STATE OF RHODE ISLAND
SUPREME COURT

RICHARD SOUTHWELL, et al.	:	
	:	
Respondents	:	
	:	SU-2021-0302-MP
vs.	:	C.A. No. PC-2021-05915
	:	
DANIEL J. MCKEE, in his official capacity as the Governor of the State of Rhode Island, et al.	:	
	:	
Petitioners	:	

I. STATE OF RHODE ISLAND'S MEMORANDUM IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

Now comes the State of Rhode Island, through Daniel J. McKee and Dr. Nicole Alexander-Scott, in their official capacities (hereafter the "State"), and seeks a writ of certiorari pursuant to Supreme Court Rule 13. The State submits that while it opposes the Petition for a Writ of Certiorari sought by the Petitioners (in SU-2021-280 MP), if this Court grants the Petition in that case, the Court should also grant the instant Petition.

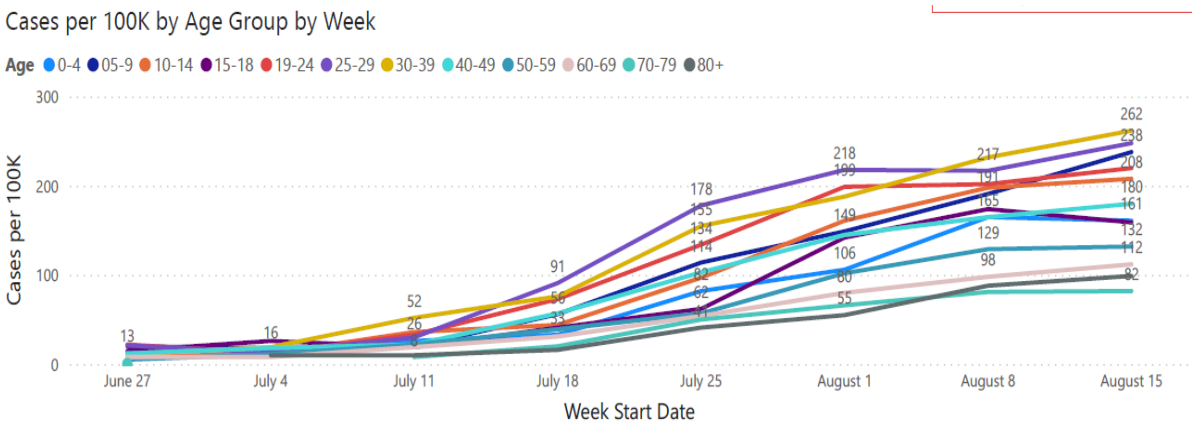
II. FACTUAL BACKGROUND

Dr. James McDonald, the official leading the Rhode Island Department of Health's (RI DOH) COVID-19 unit, explained that on or around July 4, 2021, the decrease that Rhode Island had seen in COVID-19 cases and hospitalizations over

the prior several months began to reverse itself and cases began to rise. Dr. McDonald testified that this increase in cases and hospitalizations was due to the Delta variant, which became the dominant strain in Rhode Island (and elsewhere) around July 4, 2021.

Trial testimony elicited that the Delta variant is different from the original strain. The Delta variant has a viral load 1,000 times the original virus, meaning an infected person had 1,000 times more copies of the virus in their bodies. The Delta variant is also more contagious (6-8 times the original strain), vaccination seemed to be less protective against the Delta variant, and even during the summer months when people are more likely to be outside (and thus, the disease less likely to spread), the number of cases increased. The chart below – introduced as Exhibit P (August 26, 2021 tab) [1] – demonstrates the weekly trends in positive cases and illustrates that the disease had all but ceased to exist in Rhode Island in late June-early July, but then – consistent with Dr. McDonald's testimony – on or around July 4, Rhode Island experienced a steady and dramatic increase in the number of COVID-19 related cases among all age groups.

[1] All exhibits are designated as labeled during the hearing.



CASES BY AGE GROUP

TOP 5 WEEKLY CASE RATE BY AGE GROUP

August 15 - August 21

Age Group	Cases/100k
30-39	262
25-29	248
5-9	238
19-24	220
10-14	208

Based on, *inter alia*, the above information, on August 19, 2021, Governor Daniel J. McKee issued Executive Order 21-86, which declared a new state of emergency based upon what had become a new, dominant, more contagious, and highly potent variant of COVID-19, the Delta variant. Exhibit 4. Among the findings in Executive Order 21-86 are:

- the Delta Variant may have a viral load 1,000 times greater than the original strain of SARS-CoV-2 that hit Rhode Island in 2020;

- the Delta Variant is more than twice as contagious as recent variants, and 3-4 times more contagious than the original strain, leading to a significant increase in transmission who are not vaccinated and breakthrough infection in some people who are fully vaccinated;

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

- since vaccines are only authorized for people 12 and older, people less than 12 years old are particularly susceptible to infection from the Delta Variant; and

- Rhode Island is seeing increasing cases of COVID-19 in children and expects to see more childhood cases increase.

Exhibit 4. During the hearing, none of these findings were rebutted, and Executive Order 21-86 contains additional findings to support the conclusion that Rhode Island was facing a new and emergent threat. For example:

- On July 4, 2021, Rhode Island had only 11.2 new cases of COVID-19 per 100,000 people in the prior 7 days; by August 16, it had 195.6 new cases of COVID-19 per 100,000 people;

- As of July 4, 2021, there were 22 hospitalized COVID-19 patients in the hospital, whereas on August 16, 2021, there were 103 hospitalized COVID-19 patients; and

- Since August 11, 2021, Rhode Island had been experiencing a high level of community transmission of the Delta Variant, defined as more than 100 cases of COVID-19 per 100,000 people in the past 7 days.

Exhibit 4. During the hearing, none of these findings were rebutted.

On the same day Executive Order 21-86 was issued declaring a state of emergency, *i.e.*, August 19, 2021, Governor McKee issued Executive Order 21-87. Exhibit 5. That Executive Order was issued pursuant to, among other provisions, Chapter 15 of Title 30. Exhibit 5. According to Executive Order 21-87, all Local Education Agencies ("LEA") that have not adopted a universal indoor masking requirement must abide by a universal indoor masking protocol developed by RI DOH. Exhibit 5. Executive Order 21-87 added that the RI DOH protocol "shall require universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools." Exhibit 5. Both parties agree that RI DOH issued a masking directive consistent with Executive Order 21-87. Thereafter, on September 23, 2021, RI DOH issued Emergency Regulation 216-RICR-20-10-7, which provides, *inter alia*, "[a]ll students, school personnel, visitors, and vendors at LEAs without a universal indoor masking requirement must wear a mask when entering and while inside school buildings." Exhibit H. The Emergency Regulation also contained several exceptions not previously set forth in the protocol. Exhibit H. Petitioners challenge both Executive Orders and the Emergency Regulation.

III. REASONS THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED

1. Although the Motion Justice correctly denied the motion for a preliminary injunction, the Superior Court erred when it determined that the Plaintiffs satisfied their burden on the irreparable harm prong.

The moving 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. *Fund for Cmty. Progress v. United Way of Se. New England*, 695 A.2d 517, 521 (R.I. 1997). During the hearing, four Plaintiffs testified concerning the effects of the mask requirement on their children. As related by the Motion Justice, Mr. Richard Southwell testified that 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." Decision, at 5. Because of these factors, Mr. Southwell made the decision to continue homeschooling his child during the 2021-2022 school year, a decision he likewise made for the 2020-2021 school year. Decision, at 5. Ms. Maddalena Cirignotta similarly testified that she was seeking to homeschool her child as a result of the mask requirement, Decision, at 5, and has been homeschooling her children since the school advised that her children would not be permitted to attend without a mask. Ms. Cirignotta related that her children were enrolled in public school, but because they would not wear a mask, "they were released from school." Decision, at 5. When masked, the children complained of headaches (last school year), and refused to eat snacks; they became grumpy and lethargic. Decision, at 5. Ms. Cirignotta explained that "parents were told there would be breaks but in practice talking is not allowed. Her children were

in fear of getting caught without masks." Decision, 5-6. She also explained that she and her children struggled with how strict the mask requirement was enforced by school officials for her child in kindergarten during the 2020-2021 school year.

Mr. Orlando Braxton testified that he and his wife removed their children from school in favor of homeschooling. Decision, at 6. Mr. Braxton described "how difficult it was for them to come home with dirty masks." Decision, at 6. Mr. Braxton also testified that "[s]ome teachers gave breaks, others did not. . . . Masks were then worn at sports events after school. Talking was limited, even at lunch." Decision, at 6. Lastly, Ms. Julie McKenney testified that she has two school-aged children and that each child "react[ed] differently to masking, sometimes concerned that the teacher won't hear them through the masks, sometimes withdrawing more." Decision, at 6. Ms. McKenney related that while her son had difficulties adjusting to masks in schools, her daughter is not as affected by the mask requirement. Ms. McKenney related that one child with allergies was sent home by the school because the child was coughing and coughing is a symptom of COVID-19. Decision, at 6.

Similar to Mr. Southwell's experience in the manner in which desks were arranged, Ms. Cirignotta's testimony relating to the release of her children from school for refusing to wear a mask, Mr. Braxton's observation that "[s]ome teachers gave breaks, others did not," and Ms. McKenney's explanation that one of her children was sent home because of coughing, the Plaintiffs testified to other harms

their children were encountering but which are not directly attributable to the Executive Orders or the Emergency Regulation. For instance, Mr. Southwell explained that children were not permitted to mingle with other children during lunchtime and Mr. Braxton related that school staff used a pool noodle to measure distancing between students.

While the State takes no issue with the Motion Justice's determination that these witnesses are credible, Decision, at 15, the State does take exception to the Motion Justice's conclusion that these "adverse effects" were "from the requirement that they wear masks throughout the school day." Decision, at 15. As the Motion Justice elucidated, "[t]hese 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." Decision, at 15. No matter how uncomfortable it may be for one to wear a mask, as a matter of law, the adverse effects recognized by the Motion Justice do not constitute irreparable harm.

No expert testimony causally linked the Plaintiffs' testimony to wearing a mask. Dr. McDonald, who unlike the Plaintiffs had been qualified by the Court as an expert, testified that medical research has determined "mask wearing has no significant adverse health effects for wearers." Exhibit B. Moreover, three of the

four Plaintiffs testified that they made the decision to homeschool their children. No matter the difficulty in making this decision, a student cannot possibly suffer irreparable harm as a result of a requirement to wear a mask in public schools when a child is homeschooled. Any determination to the contrary is error.

Indeed, despite concluding that the Plaintiffs established irreparable harm, the Motion Justice largely sidestepped the irreparable harm question, reducing the Superior Court's analysis to a single sentence: "Regardless of the uncertainly surrounding potential long-term medical problems resulting from mask wearing, the Court finds that Plaintiffs' testimony regarding the ongoing impact of the mask mandate on their children suffices to establish a finding of irreparable harm." Decision, at 16. The Motion Justice supported this conclusion by citing four cases, none of which had anything to do with COVID-19 or wearing a mask.

Rather, courts that have examined this issue – whether a student wearing a mask constitutes irreparable harm – have responded in the negative. One such case, *Oberheim v. Bason*, 2021 WL 448333 (M.D. Penn. 2021) presents a near identical situation where the state required that all students attending schools wear a mask due to the Delta variant. This directive was challenged on constitutional grounds by parents. Similar to this case, the *Oberheim* parents claimed irreparable harm, including "exposure to present and existential threats to health and safety, threat of retribution and bullying, increased risk of serious bodily injury and/or death."

Oberheim, at * 10. In rejecting this claim, the federal district court noted "[a]s other courts have noted, wearing masks is not 'indicative of irreparable harm, but consistent with CDC guidelines.'" *Id*.

In *Arc of Iowa v. Reynolds*, 2021 WL 4166728 (S.D. Iowa, 2021), the roles were reversed. The State passed a statute banning local school districts from implementing universal mask policies on school property. Certain parents brought suit challenging the prohibition on behalf of their children with underlying health conditions. Citing *Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2* – the same study relied upon by Dr. McDonald (Exhibit B) – the federal district court concluded that "[t]he data further shows it is important for *all* students, staff, and teachers to wear masks to reduce the spread, not merely those who are most vulnerable to severe illness and death." *Id*. at *8 (emphasis in original). Thereafter, the federal district court relied upon the same report – Exhibit B – and observed that "mask wearing has no significant adverse health effects for wearers." *Id*. Because the plaintiffs demonstrated that a ban on masks "substantially increases their risk of contracting the virus that causes COVID-19 and that due to their various medical conditions they are at an increased risk of severe illness or death," the court determined that "Plaintiffs have demonstrated that an irreparable harm exists." *Id*. at * 9.

While the State has no doubt that the Plaintiffs seek only the best interests of their own children and sympathizes with the Plaintiffs (and all others) concerning mitigation measures instituted in an attempt to curb the spread of a contagious and sometimes deadly disease, the RI DOH must "do all in its power to ascertain the causes and the best means for the prevention and control of diseases or conditions detrimental to the public health, and adopt proper and expedient measures to prevent and control diseases and conditions detrimental to the public health in the state." R.I. Gen. Laws § 23-1-1. The Motion Justice's determination that the Plaintiffs satisfied the irreparable harm prong was error.

2. The Motion Justice erred when the Superior Court determined that the Department of Health had not posted on its website Emergency Regulation 216-RICR-20-10-7, and a statement of imminent peril.

Rhode Island General Laws § 42-35-2.10 provides, in relevant part:

> [i]f an agency finds that an imminent peril to the public health, safety, or welfare or the loss of federal funding for an agency program requires the immediate promulgation of an emergency rule and publishes in a record with the secretary of state and on its agency website reasons for that finding, the agency, without prior notice or hearing or on any abbreviated notice and hearing that it finds practicable, may promulgate an emergency rule without complying with §§ 42-35-2.7 through 42-35-2.9. (Emphases added).

The Motion Justice concluded that the evidence presented "provides a plausible rationale to support the DOH's finding of imminent peril." Decision, at 44.

Notwithstanding the determination that the RI DOH properly determined an imminent peril existed so that it could promulgate the Emergency Regulation, R.I. Gen. Laws § 42-35-2.10 has certain procedural requirements. Both this Court and the Rhode Island Superior Court have interpreted this – or a similar – procedural requirement.

For example, in *State ex. rel Town of Middletown v. Watson*, 698 A.2d 181 (R.I. 1997), the Court examined an emergency regulation adopted under a similar but prior version of R.I. Gen. Laws § 42-35-2.10. In reviewing the propriety of the emergency regulation, the Court's entire analysis related:

> [i]t is undisputed that the emergency rules were adopted in response to a ruling of the District Court that cast into doubt the department's procedure for certifying breathalyzer operators. In its 'Statement of Need for Emergency Action,' the department explained, 'Filing is necessary to establish approved preliminary breath testing instruments and procedures for testing breathalyzers, for reliable quantitative determinations and effective administrative practices to protect the safety and welfare of the public.' We are of the opinion that the department responded to a legitimate permit in accordance with the statute. Without doubt, the state's ability to enforce its drunk-driving laws is a matter of the highest concern for the health, safety, and welfare of the public.

Id. at 182-83.

Years later, the Court examined a similar issue in *Park v. Rizzo Ford, Inc*., 893 A.2d 216 (R.I. 2006), where the Department of Transportation passed an emergency regulation placing a $20.00 limit on title preparation fees charged by

licensed motor vehicle dealers. The plaintiffs challenged the regulation on the ground that the statutory language evidencing that it was an emergency regulation was not contained in the regulation itself. The Supreme Court rejected this claim on three grounds.

First, the cover letter and the regulation both state that the DOT regulation was enacted pursuant the statutes that create the emergency regulation procedure. *Id*. at 220. Second, the Court explained, the "cover letter, which reads '[t]he Department of Transportation finds that [there] is imminent peril to the public health, safety and welfare ***,' actually tracks the language of § 42-35-3(b), which reads '[i]f an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon less than thirty (30) days' notice ***.'" *Id*. And, third, the Court recognized, "the cover letter made the requisite finding of imminent peril: 'The consuming public would be without a forum to redress infractions of [Chapters 31-5, 31-5.1]. The industry would be unregulated and the Department would be powerless to combat unfair business practices that occur daily in the sale, manufacture and distribution of new and used automobiles.'" *Id*. Based on the foregoing, the Court held the motion justice properly determined that the DOT regulation was an emergency regulation. *Id*. at 220.

While neither *Town of Middletown* or *Park* examined the reasons or legitimacy of the promulgated emergency regulations – but rather examined only

whether the statutory requirements were satisfied – a 2019 Superior Court case took a slightly different, yet still highly deferential, approach. In *Vapor Technology Assoc. v. Raimondo*, PC 2019-10370 (R.I. Super, Nov. 5, 2019) (Stern, J.), the Court examined an emergency regulation promulgated by RI DOH that banned "[t]he manufacture, distribution, sale, or offer for sale of, or the possession with intent to manufacture, distribute, sell, or offer for sale flavored electronic nicotine-delivery system products to consumers." *Id* at 1. RI DOH promulgated the emergency regulation about 10 days after Governor Raimondo issued Executive Order 19-09, directing the RI DOH to "promulgate emergency regulations to prohibit the sale of flavored [Electronic Nicotine Delivery Systems]." *Id*. at 1. While Plaintiffs advise this Court that the Superior Court granted a temporary restraining order in *Vapor Technology,* Plaintiffs' Memorandum, at 16, the opinion clearly states that: "the Court finds that the Plaintiffs have failed to carry their burden for a Temporary Restraining Order. Accordingly, Plaintiffs' Motion is denied." *Vapor Technology*, at 22.

The denial of injunctive relief in *Vapor Technology* is significant because similar to the present case, the plaintiffs in *Vapor Technology* challenge RI DOH's reasons for enacting the Emergency Regulation. *Vapor Technology*, at 16. Specifically, the plaintiffs argued that the Emergency Regulations were not

supported by a finding of "imminent peril," as required by R.I. Gen. Laws § 42-35-2.10. *Vapor Technology*, at 16.

In reviewing this allegation, Judge Stern considered *Town of Middletown* and *Park* and observed, "the Court has seemingly given a great deal of deference to the agency's findings of 'imminent peril'" and that in "both cases, the Court concluded the agency had made the requisite finding of 'imminent peril' without undertaking an exhaustive review of the agency's findings or determinations." *Vapor Technology*, at 17-18.

The *Vapor Technology* court continued:

> [t]his deference to an agency's determination is consistent with Rhode Island's administrative agency jurisprudence. Under Rhode Island law, legislative rules – that is, rules 'promulgated pursuant to the specific statutory authority provided by the Legislature' – 'ha[ve] the force and effect of law.' *Town of Warren v. Bristol Warren Regional School District*, 159 A.3d 1029, 1039 (R.I. 2017). Thus, when reviewing a legislative rule, the Court is required to give it deference and cannot substitute its own construction of the statute for that of the agency. *** Here, the DOH promulgated the Emergency Regulations pursuant to § 42-35-2.10. Under the statute, the DOH – along with all agencies – is charged with enacting emergency rules upon a finding of 'imminent peril to the public health, safety, or welfare.' Section 42-35-1. In the statute the General Assembly failed to define the term 'imminent peril.' Thus, because the statue is silent, this Court 'must defer to a reasonable construction by the [DOH, as it is] charged with its implementation.' *See Labor Ready Northeast, Inc. v. McConaghy*, 849 A.2d 340, 346 (R.I. 2004).

Vapor Technology, at 18-19.

Here, the Motion Justice properly determined that RI DOH made the requisite and proper finding of "imminent peril" as required by R.I. Gen. Laws § 42-35-2.10. Decision, at 44. Nonetheless, the Motion Justice erred by concluding that the RI DOH failed to post the Emergency Regulation and the Statement of Imminent Peril on its website. Indeed, no evidence of any such omission was presented during the hearing. Even more so, the Motion Justice provided the State "with the opportunity to cure their procedural deficiencies by publishing, on both the DOH and Department of State websites, both [the Emergency Regulation] and an accompanying statement of imminent peril." Decision, at 46. The Motion Justice added that the RI DOH Statement of Imminent Peril should incorporate the findings set forth in Executive Orders 21-86 and 21-87. Decision, at 46. The determination that the RI DOH's current Statement of Imminent Peril needed enhancement is inconsistent with the Motion Justice's earlier observation that the Statement of Imminent Peril initially published by the RI DOH "is more akin to the statements at issue in *Watson* and *Park*[.]" Decision, at 44. Since the RI DOH's existing Statement of Imminent Peril was consistent with this Court's precedent, the Motion Justice erred by directing that the RI DOH provide a more comprehensive statement.

The Motion Justice also erred when the Superior Court determined that RI DOH had not published the Emergency Regulation or the Statement of Imminent Peril on its own agency website. No evidence was ever presented to support such a

conclusion. Moreover, both the Emergency Regulation and the Statement of Imminent Peril are already included on the RI DOH website, as well as the Secretary of State's website. With respect to the RI DOH website, a user can visit the DOH website and find a link to 216-RICR-20-10-7; after clicking on the link (on the DOH website) the Emergency Regulation and the Statement of Imminent Peril appears to a user. To be sure, the Emergency Regulation and the Statement of Imminent Peril are housed or stored on the Secretary of State's website or URL, but the actual location of where the file is saved is of no consequence when a user can access the document through visiting and clicking on the links on the RI DOH website. The Motion Justice erred in reaching a contrary conclusion.

3. The Motion Justice erred when the Superior Court considered an issue not raised in the Plaintiffs' Complaint, i.e., whether Executive Order 21-86 and/or Executive Order 21-87, as well as 216 RICR-20-10-7, implicated or violated the constitutional rights of Plaintiffs' children.

Pursuant to Rule 8(a)(1) of the Superior Court Rules of Civil Procedure, a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although a plaintiff's complaint need not "set out the precise legal theory upon which his or her claim is based," the complaint must give "the opposing party fair and adequate notice of the type of claim being asserted." *Konar v. PFL Life Ins. Co.*, 840 A.2d 1115, 1118 (R.I. 2004).

Here, the Plaintiffs invited the Motion Justice to reach an argument that the Executive Orders and Emergency Regulation violated the Plaintiffs' constitutional

right to bodily integrity. In doing so, the Motion Justice recognized the State's argument that "Plaintiffs did not allege constitutional violations in their pleadings." Decision, at 34. "Nevertheless," the Court explained, it "will touch upon Plaintiffs' arguments." Decision, at 34. Reaching an issue never pled in the Amended Complaint was error.

4. The Motion Justice properly determined that the Delta variant constituted a new state of emergency under the Emergency Management Act, but the Motion Justice erred because the Superior Court should never have reached this issue and should have determined that the issue presented a non-justiciable political question.

Plaintiffs' invitation that the Superior Court (and this Court) should step in and review the Governor's declaration of emergency (Executive Order 21-86), in the absence of the General Assembly exercising its powers to do so, injects the Superior Court and this Court into a political question. A "controversy involves a political question where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (quotation marks and alteration omitted). This Court has held, for example, that because there were no "judicial manageable standards" by which to decide a case concerning state education funding, the issue was a non-justiciable political question, that is, "not a proper arena for judicial determination," and better

left to the legislative and executive branches. *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58–59, 62-63 (R.I. 1995).

The same is true here. The statutory scheme allows the General Assembly to terminate a state of emergency as quickly as the Governor can declare one, *see* R.I. Gen. Laws § 30-15-9(b), suggesting that this is an issue best hashed out between the "[m]embers of the legislative and executive branches [who] are directly accountable to the electorate." *City of Pawtucket*, 662 A.2d at 62. The courts, respectfully, are not the right place to decide questions such as: Are the flood waters high enough, is the fire wild enough, or, as here, does the Delta variant pose a risk to the health and safety of Rhode Islanders? *See Baker v. Carr*, 369 U.S. 186, 217 (1962) (noting that a political question exists when a court is faced with "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"). As in *City of Pawtucket*, this Court, "accustomed to the constraints implicit in adversary litigation[,] cannot feasibly by judicial mandate interfere . . . without creating chaos." *City of Pawtucket*, 662 A.2d at 63.

This, incidentally, is the conclusion reached in the analogous federal context. The National Emergency Act allows the President to declare a national emergency and, by doing so, avail himself of special statutory powers. 50 U.S.C. § 1621. Congress may terminate any such emergency by joint resolution. 50 U.S.C. § 1622(a)(1). Parties have sometimes challenged a President's emergency declaration

as ultra vires. But every court faced with this issue has abstained, lest it wade into and decide a non-justiciable political question. *See, e.g.*, *United States v. Amirnazmi*, 645 F.3d 564, 581 (3d. Cir. 2011) ("[F]ederal courts have historically declined to review the essentially political questions surrounding the declaration or continuance of a national emergency." (citation and quotation marks omitted)); *Center for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 31 (D.D.C. 2020) ("Although presidential declarations of emergencies . . . have been at issue in many cases, *no* court has ever reviewed the merits of such a declaration."); *California v. Trump*, 407 F. Supp. 3d 869, 890 (N.D. Cal.) ("[T]here is no precedent for a court overriding a President's discretionary judgment as to what is and is not an emergency.").

Because the Rhode Island context is identical in all relevant respects—the chief executive unlocking powers by declaring a state of emergency that the legislature may revoke by joint resolution—this Court should follow the federal courts' lead and abstain on political-question grounds from deciding the issue of whether Delta constitutes an emergency and whether Executive Order 21-86 is proper. This Court should do so because this authority rests exclusively with the Chief Executive and is already subject to Legislative termination, "at any time." R.I. Gen. Laws § 30-15-9(b). The Motion Justice's decision to wade into this issue – even though resolved favorably to the State – was error.

IV. CONCLUSION

For all of these reasons, the Petition for a writ of certiorari should be granted, if the Court grants the Petition in SU-2021-280 MP.

Respectfully submitted,

RESPONDENTS,

Daniel J. McKee, in his official capacity as the Governor of the State of Rhode Island, and Dr. Nicole Alexander-Scott, in her official capacity as the Director of the Rhode Island Department of Health

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CERTIFICATION

I hereby certify that on this 2nd day of December, 2021 I filed this document through the electronic filing system.

I hereby further certify that the document electronically filed is available for viewing and downloading from the Rhode Island Judiciary's Electronic Filing System and that a true and accurate copy has been sent via email to:

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