would be without a forum to redress infractions of [Chapters 31–5, 31–5.1]. The industry would be unregulated and the Department would be powerless to combat unfair business practices that occur daily in the sale, manufacture and distribution of new and used automobiles.'" 893 A.2d at 220.

As the *Vapor Technology Association* Court noted, this deference is in line with the Supreme Court's general approach to reviewing legislative rules, which affords "'great deference to an agency's interpretation of its rules and regulations and its governing statutes, *provided that the agency's construction is neither clearly erroneous nor unauthorized*.'" 2019 WL 5865900, at *8 (emphasis in original) (quoting *Endoscopy Associates, Inc. v. Rhode Island Department of Health*, 183 A.3d 528, 533 (R.I. 2018)). Eventually, the *Vapor Technology Association* Court concluded that because "the General Assembly failed to define the term 'imminent peril[,]' . . . . this Court 'must defer to a reasonable construction by the [DOH, as it is] charged with [the statute's] implementation.'" *Id.* at *9 (quoting *Labor Ready Northeast, Inc. v. McConaghy*, 849 A.2d 340, 346 (R.I. 2004)).

The statement of imminent peril for 216-RICR-20-10-7, which appears on the Secretary of State's website and within the rule itself, runs as follows: "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." As Plaintiffs point out, this brief rationale is more akin to the statements at issue in *Watson* and *Park* than the statement of imminent peril in *Vapor Technology Association*, which was "over eight-hundred words long" and incorporated "numerous findings and citations to the Centers for Disease Control, the Food and Drug Administration, and other studies" in support of its vaping ban. 2019 WL 5865900, at *9.

In their post-hearing brief, Defendants attempt to buttress the statement by discussing the testimony and opinions of Dr. McDonald, multiple studies regarding the efficacy of masks, and data regarding the spread of the Delta variant in Rhode Island. Defs.' Mem. in Opp'n at 26-35. The Court agrees that this evidence provides a plausible rationale to support the DOH's finding of imminent peril. *See Vapor Technology Association*, 2019 WL 5865900, at *9. The difficulty the

Court faces is that very little of the information available to the DOH appears in the statement of imminent peril. Under § 42-35-2.10, it is the DOH's responsibility to compile and publish the reasons for its finding. The Court is also disappointed to note that by failing to publish the statement of imminent peril on its own website, DOH has repeated the same easily avoidable procedural misstep at issue in *Vapor Technology Association*. *See* 2019 WL 5865900, at *7 ("[T]he statement of Reason for Finding Imminent Peril . . . is only available on the Rhode Island Secretary of State's website.").

Ultimately, however, the Court cannot ignore that the DOH did not act in a vacuum when promulgating the rule. In Executive Orders 21-86 and 21-87, the Governor declared a state of emergency for the Delta variant, explicitly ordered the DOH to institute a universal indoor masking protocol for schools and set forth sufficient findings to support both actions. 216-RICR-20-10-7, which differs from the original August 20, 2021 protocol by allowing several exceptions to the mask mandate, nonetheless complies with Executive Order 21-87's directive to DOH to develop a universal indoor masking protocol. The Executive Orders and their renewals have the force of law, and the specific findings they incorporate demonstrate a plausible rationale for DOH's determination of imminent peril. As a result, Plaintiffs have not demonstrated a reasonable likelihood of success on the merits of their substantive challenge to 216-RICR-20-10-7 under § 42-35.2.10.

Regarding the procedural requirements of § 42-35-2.10, this Court notes that Defendants have represented that 216-RICR-20-10-7 currently serves as the masking protocol directed by Executive Order 21-87. As a result, if the rule were to be invalidated on procedural grounds while Executive Order 21-87 remains in effect, the DOH would have the legal obligation to immediately promulgate an additional masking protocol. *See Vapor Technology Association*, 2019 WL

5865900, at *10 ("[T]he Court recognizes that invalidating the Emergency Regulations upon these grounds would simply result in the Defendants immediately adopting the same Emergency Regulations with the publication requirements fulfilled."). Counsel for Defendants have also indicated that the DOH may have refrained from updating its statement of imminent peril so as not to create a shifting target for this Court's review. Accordingly, in the interests of judicial efficiency and avoiding unnecessary confusion regarding the status of the mask mandate, this Court will provide Defendants with the opportunity to cure their procedural deficiencies by publishing, on both the DOH and Department of State websites, both 216-RICR-20-10-7 and an accompanying statement of imminent peril incorporating the findings relied upon by the Governor in issuing Executive Orders 21-86 and 21-87. *See id.*

With all of that said, the Court is obviously concerned about "giving deference" to a department's determination of imminent peril during a public health crisis, particularly in regard to an emergency regulation that is likely to endure for some time and undergo public opposition. This is not the type of regulation that should omit a key statutory requirement and depend on a court to look outside the four corners of the regulation to find its justification. Only twenty-four months ago, the Court met a similar challenge in *Vapor Technology Association*. While the Department is clearly burdened with the awesome responsibility of meeting the needs of the state in a pandemic, a regulation enacted to meet a public health emergency should squarely meet the dictates of the statute. The judiciary should not be left in the position of giving deference; the regulation should be clear.

The bottom line is that the Department failed to correct that which appears to be easily correctable even in the face of a challenge, placing the regulation itself at risk. While the rule passes muster today, the Department should tread carefully in promulgating new regulations or

extending any existing regulations. This Court is particularly reluctant to provide a bottomless pit of deference in the future.

IV

Conclusion

For the foregoing reasons, Plaintiffs' Motion for a Preliminary Injunction is denied. Counsel shall prepare the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: **Richard Southwell, et al.**

CASE NO: **PC-2021-05915**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **November 12, 2021**

JUSTICE/MAGISTRATE: **Lanphear, J.**

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