

STATE OF RHODE ISLAND
SUPREME COURT

RICHARD SOUTHWELL, et al. :
: Respondents :
: SU 2021-
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. :

**STATE OF RHODE ISLAND’S 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 in SU-2021-280 MP, if this Court grants the Petition, the Court should also grant the instant Petition.

I. FACTUAL BACKGROUND

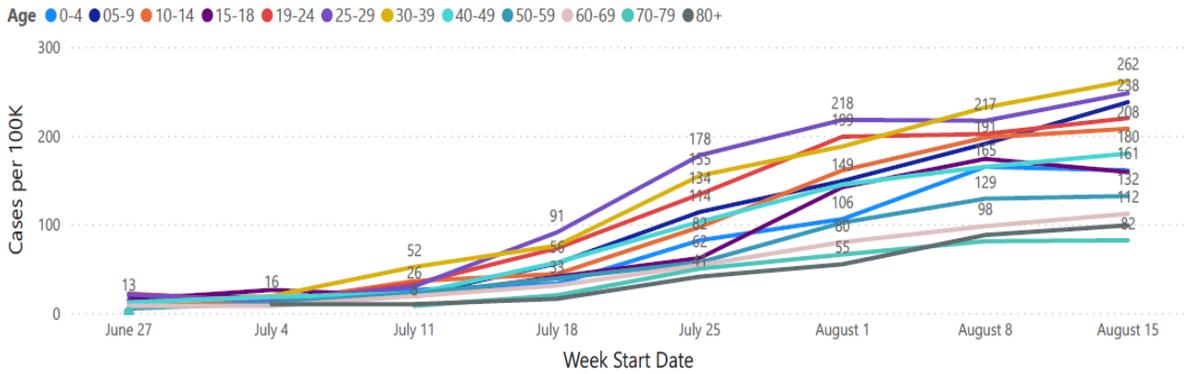
Dr. James McDonald, the official leading the Rhode Island Department of Health’s (RI DOH) COVID-19 unit, explained that on or around July 4, 2021, the decrease that Rhode Island had seen in COVID-19 cases and hospitalizations over the prior several months began to reverse itself and cases began to rise. 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 per 100K by Age Group by Week



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.

II. REASONS THE PETITION SHOULD BE GRANTED

Article I, Rule 13(e)(2) provides that among the requirements for a petition for a writ of certiorari, a petitioner must provide “[a] statement setting forth with particularity why the relief sought is not available in any other court, or cannot be

had through other appellate processes[.]” In its response to the Petition requested in SU-2021-280-MP, the State will (has) filed a Memorandum opposing the Petition for a Writ of Certiorari. While this Court should not grant either the Petition in SU-2021-280-MP, or this Petition, for the reasons the State articulated in its Memorandum Opposing the Petition for a Writ of Certiorari, if this Court grants the Petition in SU-2021-280-MP, it should also grant this Petition. As discussed, *infra*, the issues raised by this Petition are intertwined with the issues presented in the Petition filed in SU-2021-280-MP.

For example, Petitioners contend the Motion Justice improperly denied their motion for preliminary injunctive relief. In doing so, the Motion Justice determined that the Petitioners prevailed on the irreparable harm prong, but failed to establish their burden on the likelihood of success, balancing of the equities, or status quo prongs. Granting the Petition to review the likelihood of success, balancing of the equities, and status quo prongs (as the Petitioners seek) without also reviewing the Motion Justice’s determination on the irreparable harm prong (as the State seeks) will leave this case in a posture where this Court is not provided with all the relevant issues. As such, this Petition should be granted only if the Petition in SU-2021-280-MP is granted.

III. ISSUES TO REVIEW

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.
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.
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.
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.

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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