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STATE OF RHODE ISLAND

PROVIDENCE, Sc.

SUPERIOR COURT

RICHARD SOUTHWELL, et al.)	
)	
vs.)	NO: PC-2021-05915
)	
DANIEL J. MCKEE, et al.)	

HEARD BEFORE THE HONORABLE
MR. JUSTICE JEFFREY LANPHEAR

Volume 6

OCTOBER 14, 2021

APPEARANCES:

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FOR THE PLAINTIFFS

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Certified Shorthand Reporter

I N D E X

<u>WITNESSES</u>	DIRECT	CROSS
DR. JAMES MCDONALD	5	34

E X H I B I T S

DEFENDANTS'	IDENTIFICATION	FULL
V	4	5
W	6	8
X	7	12
Y	26	28
D		71
PLAINTIFFS'	IDENTIFICATION	FULL
32		44
33	45	47
34	49	54
35	51	54
36	61	
37	86	
38		96
39	100	
40	105	113
41	119	

C E R T I F I C A T I O N

I, Andrea Iacobellis, CSR, hereby
certify that the succeeding pages, 1 through 128
inclusive, are a true and accurate transcript
of my stenographic notes.

ANDREA IACOBELLIS, CSR
Court Reporter

11:33:56 1 **Thursday, October 14, 2021**

11:33:56 2 **(Morning Session)**

11:33:56 3 **(DEFENDANTS' EXHIBIT V WAS PREMARKED FOR**
11:37:00 4 **IDENTIFICATION)**

11:37:00 5 THE CLERK: Resuming the matter of **PC-2021-5915**
11:37:05 6 **Richard Southwell vs. Daniel McKee.**

11:37:11 7 THE COURT: Alright. We're continuing with the
11:37:13 8 direct examination of Dr. McDonald.

11:37:16 9 MS. WYRZYKOWSKI: Yes, your Honor.

11:37:17 10 THE COURT: If you can come back up, please.

11:37:29 11 THE CLERK: And for the record, defense has
11:37:33 12 premarked Exhibit V as in Victor for identification.
11:37:35 13 And, your Honor, that exhibit has been scanned.

11:37:38 14 I'd just like to remind the witness that having been
11:37:41 15 previously sworn in you are still under oath. If you
11:37:41 16 could just state your name for the record, please.

11:37:43 17 THE WITNESS: I am Dr. Jim McDonald.

11:37:46 18 MS. WYRZYKOWSKI: Your Honor, before we begin,
11:37:47 19 as a procedural matter, Plaintiffs' counsel and I have
11:37:51 20 agreed to enter Exhibit U without objection, with respect
11:37:54 21 to Executive Order 2197, which continues the prior
11:37:58 22 Executive Order from August 19th. So I ask that that be
11:38:03 23 marked in full.

11:38:05 24 THE COURT: By agreement U is full.

11:38:07 25 THE CLERK: Defendants' U is full.

11:38:09 1 MS. WYRZYKOWSKI: Your Honor, additionally
11:38:11 2 Plaintiffs' counsel and I have spoken with respect to
11:38:13 3 Exhibit V, which is premarked, which is Dr. McDonald's
11:38:16 4 resume.

11:38:17 5 MR. PICCIRILLI: We have no objection. It's
11:38:18 6 full.

11:38:19 7 THE COURT: V as in Victor is full.

11:38:22 8 THE CLERK: Defendants' V is full.

11:38:22 9 **(DEFENDANTS' EXHIBIT V WAS MARKED FULL)**

11:38:43 10 **CONTINUED DIRECT EXAMINATION BY MS. WYRZYKOWSKI**

11:38:44 11 Q Doctor, you've been handed what's been marked in full as
11:38:50 12 Exhibit V, which is a current copy of your resume? Do
11:38:55 13 you have that in front of you doctor?

11:38:56 14 A I do.

11:38:56 15 Q And, Doctor, in looking at your resume that is before
11:39:01 16 you, is there any material related to the COVID-19
11:39:04 17 pandemic that is not listed on your current resume?

11:39:08 18 A No. The only thing missing is I did have a publication in
11:39:12 19 the American Journal of Public Health early pandemic with
11:39:15 20 Dr. Chan and some others on the zero prevalence of
11:39:19 21 SARS-CoV-2. It was a surveillance study. But other than
11:39:23 22 that it looks accurate.

11:39:24 23 Q Doctor, what was the title of your study?

11:39:26 24 A It was Zero Prevalence of SARS-CoV-2 in various
11:39:30 25 populations in Rhode Island.

11:39:32 1 Q Thank you, Doctor.

11:39:43 2 MS. WYRZYKOWSKI: Your Honor, a couple studies
11:39:49 3 in here. These have not been reviewed by counsel at this
11:40:11 4 point in time.

11:40:11 5 THE CLERK: Exhibit W for identification.

11:40:11 6 **(DEFENDANTS' EXHIBIT W WAS MARKED FOR**
11:40:11 7 **IDENTIFICATION)**

11:40:17 8 THE CLERK: I'll hand it to the witness.

11:40:20 9 MS. WYRZYKOWSKI: Yes, please. And what number
11:40:23 10 is that?

11:40:23 11 THE CLERK: W.

11:40:24 12 MS. WYRZYKOWSKI: 70?

11:40:25 13 THE CLERK: W.

14 MS. WYRZYKOWSKI: W. Thank you.

15 THE CLERK: You're welcome. I'm sorry, is that
16 the one you wanted marked?

17 MS. WYRZYKOWSKI: Yes, there is two separate --

18 THE CLERK: I'm sorry, the copy that you just
19 gave me.

11:40:57 20 MS. WYRZYKOWSKI: Yes, it's separate studies.

11:40:57 21 THE CLERK: I'm sorry, the copy you just gave
11:40:57 22 me?

11:40:57 23 MS. WYRZYKOWSKI: It will be eventually but
11:40:58 24 it's a separate study. So you gave him one that was not
11:41:00 25 -- the Doctor hasn't gone through.

11:41:02 1 THE CLERK: Can that I have that back.

11:41:05 2 Defendants' X for identification.

11:41:06 3 MS. WYRZYKOWSKI: That is X, correct.

11:41:20 4 THE CLERK: Defendants' X for identification.

11:41:20 5 **(DEFENDANTS' EXHIBIT X WAS MARKED FOR**

11:41:20 6 **IDENTIFICATION)**

11:41:29 7 THE CLERK: Do you have a copy for the Judge?

11:41:31 8 MS. WYRZYKOWSKI: I do have a copy for the

11:41:33 9 Judge.

11:41:33 10 THE CLERK: Thank you.

11:41:35 11 Q BY MS. WYRZYKOWSKI: Doctor, you've been handed a
11:41:51 12 document that has been premarked as -- not been marked
11:41:55 13 but marked as Exhibit W. Doctor, do you recognize this
11:42:00 14 document?

11:42:00 15 A Yes.

11:42:01 16 Q Doctor, what is this document?

11:42:03 17 A It's a publication from the Center for Disease Control
11:42:06 18 and Prevention, Morbidity and Mortality Weekly Report,
11:42:10 19 published September 10, 2021. It's entitled, Trends in
11:42:15 20 COVID-19 Cases, Emergency Department Visits and Hospital
11:42:18 21 Admissions Among Children and Adolescents 0 to 17 from
11:42:22 22 August of 2020 to August of 2021.

11:42:24 23 Q Doctor, how do you recognize the document that's in front
11:42:27 24 of you?

11:42:28 25 A I read this report. I get -- this is a periodic, I

11:42:33 1 subscribe to it electronically so it comes to my e-mail.

11:42:35 2 Q Thank you, Doctor. Doctor, is this document, Exhibit W,
11:42:37 3 relevant to your current role at the Rhode Island
11:42:40 4 Department of Health?

11:42:41 5 A Yes.

11:42:41 6 Q Doctor, do you rely on this document in your current role
11:42:45 7 at the Rhode Island Department of Health?

11:42:46 8 A Yes.

11:42:47 9 MS. WYRZYKOWSKI: Your Honor, I ask that the
11:42:48 10 document be marked in full.

11:42:50 11 MR. PICCIRILLI: No objection.

11:42:54 12 THE COURT: W is full.

11:42:55 13 THE CLERK: W is full.

11:42:56 14 **(DEFENDANTS' EXHIBIT W WAS MARKED FULL)**

11:42:56 15 Q Doctor, you testified that you relied in part on Exhibit
11:42:59 16 W that is before you. Can you please explain what
11:43:04 17 information in Exhibit W that you relied upon in your
11:43:08 18 role at the Rhode Island Department of Health,
11:43:09 19 specifically with the COVID-19 unit?

11:43:12 20 A Yes. So this is a study that just looks at what we see
11:43:16 21 with Covid in children over the last year. It was
11:43:19 22 relevant because of the time frame, it's so recent but
11:43:24 23 includes last year. Part of what peaked my interest was
11:43:28 24 Figure 1.

11:43:28 25 Q And, Doctor, what page is that on?

11:43:30 1 A Figure 1 on the third page here.

11:43:32 2 Q Thank you.

11:43:33 3 A It says Page 1251 on the bottom.

11:43:36 4 Q Thank you.

11:43:36 5 A So what you see in Figure 1, it just talks about cases
11:43:41 6 per 100,000 persons, and it does it from August of 2020
11:43:46 7 to August of 2021. And what was interesting is since
11:43:52 8 this is a national study, you see in July there's the
11:43:56 9 same dip that we had seen in Rhode Island. But after
11:43:59 10 July you see in different age groups, whether it's
11:44:02 11 children in 0 to 4 years old, 5 to 11 years old, or 12 to
11:44:07 12 17 year olds, that it really goes up quite steeply
11:44:11 13 through August.

11:44:12 14 So that was something that was, you know,
11:44:15 15 interesting to me, and certainly made sense of things
11:44:19 16 we're seeing in Rhode Island. The other thing that was
11:44:22 17 kind of interesting is just the context of the data in
11:44:26 18 Figure 2, that looks at hospitalizations. So Figure 1
11:44:30 19 looked at cases, but Figure 2 looked at children that
11:44:34 20 ended up in the hospital by age group, and it also
11:44:38 21 includes how many end up in the intensive care unit, and
11:44:41 22 then how many end up on the ventilator.

11:44:44 23 Then it shows the numbers over time and you see a
11:44:47 24 similar trend is it really dips in June of 2021 but yet
11:44:53 25 starts to go up in July and August, and it doesn't

11:44:56 1 include a full month of August, as they stopped at
11:44:59 2 August 21st, but it does seem, you know, the same trend
11:45:03 3 we've seen here, as well as in Rhode Island.

11:45:05 4 So you know what they have concluded was, you know,
11:45:10 5 severe illness in children isn't common but it still
11:45:13 6 occurs. And they looked at emergency department
11:45:17 7 hospitalizations and they saw increases, which really
11:45:19 8 coincides with the Delta variant being dominant.

11:45:24 9 So they talk about why it's important to do
11:45:26 10 preventive measures to protect people from acquiring
11:45:30 11 Covid, and that was the point, not everyone is
11:45:33 12 vaccinated, so the other preventative measures that we
11:45:36 13 talked about yesterday were all the more important.

11:45:38 14 Q Thank you, Doctor. Doctor, you can put that Exhibit --
11:45:41 15 unless there's something else. You can put that down.
11:45:42 16 And now directing your attention to an Exhibit that's
11:45:45 17 been marked as Exhibit X. Do you have that, Doctor?

11:45:48 18 A I do.

11:45:49 19 Q Doctor, what is this document before you?

11:45:53 20 A So this is a publication from the Center For Disease
11:45:56 21 Control and Prevention, Morbidity Mortality Weekly
11:46:00 22 Report. It's published the same day, September 10, 2021.
11:46:05 23 It's titled, Hospitalizations Associated With COVID-19
11:46:09 24 Among Children and Adolescents, COVID-19, 14 States,
11:46:15 25 March 1st 2020 through August 14, 2021.

11:46:20 1 Q Doctor, how do you recognize this document?

11:46:22 2 A So it came in the same e-mail that I got from the other
11:46:27 3 episode. In other words, I subscribe to this periodical
11:46:30 4 so it came in my e-mail so I read it.

11:46:33 5 Q Doctor, why is this information -- is the information in
11:46:36 6 this document relevant to your current position at Rhode
11:46:39 7 Island Department of Health in the Covid unit?

11:46:41 8 A It is.

11:46:41 9 Q Doctor, why is the information in this article relevant
11:46:44 10 to you in the Covid unit at the Rhode Island Department
11:46:47 11 of Health?

11:46:47 12 A Well, they looked at these 14 states throughout the
11:46:50 13 entire pandemic, so there's trends that we gleaned from
11:46:53 14 there, and they're examples from all over the country but
11:46:56 15 it's relevant to really how the pandemic is acting. When
11:47:00 16 you look at Figure 1 in particular it tells an
11:47:03 17 interesting story.

11:47:03 18 Q Doctor, one second, please. Figure 1 is on what page?

11:47:06 19 A Figure 1 is on Page 1257.

11:47:08 20 Q Thank you, Doctor.

11:47:09 21 A Or the third page of this document. So Figure 1 just
11:47:15 22 illustrates hospitalizations per 100,000 children --

11:47:20 23 THE COURT: Excuse me. He's reading from a
11:47:22 24 document for identification.

11:47:23 25 MS. WYRZYKOWSKI: Yes. Your Honor, I ask that

11:47:25 1 this document be moved in full, as Dr. McDonald testified
11:47:28 2 he relied on this information in the COVID-19 unit.

11:47:32 3 MR. PICCIRILLI: Just to clarify, he relies
11:47:37 4 upon it for advising the Governor on the Executive Order
11:47:40 5 in the emergency room, or is it just he just looked at
11:47:44 6 and it informed his decision. I don't know if that's
11:47:47 7 relevant.

11:47:48 8 MS. WYRZYKOWSKI: It informed his decision in
11:47:50 9 general with respect to any guidance he would give to the
11:47:53 10 Governor, based upon updating information.

11:47:56 11 MR. PICCIRILLI: No objection.

11:47:57 12 THE COURT: X is full.

11:47:59 13 THE CLERK: Exhibit X is full.

11:47:59 14 **(DEFENDANTS' EXHIBIT X WAS MARKED FULL)**

11:48:00 15 Q Doctor, now that the Exhibit is full. Please go on.

11:48:03 16 A So Figure 1 tells an interesting story. It looks at
11:48:07 17 hospitalization per 100,000 children in adolescents, and
11:48:11 18 it's cumulative hospitalizations per 100,000 by age
11:48:15 19 group, and it just shows over time no matter what age
11:48:20 20 group you're looking at what. What it indicate is, you
11:48:22 21 know, it's just heading in the direction where it's still
11:48:25 22 an active pandemic. Figure 2, which I think is even more
11:48:30 23 interesting.

11:48:30 24 Q And, Doctor, what page is that on, please?

11:48:33 25 A Figure 2 is on 1258.

11:48:35 1 Q Thank you, Doctor.

11:48:36 2 A Or the fourth page of what's in front of you.

11:48:39 3 So that actually shows hospitalizations per 100,000
11:48:43 4 in children and adolescents and it starts from the
11:48:46 5 beginning of the pandemic in March of 2020 through August
11:48:50 6 of 2021.

11:48:52 7 And you see the rates peak and dip. You can see it
11:48:57 8 dip. It peaked in December of 2020 and then started to
11:49:01 9 trend down again and up again in May, and then it came
11:49:05 10 down again in June, and then it sort of echoes what's
11:49:09 11 going on now, which is it's going up again.

11:49:09 12 One of the things you really see about the pandemic
11:49:12 13 is it's a new disease. We're still learning about it but
11:49:16 14 it seems to peak and then go down a little bit, peak and
11:49:20 15 go down a little bit. But you really can't see that it's
11:49:24 16 actually stopping just yet.

11:49:25 17 So I thought it was informative to me and
11:49:28 18 interesting to me. You know, when you look at what the
11:49:31 19 authors did in this study was, you know, they admitted
11:49:34 20 that we don't see a lot of severe cases in children and
11:49:37 21 adolescents, but we do see some in tracking
11:49:39 22 hospitalization rates, it's something we should be
11:49:41 23 keeping our eye on.

11:49:42 24 One of the things they noticed was how it's really
11:49:46 25 increasing between June of 21 and August of 21. And one

11:49:52 1 of the conclusions they draw here is they said, and I'm
11:49:56 2 just going to read from here, please.

11:49:57 3 Q Doctor, can you please identify what page you're on and
11:49:59 4 what paragraph?

11:49:59 5 A I'm on Page 1259. I'm just going to read a sentence from
11:50:04 6 the summary because I thought it was informative. It
11:50:06 7 said that proportions of hospitalized children and
11:50:09 8 adolescents --

11:50:10 9 MR. PICCIRILLI: Judge, I'm sorry --

11:50:11 10 MS. WYRZYKOWSKI: You need to pause for one
11:50:13 11 second. Can you please tell us what paragraph you're in?

11:50:15 12 THE WITNESS: So I'm in the blue box in the
11:50:17 13 upper right-hand corner that's called summary. I'm
11:50:19 14 reading from the second sentence.

11:50:26 15 MS. WYRZYKOWSKI: Thank you, Doctor.

11:50:27 16 A It just says the proportions of hospitals with children
11:50:29 17 and adolescents with severe disease were similar before
11:50:34 18 and during the period of Delta, predominance for
11:50:37 19 hospitalization rates were ten times higher among
11:50:40 20 unvaccinated than those fully vaccinated adolescents.

11:50:43 21 Then they go on to talk about how preventive
11:50:47 22 measures reduce transmission, and fear outcomes in
11:50:51 23 children and adolescents are critical including;
11:50:53 24 vaccination, universal masking in schools and masking
11:50:58 25 persons older than two and other outdoor public spaces

11:51:03 1 and child care centers.

11:51:05 2 So it was informative to us. It just was consistent
11:51:08 3 with previous studies but it's the type of thing that you
11:51:11 4 like to see is consistency and how is the pandemic still
11:51:15 5 acting.

11:51:15 6 Q Thank you, Doctor.

11:51:17 7 MS. WYRZYKOWSKI: Your Honor, before I have
11:51:18 8 more Exhibits marked at this point in time, I want to
11:51:21 9 advise the Court and opposing counsel that the State is
11:51:25 10 now looking to introduce information with respect to the
11:51:28 11 October data dashboard.

11:51:33 12 The reason to present to the Doctor, we had focussed
11:51:38 13 primarily on August and September, with a little bit on
11:51:41 14 June, but we're now moving into October. I just wanted
11:51:45 15 to inform the Court that in case there's an objection
11:51:48 16 with respect to that before I go ahead and mark things.

11:51:52 17 THE COURT: Well, the Court has a concern, even
11:51:54 18 though you're being thorough, and I understand your
11:51:57 19 desire to be thorough, this order was put into affect
11:52:00 20 well before October, correct?

11:52:02 21 MS. WYRZYKOWSKI: Yes, your Honor. But one of
11:52:03 22 the prongs that we see establish with respect to issuing
11:52:05 23 an injunction is what's the current status quo? And
11:52:08 24 right now there's been no information before the Court if
11:52:11 25 the status quo is going to be altered by removing the

11:52:14 1 mask mandate.

11:52:15 2 So in order to make that decision, it's the State's
11:52:17 3 position that we need to know where the October numbers
11:52:18 4 lie to help make an informed decision about the status
11:52:22 5 quo and whether or not the status quo will be effected
11:52:25 6 moving forward.

11:52:25 7 THE COURT: Mr. Piccirilli?

11:52:30 8 MR. PICCIRILLI: Yes, your Honor. First of
11:52:32 9 all, I think the status quo is part of the TRO, it's not
11:52:37 10 a preliminary injunction. But even if it did apply --

11:52:38 11 THE COURT: No, it applies. But I thought it
11:52:41 12 was not the current status quo but the injunction's
11:52:44 13 effect on the status quo. The action's effect on the
11:52:49 14 status quo and whether the injunction would effect the
11:52:50 15 status quo.

11:52:50 16 MS. WYRZYKOWSKI: I'm sorry, your Honor, can
11:52:50 17 you say that one more time? The status quo, your Honor,
11:52:52 18 has been wearing masks so it goes to --

11:52:56 19 MR. PICCIRILLI: I disagree.

11:52:58 20 MS. WYRZYKOWSKI: The status quo for the last
11:53:00 21 two months, or I guess 40 something days has been to wear
11:53:04 22 a mask. But one of the issues is the eminent harm of
11:53:08 23 removing masks in granting or denying Plaintiff's motion.

11:53:12 24 So in order to make a calculated decision with
11:53:14 25 respect to that, it's the State's position that October

11:53:16 1 numbers are relevant to that.

11:53:16 2 THE COURT: Counsel?

11:53:22 3 MR. PICCIRILLI: Actually, I think the status
11:53:24 4 quo was not wearing a mask, as of June 29th, the State,
11:53:30 5 the Governor, the Department of Education and the
11:53:33 6 Department of Health all indicated that masks would be
11:53:37 7 optional in the upcoming school year. That was the
11:53:40 8 status quo on August 19th. The Executive Order changed
11:53:45 9 the status quo.

11:53:47 10 So the issue, with regard to maintaining the status
11:53:50 11 quo, would be to go back to what the situation was on
11:53:54 12 August 18th, which was that masks were optional.

11:53:58 13 MS. WYRZYKOWSKI: Your Honor, I apologize,
11:54:00 14 Greg.

11:54:00 15 MR. PICCIRILLI: So if we're going to argue
11:54:04 16 status quo, that's the status quo.

11:54:04 17 MS. WYRZYKOWSKI: Your Honor, we can get into
11:54:06 18 status quo down the road. I understand that. But it's
11:54:08 19 actually status quo to when that lawsuit was filed.

11:54:10 20 So the status quo is when the lawsuit was filed with
11:54:13 21 a mask mandate in the K-12 setting.

11:54:16 22 MR. PICCIRILLI: Well, the only reason the
11:54:17 23 lawsuit was filed was because of the Executive Order.
11:54:18 24 There would be no reason to file a lawsuit until the
11:54:22 25 emergency order came into affect to change the status

11:54:27 1 quo.

11:54:29 2 MS. WYRZYKOWSKI: It's still, your Honor.

11:54:31 3 THE COURT: Mr. Piccirilli, you acknowledge the
11:54:33 4 issuance of a preliminary injunction will preserve the
11:54:36 5 status quo?

11:54:38 6 MR. PICCIRILLI: Our position would be that,
11:54:40 7 whether it's by TRO or preliminary injunction, if it was
11:54:43 8 issued. It would issue -- it would revert to the status
11:54:47 9 quo prior to the issuance of the Executive Order, which
11:54:49 10 was no mask mandate or option mask.

11:54:54 11 THE COURT: Obviously, there's slight
11:54:56 12 variations to when the Supreme Court considers
11:54:58 13 injunctions and the element for it.

11:55:00 14 But the Foster Gloucester Regional school committee
11:55:05 15 case from 2010 indicates that the court needs to consider
11:55:08 16 whether the issuance of a preliminary injunction will
11:55:11 17 preserve the status quo. So if the status quo is
11:55:15 18 students have masks, then the injunction would preserve
11:55:20 19 the status quo. But actually, another case --

11:55:27 20 MR. PICCIRILLI: I actually know that case.
11:55:29 21 That was probably my case, your Honor. I just can't
11:55:31 22 remember.

11:55:31 23 THE COURT: But there's actually another case
11:55:33 24 that says status quo ante and defines that a little
11:55:37 25 better, which I don't have in front of me.

11:55:39 1 MR. PICCIRILLI: I think that might be Iggy's
11:55:45 2 -- which was the lease that was going to be -- I think
11:55:47 3 the Iggy's case was there was a lease. They tried to
11:55:51 4 break the lease and the Court said the status quo anti
11:55:55 5 was the lease stayed in affect prior to them breaking the
11:55:57 6 lease, leading to the request for the TRO.

11:56:03 7 MS. WYRZYKOWSKI: Your Honor, if I may add one
11:56:05 8 more thing?

11:56:05 9 THE COURT: Sure.

11:56:06 10 MS. WYRZYKOWSKI: Putting aside the status quo,
11:56:08 11 the issue is still irreparable harm and what harm would
11:56:14 12 be done if the mask mandate, whether it's lifted, whether
11:56:17 13 it stays, where we are currently in the pandemic matters
11:56:22 14 in making that determination. That goes to the
11:56:26 15 irreparable harm.

11:56:33 16 MR. PICCIRILLI: I remember the Foster
11:56:35 17 Gloucester case, that had to do with the building
11:56:38 18 committee and they tried to remove a member of the
11:56:44 19 building committee and the status quo anti was letting a
11:56:47 20 person remain on the building committee before he was
11:56:50 21 removed. I remember that case now, Judge. That was
11:56:54 22 Judge Silverstein.

11:56:55 23 THE COURT: His question was whether or not X
11:56:58 24 was full; am I correct?

11:56:59 25 MS. WYRZYKOWSKI: No, your Honor. I was

11:57:01 1 presenting an offer of proof to let the Court know where
11:57:04 2 I was going next in anticipation of an objection from
11:57:06 3 plaintiffs, so I didn't want to go through that whole
11:57:09 4 process.

11:57:11 5 THE COURT: Well, it's the Court's concern. I
11:57:14 6 don't think the plaintiff -- well, the Court is concerned
11:57:18 7 because what we really have to look at is what the
11:57:22 8 situation is going to be I suppose if I make a decision,
11:57:24 9 if you look at it that way. So this is a moving case.
11:57:30 10 But let me defer to the plaintiffs and find out what
11:57:34 11 their objection is. We also want to get to a decision at
11:57:39 12 some point, I suppose.

11:57:40 13 MR. PICCIRILLI: I agree, your Honor. I mean,
11:57:44 14 I mention the data is irrelevant because the Executive
11:57:47 15 Order is up for renewal in two days. If you're going to
11:57:50 16 be relying upon that, and giving his recommendation to
11:57:53 17 the Governor in two days as to whether to extend this
11:57:56 18 Executive Order or to end it, then it might be relevant.
11:57:59 19 But we don't know what this witness is going to be
11:58:02 20 recommending to the Governor in two days.

11:58:05 21 And of course the emergency rule continues at least
11:58:10 22 for 45 days, which I think brings us to the middle of
11:58:14 23 November, although in the order there's also a reference
11:58:19 24 to January 20th of 2022. So I'm not quite sure how long
11:58:23 25 the emergency rule was intended to be in effect.

11:58:26 1 THE COURT: You're saying this order is
11:58:29 2 dependent on an executive order, which expires in two
11:58:32 3 days?

11:58:32 4 MR. PICCIRILLI: Potentially, yeah. We don't
11:58:34 5 know whether -- you know, I'm sure the witness is
11:58:36 6 prepared to make a recommendation to the Governor, since
11:58:38 7 the Governor listens to him, so whatever he tells the
11:58:42 8 Governor is probably what's going to happen.

11:58:45 9 THE COURT: Well, the Governor can think on his
11:58:48 10 own but that's fine.

11:58:48 11 MS. WYRZYKOWSKI: Your Honor, I guess get rid
11:58:50 12 of the executive order. We still have the Rhode Island
11:58:53 13 Department of Regulation that is still in affect.

11:58:55 14 THE COURT: It's not dependent on the Executive
11:58:55 15 Order?

11:58:57 16 MS. WYRZYKOWSKI: The regulation is separate
11:58:58 17 and apart for a set period of time, for a period of time.
11:59:02 18 And so the State's position, it all comes back to
11:59:07 19 irreparable harm. They're focussed on irreparable harm.
11:59:09 20 I don't want to speak for Greg, but with respect to the
11:59:12 21 35 plaintiffs and their children, we're focussed, we
11:59:14 22 being the State, is focussed on irreparable harm for the
11:59:16 23 rest of the State, and that's why these numbers matter.

11:59:19 24 MR. PICCIRILLI: Judge, not to -- I'm sorry, if
11:59:22 25 you don't want to hear from me.

11:59:24 1 THE COURT: I'm inclined just to allow it, to
11:59:27 2 see where this goes. There's no jury here which will be
11:59:30 3 prejudiced.

11:59:30 4 MR. PICCIRILLI: I have a problem with --
11:59:33 5 Exhibit U, the extension of the original and Executive
11:59:36 6 Order. It says nothing. It gives no basis for
11:59:40 7 continuing the executive -- all it say is I continue the
11:59:43 8 Executive Order.

11:59:44 9 THE COURT: I get your concerns.

11:59:46 10 MR. PICCIRILLI: And that's going to happen
11:59:48 11 again in October and in two days. If it's going to say
11:59:52 12 we relied on this data dashboard information, they got to
11:59:57 13 tip off the State as to how they should write the new
12:00:02 14 Executive Order. They didn't write this one very well,
12:00:03 15 the second one.

12:00:06 16 THE COURT: But the State is saying that the
12:00:09 17 masking requirement is not dependent upon the Executive
12:00:13 18 Order.

12:00:13 19 MR. PICCIRILLI: Is that -- I don't.

12:00:17 20 MS. WYRZYKOWSKI: It's not exactly what we're
12:00:18 21 saying. I'm saying there's two prongs. You have the
12:00:22 22 Executive Order that was put in on 8/19, then the
12:00:24 23 extension of that Executive Order, which is Exhibit U,
12:00:26 24 then and we also have the Rhode Island Department of
12:00:28 25 Health regulations on September 23rd. So there's

12:00:30 1 multiple prongs here.

12:00:32 2 THE COURT: Okay. So if it's not dependent on
12:00:34 3 the renewal of the Executive Order, then this whole case
12:00:38 4 may be moot in two days.

12:00:40 5 MS. WYRZYKOWSKI: You still have the Rhode
12:00:42 6 Island Department of Health regulations.

12:00:43 7 THE COURT: Which you're now saying is not
12:00:47 8 dependent upon the Executive Order?

12:00:48 9 MS. WYRZYKOWSKI: Is that what I said? Yeah,
12:00:51 10 it is what I said.

12:00:52 11 THE COURT: I thought you said it was wasn't.

12:00:52 12 MS. WYRZYKOWSKI: Well, they're all sort of
12:00:56 13 intertwined, your Honor.

12:00:56 14 THE COURT: I know but maybe we should wait for
12:00:59 15 the other side of this to see what the law will be at the
12:01:08 16 time the decision is written. If there's a change, if
12:01:10 17 there's a renewal of the Executive Order or if the status
12:01:16 18 quo will then be without an Executive Order, it could be
12:01:19 19 or it could be with the new Executive Order. The case
12:01:28 20 isn't ripe yet.

12:01:29 21 MS. WYRZYKOWSKI: The October data?

12:01:30 22 THE COURT: No, we don't know what law will
12:01:33 23 apply. We don't know what regulations we'll applying to
12:01:36 24 this case.

12:01:39 25 MS. WYRZYKOWSKI: I don't know what's going to

12:01:41 1 happen in two days, your Honor. That's the question.

12:01:43 2 THE COURT: I know, none of us do. But I don't
12:01:46 3 know why we should spend the rest of the afternoon
12:01:50 4 shooting in the dark. Clearly, you've all put a lot of
12:01:55 5 time into this. I have no question about that.

12:01:57 6 And clearly, if there is harm going on with the
12:01:59 7 school children, it's continuing to go on every day. I
12:02:02 8 get that. But I'm not going to be able to determine this
12:02:07 9 case in two days before the Governor either takes action
12:02:11 10 or doesn't take action.

12:02:30 11 You're showing a new dashboard, or whatever other
12:02:34 12 proof you have concerning what's going on right now or
12:02:37 13 may go on in the next week or so, which I think is where
12:02:42 14 you're about to go, that's going to show that there is
12:02:49 15 additional harm?

12:02:50 16 MS. WYRZYKOWSKI: It's going to show that the
12:02:52 17 harm is still ongoing. That the numbers are not where
12:02:57 18 they were back in June, when we kind of thought we were
12:02:58 19 on the tail end of this.

12:03:01 20 MR. PICCIRILLI: That sounds to me like they're
12:03:03 21 going to renew the order Executive Order. Otherwise, why
12:03:09 22 would they be putting this in right now?

12:03:12 23 MS. WYRZYKOWSKI: I want to be clear, I have
12:03:14 24 not had any conversations with the Governor's Office. I
12:03:16 25 am just using these documents to show that there is

12:03:18 1 ongoing irreparable harm.

12:03:21 2 MR. PICCIRILLI: It's your client. What do you
12:03:21 3 mean you haven't had a chance? I'm sorry, Judge. I
12:03:21 4 apologize for the comment.

12:03:31 5 THE COURT: If you want to go there now I'll
12:03:33 6 allow it for what it's worth, but preserve to
12:03:37 7 Mr. Piccirilli the right to object to each individual
12:03:39 8 question.

12:03:41 9 MS. WYRZYKOWSKI: Okay.

12:03:42 10 THE COURT: Well, I guess you're making an
12:03:44 11 offer of proof but I don't know what you're going to
12:03:46 12 offer. I don't know what's coming.

12:03:48 13 MS. WYRZYKOWSKI: I can tell the Court it's the
12:03:49 14 same data sheets that were introduced --

12:03:50 15 THE COURT: He's probably going to want to
12:03:51 16 object when it comes up anyway.

12:03:53 17 MS. WYRZYKOWSKI: Okay. That's fine.

12:03:54 18 THE COURT: We can argue about it for awhile
12:03:54 19 and I don't know if it's doing any good.

12:03:58 20 MR. PICCIRILLI: Judge, time wise, okay. When
12:04:04 21 do I get to do my cross-examination? We've been -- this
12:04:06 22 is getting dragged on for quite awhile here. At some
12:04:10 23 point there's got to be an end to this direct
12:04:14 24 examination. I should have an opportunity to present my
12:04:17 25 case and this is getting dragged on. This is day three I

12:04:20 1 believe of this witness. Its been -- if I had to guess,
12:04:23 2 about eight hours of his testimony so far. When do --
12:04:28 3 when is enough is enough on the State's case here?

12:04:32 4 THE COURT: I think they're serious in their
12:04:35 5 defense.

12:04:54 6 THE CLERK: Defendants' Y for identification.

12:04:54 7 **(DEFENDANTS' EXHIBIT Y WAS MARKED FOR**
12:04:54 8 **IDENTIFICATION)**

12:05:20 9 Q BY MS. WYRZYKOWSKI: Okay, Doctor. Doctor, what you have
12:05:33 10 before you has been marked as Exhibit Y. Can you please
12:05:40 11 identify the document that is before you?

12:05:45 12 A It's the October 4, 2021, Covid data dashboard.

12:05:51 13 Q And is there any other documents associated with this
12:05:55 14 set?

12:05:56 15 A There's a tab for October 7th, and there's a tab for
12:06:01 16 October 12th, and they're all of the Covid data dashboard
12:06:07 17 excerpts that we went over in similar fashion yesterday.

12:06:09 18 Q So, Doctor, are these excerpts the same pages that were
12:06:16 19 introduced yesterday with the data dashboard for
12:06:20 20 September and August?

12:06:24 21 A Yes, they're the same ones.

12:06:27 22 Q And, Doctor, how do you recognize the data dashboards
12:06:30 23 that are before you?

12:06:31 24 A These are e-mailed to me twice a week.

12:06:34 25 Q And Doctor --

12:06:36 1 THE COURT: So by Monday, I'm sorry, next
12:06:38 2 Tuesday we'll have another one, right? You will have
12:06:41 3 another one?

12:06:42 4 THE WITNESS: I will have another one.

12:06:43 5 MS. WYRZYKOWSKI: I actually think they might
12:06:45 6 come out today too.

12:06:48 7 Q Doctor, in your role at the Rhode Island Department of
12:06:52 8 Health, do you rely on the data dashboard to help
12:06:55 9 formulate your opinions with respect to the ongoing
12:06:58 10 pandemic?

12:06:58 11 A Yes.

12:06:59 12 Q Doctor, can you, without looking at the Exhibits, testify
12:07:02 13 as to why the information in the data dashboard is
12:07:05 14 relevant to you in your current role in the excerpt that
12:07:08 15 I provided?

12:07:09 16 A So we looked at a number of cases per day, a number of
12:07:12 17 admissions. I looked at how the hospitals are doing so
12:07:16 18 far, as to whether they're overcrowded or not. I look at
12:07:19 19 how many monoclonal antibodies have been given out, and
12:07:22 20 it gives me an idea of where we are at vaccinations as
12:07:25 21 well. We follow hospitalization data. So it gives me a
12:07:28 22 big picture of the entire pandemic, that why it's a full
12:07:32 23 document for me.

12:07:33 24 MS. WYRZYKOWSKI: Your Honor, at this point in
12:07:34 25 time I ask that Exhibit Y be moved in full.

12:07:37 1 THE COURT: Y is full.

12:07:39 2 MR. PICCIRILLI: I object, your Honor.

12:07:40 3 **(DEFENDANTS' EXHIBIT Y WAS MARKED FULL)**

12:07:40 4 Q Doctor, I'm just going to focus your attention to the
12:07:42 5 last data dashboard that is here, the October 12th.

12:07:56 6 Doctor, looking at the October 12th data dashboard,
12:07:58 7 you previously testified on the first page of the
12:08:00 8 dashboard reviews. I want to direct your attention,
12:08:03 9 please, to the second page, hospital details.

12:08:12 10 Doctor, in your role at the Rhode Island Department
12:08:15 11 of Health, and as the director of the Covid unit, can you
12:08:17 12 please explain why the information on the hospital
12:08:21 13 details page is relevant to you in your current position?

12:08:23 14 A Yes.

12:08:25 15 Q Why, Doctor?

12:08:27 16 A Well, I look at the national emergency department
12:08:30 17 overcrowding scores and it just shows how our hospitals
12:08:36 18 are doing right now. They report this data twice a day
12:08:41 19 and it comes up with a number.

12:08:43 20 So I like to see how many of the hospitals are in
12:08:45 21 the dangerously and severely overcrowded scores, because
12:08:49 22 that's how likely they're going to have to go on
12:08:52 23 diversion and not be able to care for the patients that
12:08:55 24 are presenting to the emergency room either by ambulance
12:08:59 25 or by walking into the emergency room.

12:09:00 1 Q Doctor, based upon the NEDOC score that is on this page,
12:09:04 2 how many hospitals in the State of Rhode Island, as of
12:09:08 3 October 11, 2021, are at dangerously overcrowded or
12:09:12 4 severely overcrowded in the State of Rhode Island?

12:09:15 5 A Seven.

12:09:17 6 Q And that's out of how many hospitals, Doctor?

12:09:19 7 A We have ten acute care hospitals.

12:09:21 8 Q Doctor, I want to direct your attention to the next page
12:09:24 9 of the data dashboard, same date. Doctor, what's the
12:09:28 10 title of this page, please? What's the title, please,
12:09:38 11 Doctor?

12:09:38 12 A Hospital overcrowding.

12:09:40 13 Q And, Doctor, can you please explain, can you please tell
12:09:43 14 me whether or not this information is relevant to you at
12:09:45 15 your current role at the Rhode Island Department of
12:09:45 16 Health?

12:09:48 17 A Yes.

12:09:48 18 Q Could you please explain why this information is relevant
12:09:50 19 to you in your current role at the Rhode Island
12:09:52 20 Department of Health?

12:09:53 21 A Because it tells me a trend of how the hospital has been
12:09:56 22 doing over the last several weeks when it comes to their
12:10:00 23 scores. So it's a different way of looking at the same
12:10:03 24 data on the day before.

12:10:05 25 Q Thank you, Doctor. And finally, Doctor, I want to direct

12:10:08 1 your attention to the last page: Cases by age group.
12:10:13 2 And, Doctor, you've seen this exhibit before with respect
12:10:16 3 to other dates.

12:10:21 4 Doctor, looking at this particular page, can you
12:10:25 5 please explain what information this provides with
12:10:28 6 respect to your current role in the COVID-19 unit at the
12:10:31 7 Rhode Island Department of Health?

12:10:33 8 THE COURT: Is there new information on that,
12:10:35 9 Doctor, which is not contained in the prior report?

12:10:35 10 MS. WYRZYKOWSKI: Excuse me, your Honor, can
12:10:35 11 you repeat that?

12:10:37 12 THE COURT: Is there new information on that
12:10:39 13 page, which is not contained in the prior report?

12:10:43 14 THE WITNESS: Yes.

12:10:45 15 THE COURT: Okay. Well, what is that?

12:10:47 16 THE WITNESS: In the box in the upper left-hand
12:10:47 17 corner --

12:10:52 18 THE COURT: October 2?

12:10:53 19 THE WITNESS: Right here. The top 5 weekly.

12:10:56 20 THE COURT: So October 2, right?

12:11:00 21 THE WITNESS: September through October 2.

12:11:01 22 THE COURT: Wasn't that in the previous report
12:11:03 23 that you talked about?

12:11:04 24 MS. WYRZYKOWSKI: The previous report, your
12:11:07 25 Honor, stopped on September, right before September 23rd

12:11:10 1 and I don't remember --

12:11:11 2 THE COURT: I did ask the witness but I'll let
12:11:13 3 it go.

12:11:14 4 THE WITNESS: It is the same. It is the same.
12:11:15 5 I'm not sure why. You're right, it's the same.

12:11:17 6 Q BY MS. WYRZYKOWSKI: It's the same information previously
12:11:19 7 testified to?

12:11:20 8 A I didn't previously testify to this date range, but Judge
12:11:24 9 Lanphear is correct. I'm not sure why it's there but
12:11:26 10 it's the same data that's in the October but I haven't
12:11:31 11 testified as to before.

12:11:32 12 Q So briefly, Doctor --

12:11:35 13 THE COURT: If I could add something just for
12:11:36 14 clarification, Counsel, because I know that
12:11:38 15 Mr. Piccirilli is concerned about his right to
12:11:41 16 cross-examine, and that's not only a concern, it's a
12:11:45 17 priority of the Court that has to be done. And I thought
12:11:50 18 about that in this case and how to handle it, and let me
12:11:56 19 just -- I know Dr. McDonald's time is limited, but the
12:12:03 20 right of cross-examination is paramount.

12:12:07 21 So this is a problem that the Court gets a lot, and
12:12:11 22 I get it a lot and try to figure out how to handle it.
12:12:15 23 When handling medical malpractice cases for the first few
12:12:19 24 times, because the witness, an expert witness flies in on
12:12:23 25 a plane, comes to the court in the morning and hopes to

12:12:26 1 get out that evening to go home. The problem is the
12:12:31 2 party whose calling him keeps him on the stand, him or
12:12:35 3 her on the stand for awhile.

12:12:37 4 So what I did in the past is I make it very clear to
12:12:42 5 counsel pretrial that if the direct examination of the
12:12:47 6 expert is not concluded by noon, assume that that Doctor
12:12:52 7 is going to stay in the state another day or be called
12:12:56 8 back, and you're going to pay for it even though it's
12:12:59 9 cross-examination.

12:13:00 10 If we were to apply the same limit here that would
12:13:04 11 give Mr. Piccirilli some, I thought it was four days, he
12:13:10 12 says three. That would give Mr. Piccirilli some time.
12:13:14 13 So I understand his concern, but with almost every
12:13:18 14 question he has a right to cross-examine. I'll leave it
12:13:24 15 at that.

12:13:27 16 MS. WYRZYKOWSKI: Okay. May I go on with that
12:13:32 17 caveat, your Honor?

12:13:34 18 THE COURT: In case you didn't get it, brevity
12:13:37 19 is always appreciated.

12:13:39 20 MS. WYRZYKOWSKI: Your Honor, I have two
12:13:41 21 minutes left, maybe three.

12:13:44 22 THE COURT: And then when you get to the late
12:13:47 23 afternoon then the person calling him wants to do a
12:13:49 24 rebuttal.

12:13:51 25 MS. WYRZYKOWSKI: That might happen.

12:13:52 1 THE COURT: Yes, I think so. I think he has to
12:13:56 2 get back to the Department of Health at some point but go
12:13:59 3 ahead.

12:13:59 4 Q MS. WYRZYKOWSKI: All right, Doctor, focussing on the
12:14:04 5 data update on cases by age group. With respect to
12:14:08 6 October 6th, we're looking at the 10/12 document. It
12:14:13 7 should be the last page of the set that you have in front
12:14:15 8 of you.

12:14:16 9 A

I do.

12:14:17 10 Q Okay, Doctor. Thank you. Looking at this document,
12:14:21 11 looking at this specific document, does this -- you've
12:14:24 12 already testified that the data dashboard helps to
12:14:26 13 formulate your opinion with respect to the Covid?

12:14:29 14 THE COURT: Didn't you cover all the questions
12:14:30 15 on that last week?

12:14:32 16 MS. WYRZYKOWSKI: We have not --

12:14:33 17 THE COURT: That's the same chart --

12:14:36 18 MS. WYRZYKOWSKI: The chart is always the same,
12:14:37 19 your Honor. The information itself is updated. So we
12:14:40 20 have not talked about anything with respect to October.
12:14:47 21 But it could quite possibly be --

12:14:47 22 THE COURT: You may get to the end of
12:14:47 23 September.

12:14:51 24 MS. WYRZYKOWSKI: Your Honor, it's the
12:14:52 25 September 26th data. I think that's where you're going.

12:14:52 1 THE COURT: Okay.

12:14:55 2 MS. WYRZYKOWSKI: So, yes, that's been talked
12:14:56 3 about. That's the most recent one.

12:14:59 4 THE COURT: Thank you. And with that, your
12:15:00 5 Honor. I have no further questions at this time.

12:15:04 6 THE COURT: Thank you.

12:15:06 7 MS. WYRZYKOWSKI: If I could just have a minute
12:15:08 8 to clean up, please.

12:15:17 9 THE COURT: Do you have X for ID?

12:15:25 10 THE CLERK: One moment, your Honor. X is full,
12:15:26 11 your Honor.

12:15:27 12 THE COURT: Thank you. Mr. Piccirilli?

12:16:14 13 MR. PICCIRILLI: Thank you, your Honor.

12:16:14 14 **CROSS-EXAMINATION BY MR. PICCIRILLI**

12:16:15 15 Q Dr. McDonald, have you ever been, ever designed, funded
12:16:25 16 or had funded, completed or published results of a
12:16:29 17 randomized control trial?

12:16:31 18 A No.

12:16:37 19 Q Have you ever designed, been funded to implement,
12:16:42 20 completed or published results of a prospective cohort
12:16:48 21 study?

12:16:49 22 A You know, I've done so many but I don't think that I've
12:16:57 23 done a prospective cohort study, so no.

12:16:57 24 Q Have you ever designed, funded to implement, completed
12:16:59 25 and published results of a retrospective --

12:16:59 1 THE REPORTER: I'm sorry, could you please
12:16:59 2 start over?

12:17:04 3 MR. PICCIRILLI: Yes.

12:17:04 4 Q Doctor, have you ever designed, been funded to implement
12:17:09 5 and then completed and published the results of a
12:17:13 6 retrospective case control study?

12:17:15 7 A Just so I understand your question, if I could. Are you
12:17:19 8 asking if I've done all of those things or any of those
12:17:22 9 things? Because I've never funded any study.

12:17:26 10 Q Okay. Have you ever designed a retrospective case
12:17:30 11 control study?

12:17:31 12 THE COURT: There was an or there, right,
12:17:31 13 Mr. Piccirilli? When you went through that list, there
12:17:33 14 was an or?

12:17:34 15 MR. PICCIRILLI: Right, there was.

12:17:34 16 THE COURT: Any of those.

12:17:36 17 THE WITNESS: Okay. Yes, I've done those.

12:17:38 18 Q A retrospective case control study?

12:17:41 19 A Yes, there's some on my resume. We just did one recently
12:17:44 20 on deaths from overdoses.

12:17:46 21 Q Okay. And did you design the study?

12:17:50 22 A With my team sure, yes.

12:17:52 23 Q You had it funded to implement?

12:17:54 24 A We did the study. It's published.

12:17:56 25 Q And it was published, okay. And you're saying that was

12:18:00 1 opoid deaths?

12:18:02 2 A Yes. We looked at people on methadone or buprenorphine
12:18:06 3 and what their outcomes were.

12:18:08 4 Q And, Doctor, you spent some time talking about randomized
12:18:15 5 control trials, and you testified that in your opinion
12:18:21 6 randomized control trials with regard to children and
12:18:25 7 masking would somehow be improper or unethical; is that
12:18:30 8 correct?

12:18:30 9 A I did.

12:18:30 10 Q And you say, you testified that you are on what's called
12:18:34 11 an Institutional Review Board?

12:18:35 12 A I did. I am.

12:18:37 13 Q And that's at Rhode Island Hospital, correct?

12:18:39 14 A No, I'm on the --

12:18:40 15 Q I mean the Rhode Island Department of Health?

12:18:42 16 A Yes, sir.

12:18:42 17 Q Institutional Review Boards are at almost every medical
12:18:47 18 facility or institution; is that correct?

12:18:49 19 A Yes. Any facility that does research, they're not
12:18:55 20 leaning to medicine.

12:18:56 21 Q So there's not just one institutional review board in the
12:18:59 22 State of Rhode Island; correct?

12:19:00 23 A That's correct.

12:19:01 24 Q All the hospitals have them; is that correct?

12:19:04 25 A I would assume so. I don't know for sure.

12:19:07 1 Q Brown Medical probably has one?

12:19:09 2 A Anyone that does research would have one.

12:19:11 3 Q And then they're all over the country; correct?

12:19:14 4 A Yes.

12:19:14 5 Q Okay. And there's standards for them; right?

12:19:17 6 A Yes.

12:19:18 7 Q They're Federal standards?

12:19:20 8 A Yes. Yes, there's Federal standards.

12:19:23 9 Q Do you know what those standards are?

12:19:27 10 A Well, they're in the CITI training. If you take the CITI

12:19:30 11 training, which is the training you have to take to do

12:19:35 12 the study, they talk about the standards that you have

12:19:37 13 for human subject protection.

12:19:38 14 Q CITI training?

12:19:40 15 A C-I-T-I is what it's called..

12:19:41 16 Q What does C-I-T-I stand for?

12:19:42 17 Q What are those?

12:19:43 18 A It's an acronym for the name of the training. I don't

12:19:47 19 really remember what the acronym stands for. It's

12:19:50 20 C-I-T-I though. It's a training everyone takes to do

12:19:52 21 research.

12:19:52 22 Q Okay. And what is the standard that the Federal

12:19:58 23 Government has with regard to research for children?

12:20:03 24 A Well, it's a higher standard than for adults but it

12:20:08 25 really gets the human subject protection. It really

12:20:12 1 describes in the training in quite detail, but the main
12:20:17 2 concept is if you want to prevent harm to children during
12:20:21 3 research, the risk has to outweigh the benefits.

12:20:24 4 What I do as a member of an Institutional Review
12:20:26 5 Board is make sure whoever is doing the study has
12:20:29 6 considered all these things, and sometimes randomized
12:20:32 7 control trials are allowed for other reasons. There's
12:20:35 8 informed consent and other aspects of it. But we have to
12:20:39 9 make sure that the human subjects are protected. And
12:20:42 10 sometimes studies are modified to accommodate whatever an
12:20:45 11 IRB says would be a better way of doing a study.

12:20:48 12 Q Isn't it true, Doctor, that there's four different types
12:20:53 13 of categories that IRB's are supposed to consider with
12:20:57 14 regard to children?

12:20:58 15 A Yes. I don't know what they are off the top of my head.

12:21:02 16 Q You don't know what they are?

12:21:03 17 A Not off the top of my head. I really don't recall every
12:21:09 18 detail. When I'm on an IRB I usually have material in
12:21:10 19 front of me.

12:21:10 20 Q Well, you testified very concrete that under no
12:21:16 21 circumstances would an IRB approve a randomized control
12:21:21 22 trial of children and masking. You are very confident
12:21:25 23 about that?

12:21:25 24 A I am. I still am.

12:21:26 25 Q But you still don't -- but you can't tell us what the

12:21:29 1 four levels of review that an IRB is supposed to use to
12:21:36 2 determine whether or not such a study would be
12:21:38 3 appropriate?

12:21:38 4 A No, I don't know those off the top of my head, but I
12:21:44 5 don't need to know them to tell you it's unethical. It's
12:21:45 6 still unethical.

12:21:45 7 Q Okay. Well, let's say the first, the first standard --
12:21:51 8 these are in the federal regulations, did you know that?

12:21:53 9 A I did know that. Like I said, I don't remember all this
12:21:57 10 stuff off the top of my head. I actually don't remember
12:22:01 11 a lot of things. I know where to find things and that's
12:22:05 12 where I keep details.

12:22:06 13 Q So one of the standards is research not involving greater
12:22:11 14 than minimal risk to children, that's one of the
12:22:14 15 standards; right?

12:22:14 16 A Yes.

12:22:18 17 Q Okay. There's another standard, research involving
12:22:23 18 greater than minimal risk but presenting the prospects of
12:22:28 19 direct benefit to the individual child subject involved
12:22:31 20 in the research; right?

12:22:34 21 A Yes.

12:22:34 22 Q So greater than minimal risk, but the child may benefit.
12:22:41 23 So there's a sliding scale right; Doc?

12:22:44 24 A Yes.

12:22:44 25 Q So to say unequivocally if there's more than minimal risk

12:22:49 1 to a child, you would under no circumstances allow a
12:22:55 2 randomized control trial study. That's not true because
12:22:57 3 under the federal regulation you can't consider greater
12:23:01 4 than minimal risk.

12:23:03 5 THE COURT: Mr. Piccirilli, can you reword your
12:23:05 6 question? Its gotten a little complex.

12:23:07 7 Q Doctor, when you testified that under no circumstances
12:23:14 8 should a randomized control trial study be done in
12:23:17 9 children wearing masks because it presented too great a
12:23:21 10 risk to then; correct?

12:23:21 11 A I did.

12:23:21 12 Q But under the federal regulation, even if it's a greater
12:23:24 13 than minimal risk, you can do a study with children if it
12:23:31 14 presents a prospect of a direct benefit to the children?

12:23:34 15 A Yes, you may say that, but I think that I actually
12:23:39 16 highlighted the point why I wouldn't allow a study to be
12:23:43 17 done exposing children wearing masks.

12:23:47 18 Because in my opinion, if you put children in one
12:23:50 19 classroom that aren't wearing masks, or one in school not
12:23:55 20 wearing masks, no matter how you assign the study, you're
12:23:59 21 still putting the population of children at risk where
12:24:02 22 they really doesn't need to be. Because in my opinion
12:24:05 23 there's ample observational studies, national expert
12:24:09 24 opinion, federal agency reports that say masks are safe
12:24:13 25 and effective.

12:24:15 1 So I couldn't -- I couldn't advocate for any risk to
12:24:20 2 be accepted by a child. Keep in mind that a classroom in
12:24:22 3 school, you have some children who have highly complex
12:24:26 4 medical problems, greater risk. It just would be too
12:24:29 5 complex for a study to design. You need it to be large
12:24:33 6 numbers. Yes, so it's unethical. I stay with my
12:24:35 7 position on that.

12:24:36 8 Q The regulation is gone. The next one is research
12:24:41 9 involving greater than minimal risk and no prospect of
12:24:45 10 direct benefit to the individual child, but likely to
12:24:49 11 yield generalized knowledge about the subject disorder or
12:24:53 12 conditions. Are you familiar with that standard?

12:24:57 13 A Yes.

12:24:57 14 Q Okay. You still don't think a randomized control trial
12:25:04 15 of children wearing masks would be likely to yield
12:25:10 16 generalized knowledge about children's disorders or
12:25:14 17 conditions?

12:25:14 18 A Right. I still think it's ethical. You have plenty of
12:25:20 19 observational studies, like I just said, national
12:25:21 20 experts, federal agencies are saying that the masks are
12:25:23 21 safe and effective, and there's plenty of observational
12:25:23 22 studies.

12:25:26 23 So an observational study can answer the question,
12:25:29 24 and in my opinion has answered the question. So I
12:25:32 25 couldn't put any child at risk in a situation like this.

12:25:35 1 Q Doctor, you heard Dr. Boston testify that randomized
12:25:40 2 control trials are the gold standard of studies; correct?
12:25:43 3 A I did hear him testify to that.
12:25:44 4 Q And you agree with that; right?
12:25:46 5 A Yes, if you can do them, they're great.
12:25:47 6 Q And the reason that that is an observational study is
12:25:50 7 because observational studies suffer deficiencies?
12:25:53 8 A Well, there's -- they are better than observational
12:25:57 9 studies but you can have problems with randomized control
12:26:00 10 trials too.
12:26:01 11 Q The problems with observational studies are things like
12:26:08 12 recall bias, other issues with observational studies;
12:26:14 13 right?
12:26:14 14 A Well, confounding variables, confounding is the most
12:26:17 15 common problem we have, but that's one of the things
12:26:20 16 where people do observational studies, they always list
12:26:23 17 the limitations of their studies.
12:26:25 18 Q We'll get into that, Doctor.
12:26:26 19 A Okay.
12:26:26 20 Q But, again, I'm asking you about your opinion with regard
12:26:31 21 to the unethical basis of doing randomized control trials
12:26:38 22 with regard to student masks. So you don't agree with
12:26:40 23 that standard. How about this standard; research that
12:26:43 24 the IRB believes does not meet the conditions of the
12:26:47 25 previous three, but finds the research presents a

12:26:51 1 reasonable opportunity to further the understanding,
12:26:53 2 prevention or alleviation of a serious problem effecting
12:26:56 3 the health and welfare of children? Couldn't a
12:27:01 4 randomized control trial assume masking took that
12:27:05 5 definition?

12:27:05 6 A See, I'm gonna keep giving you the same answer because
12:27:09 7 you're asking me the same questions. In my opinion,
12:27:11 8 randomized control trials in children are unethical, and
12:27:15 9 I've already answered it three or four times now.

12:27:19 10 Q I'm going to present the witness what I ask be marked
12:27:23 11 next. I think -- is it 32?

12:27:25 12 THE CLERK: Yes, Counsel. Plaintiffs 32.

12:27:31 13 MR. PICCIRILLI: I have an extra copy for the
12:27:34 14 Judge.

12:27:34 15 THE CLERK: I'll take the extra copy copy for
12:27:38 16 the Judge.

12:27:38 17 Q Doctor --

12:27:58 18 THE COURT: Mr. Piccirilli, before you go on,
12:28:00 19 you were quoting a federal regulation, and this may be it
12:28:03 20 in my hand, but I just want to get the citation for the
12:28:06 21 federal regulation that you were reading from.

12:28:10 22 MR. PICCIRILLI: Yes, it's included in this
12:28:11 23 document, 45 CFR 46.404.405.406 and .407.

12:28:22 24 THE COURT: Thank you.

12:28:23 25 MR. PICCIRILLI: And it's contained in this

12:28:24 1 document.

12:28:25 2 THE COURT: Thank you.

12:28:26 3 MR. PICCIRILLI: Unless there's an objection,
12:28:29 4 I'd like to move this as a full exhibit, it's a
12:28:31 5 government document.

12:28:32 6 MS. WYRZYKOWSKI: If I can just have one
12:28:34 7 moment.

12:28:35 8 MR. PICCIRILLI: Sure.

12:28:40 9 MS. WYRZYKOWSKI: No objection, your Honor.

12:28:42 10 THE COURT: 32 is full.

12:28:44 11 THE CLERK: Exhibit 32 is full.

12:28:44 12 **(PLAINTIFFS' EXHIBIT 32 WAS MARKED FULL)**

12:28:48 13 MR. PICCIRILLI: That's alright, Doctor, you
12:28:49 14 don't need to comment on it.

12:29:01 15 Q And, Doctor, I think I had already asked you and you
12:29:05 16 testified that you were on the IRB at the Rhode Island
12:29:09 17 Department of Health, correct?

12:29:10 18 A Yes.

12:29:11 19 Q Who else is on that board with you?

12:29:13 20 A There's several of other members. I'm not going to name
12:29:18 21 them all but I can say one is Dr. Louis Marchetti,
12:29:21 22 Dr. John Fulton are two of the members that come to mind.
12:29:25 23 There's probably eight other members, one, of them would
12:29:30 24 be Bruce McIntyre, Colleen Fontana is a member. I don't
12:29:32 25 remember the other four or five members off the top of my

12:29:35 1 head.

12:29:36 2 Q Well, the Chairman is Louis Marchetti, correct?

12:29:41 3 A Yes.

12:29:42 4 Q And he's a physician?

12:29:43 5 A No, he's a Ph.D.

12:29:45 6 Q He's a Ph.D. Okay. And then there's a Joe Megendi,
12:29:53 7 (phonetic) there's no way I can pronounce this. Do you
12:29:58 8 know who that is?

12:29:59 9 A I'm not sure who you're referring to. It's possibly new
12:30:05 10 members that I'm unaware of. If you bring the form to me
12:30:09 11 I'll look at it and see if I can recognize the names.

12:30:12 12 MR. PICCIRILLI: I ask that this be marked as
12:30:14 13 Plaintiffs 33.

12:30:15 14 THE CLERK: Plaintiffs' 33. I will take the
12:30:20 15 judge's copy.

12:30:20 16 **(PLAINTIFFS' EXHIBIT 33 WAS MARKED FOR**
12:30:33 17 **IDENTIFICATION)**

12:30:33 18 Q I'm sorry, Doctor, these pages are not numbered. If you
12:30:35 19 go towards the back, the last 5 or 6 pages, it lists the
12:30:41 20 IRB DOH members. I think it's -- I think it's six pages,
12:30:52 21 the bottom? Do you see that?

12:31:02 22 A I do.

12:31:03 23 Q Okay. You're listed there third, correct, on the full
12:31:07 24 board members?

12:31:08 25 A Yes.

12:31:08 1 Q Okay. And those are the rest of the members, right?

12:31:08 2 A Yes.

12:31:12 3 Q So you're not the Board. You don't make the final
12:31:15 4 decision. You're one of a team?

12:31:17 5 A That's right.

12:31:17 6 Q So these other individuals may have a different opinion
12:31:20 7 than you do about testing?

12:31:23 8 A I can't testify to their opinion.

12:31:25 9 Q So you don't know what their opinion is?

12:31:26 10 A No, I haven't asked them any questions.

12:31:29 11 Q Has the IRB, had your IRB, Department of Health, ever
12:31:32 12 been presented with a proposal to conduct randomized
12:31:36 13 control trials for students masking?

12:31:39 14 A Not that I'm aware of.

12:31:40 15 Q Now, this document has a whole format for how such a
12:31:52 16 proposal would be made; correct?

12:31:54 17 A Right.

12:31:55 18 Q And this isn't just for children, this is for any study;
12:31:59 19 correct?

12:31:59 20 A That's right. Yes, for anybody.

12:32:00 21 Q But there is research involving children, I believe it's
12:32:04 22 on Page 4, right? Or 5, sorry.

12:32:20 23 A Yes. There's a section called research involving
12:32:23 24 children.

12:32:23 25 Q So, again, your Board allows for research involving

12:32:29 1 children; correct?

12:32:30 2 A Sure.

12:32:30 3 Q Okay. Again, subject to the federal regulations?

12:32:35 4 A Right.

12:32:37 5 MR. PICCIRILLI: I move that as a full Exhibit,
12:32:39 6 please.

12:32:40 7 MS. WYRZYKOWSKI: No objection.

12:32:41 8 THE COURT: 33 is full.

12:32:43 9 THE CLERK: 33 is full.

12:32:51 10 **(PLAINTIFFS' EXHIBIT 33 WAS MARKED FULL)**

12:32:51 11 Q Now, Doctor, you heard Dr. Bostom testify that there were
12:32:55 12 13 negative randomized control trials of community
12:32:59 13 masking of adults between 2008 and 2021, correct?

12:33:03 14 A I did hear that.

12:33:04 15 Q So there was no problem with the potential unethicalness
12:33:13 16 of having adults being in a randomized control trial with
12:33:18 17 regard to masks; correct?

12:33:20 18 A Well, I don't know that to be true. I didn't review the
12:33:23 19 study and I wasn't part of the priviness, so I can't
12:33:26 20 speak to how the studies were really designed. I'm not
12:33:29 21 familiar with those studies.

12:33:30 22 Q Okay. Are you familiar with a study in Guniea-Bissau?

12:33:39 23 A I'm sorry?

12:33:40 24 Q Dr. Bostom testified to a masking study being done right
12:33:45 25 now in the country of Guninea Bissau in West Africa?

12:33:49 1 A I'm not familiar with it.

12:33:50 2 Q You're not.

12:33:51 3 THE COURT: Could you be kind enough to spell
12:33:55 4 that name?

12:33:55 5 MR. PICCIRILLI: The country name is
12:33:55 6 Guinea-Bissau.

12:34:03 7 THE COURT: Thank you. Could the attorneys
12:34:44 8 approach so we can talk about the schedule if this is a
12:34:47 9 good time, Mr. Piccirilli?

12:34:48 10 MS. WYRZYKOWSKI: Yes, your Honor.

12:34:49 11 **(Bench conference off the record)**

12:35:20 12 THE COURT: So the Court is going to be in
12:35:22 13 recess for an hour. We'll try to come back closer to
12:35:27 14 1:40, please. The witness is excused.

13:47:29 15 **(Break taken)**

13:47:29 16 THE CLERK: I'd just like to remind the witness
13:47:35 17 you are still under oath. If you can just state your
13:47:37 18 name for the record.

13:47:39 19 THE WITNESS: I am Dr. Jim McDonald.

13:47:41 20 THE CLERK: Thank you.

13:47:54 21 **CONTINUED CROSS-EXAMINATION BY MR. PICCIRILLI**

13:47:58 22 THE CLERK: Exhibit number 34 for
13:48:01 23 identification.

13:48:01 24 **(PLAINTIFFS' EXHIBIT 34 WAS MARKED FOR**
13:48:01 25 **IDENTIFICATION)**

13:48:02 1 THE CLERK: One moment, Counsel, I got to give
13:48:04 2 the witness the Exhibit marked.

13:48:12 3 Q Dr. McDonald, when we left last we were talking -- or I
13:48:26 4 was talking about a study in the west African country of
13:48:31 5 Guinea-Bissau. And you said you weren't familiar with
13:48:33 6 that study; correct?

13:48:34 7 A That's correct.

13:48:35 8 Q I'm going to show you what's been marked as Exhibit 14.

13:48:42 9 MS. WYRZYKOWSKI: 14?

13:48:42 10 MR. PICCIRILLI: I mean 34, I'm sorry.

13:48:46 11 Q I ask you to take a look at this document and tell me is
13:48:51 12 this the study that took place in Guinea-Bissau that is
13:48:54 13 currently ongoing under the collaboration of the
13:48:58 14 University of Southern Denmark and Engineers Without
13:49:01 15 Borders.

13:49:03 16 A I'm looking at the cover sheet and that's what it says.

13:49:06 17 Q Okay. And if you turn to Page 2, do you notice that
13:49:13 18 children as young as 10 are involved in this study?

13:49:16 19 A Okay. It does also say the study is active and not
13:49:23 20 recruiting, so I don't know what that means. I don't
13:49:27 21 know if this study is actually happening.

13:49:29 22 Q Okay. But if I told you that this study, a randomized
13:49:35 23 control study of children as young as ten with regard to
13:49:39 24 cloth masks, you don't have any information to contradict
13:49:43 25 that, do you?

13:49:44 1 A No.

13:49:45 2 Q Okay. So that's not an unethical study is it, Doctor?

13:49:57 3 A I haven't seen the study design. I can't comment on
13:50:03 4 what's going on in Africa. I don't know the situation
13:50:05 5 over there. It's very different than what's going on in
13:50:09 6 the United States.

13:50:10 7 Q They care less about their kids there than we do; is that
13:50:14 8 what you're saying?

13:50:15 9 A Actually, I didn't say that. And actually --

13:50:20 10 Q Are you implying?

13:50:21 11 A Excuse me?

13:50:22 12 Q Is that what you're implying?

13:50:24 13 THE COURT: You got to let him answer a
13:50:25 14 question if you ask it.

13:50:26 15 A So as a pediatrician I value every child's life. Part of
13:50:31 16 my role as a pediatrician is an advocate for children,
13:50:35 17 vaccination allows to keep children healthy and prevent
13:50:38 18 them from dying.

13:50:39 19 I've actually practiced medicine in a third world
13:50:42 20 and I've practiced in all parts of the United States,
13:50:42 21 many times where no one else would go. I've seen
13:50:46 22 children die in third world countries. I can tell you
13:50:49 23 first-hand parents grieve the same way that anyone else
13:50:54 24 would grieve and so, no, I would never imply that a
13:50:58 25 parent doesn't love their child in a third world country.

13:51:03 1 What was implied is I don't know what's going on in the
13:51:06 2 pandemic in Africa. I attest to the study design but I
13:51:09 3 don't know what's going on. So, yes, I think parents
13:51:14 4 love their children in Africa.

13:51:15 5 Q Let's get back, Doctor, the concept of randomized control
13:51:28 6 trials versus observational studies. You admitted last --
13:51:33 7 earlier this morning that you believe, you agree with
13:51:35 8 Dr. Boston that randomized trials are the goal standard
13:51:39 9 of studies; correct?

13:51:41 10 A Yes, if you can do them, I love to do them.

13:51:45 11 Q And in fact, that concept goes back at least 100 years to
13:51:51 12 Dr. William Kellogg, who published a study about the
13:51:57 13 effectiveness of face masks during the 1918 pandemic; right?

13:52:02 14 A You quoted that study earlier and I'm not familiar with
13:52:05 15 the study.

13:52:05 16 Q Okay. Well, I'll show it to you.

13:52:09 17 MR. PICCIRILLI: Let's mark this as the next
13:52:12 18 exhibit.

13:52:13 19 THE CLERK: Plaintiffs' Exhibit 35.

13:52:13 20 **(PLAINTIFFS' EXHIBIT 35 WAS MARKED FOR**
13:52:25 21 **IDENTIFICATION)**

13:52:25 22 Q You want a minute to review it or I can point you to the
13:52:29 23 specific quotes that I think are relevant. Tell me when
13:52:42 24 you're ready, Doctor?

13:52:43 25 A Ready.

13:52:44 1 Q Do you need time to review it or you're ready for me to
13:52:47 2 ask a question?

13:52:49 3 THE COURT: Well, you don't want him to read
13:52:50 4 the entire exhibit, right?

13:52:52 5 MR. PICCIRILLI: Right.

13:52:52 6 THE COURT: He's scanned.

13:52:54 7 THE WITNESS: I mean I have the study in front
13:52:55 8 of me, if you want me to read it it's going to take me
13:52:57 9 some time.

13:52:57 10 Q Well, why don't we do this, Doctor. On the first page,
13:53:00 11 on the very top of the box, can you read what it says?

13:53:06 12 A It says masks have not been approved efficient enough to
13:53:11 13 warrant compulsory application for checking epidemic,
13:53:16 14 according to Dr. Kellogg, who has conducted a pain
13:53:19 15 staking investigation with gauzes. This investigation is
13:53:24 16 scientific in character, omitting not one of the
13:53:27 17 necessary factors. It also settled a much argued
13:53:32 18 question, are masks for the public?

13:53:35 19 Q Okay. And then if you look on Page 2 in the highlighted,
13:53:39 20 I'm sorry. If you go down to the bottom of the first
13:53:43 21 column, where it says in the last paragraph: The failure
13:53:52 22 of the mask was a source of disappointment. The first
13:53:56 23 experiment in San Francisco was watched with interest,
13:53:59 24 with the expectation that if it proved feasible to
13:54:02 25 enforce the regulation, the desired result would be

13:54:06 1 achieved. And I believe there he's referring to a
13:54:09 2 regulation mandating mask wearing in San Francisco; is
13:54:12 3 that correct?

13:54:12 4 A You read it. So I'm just acknowledging that you read it.
13:54:16 5 I don't know what it's referring to.

13:54:16 6 Q Doctor, you have a Master's in Public Health, you're the
13:54:21 7 head of the Covid unit in Rhode Island and you're not
13:54:25 8 familiar with Dr. Kellogg and his report on the
13:54:27 9 masking --

13:54:27 10 A No.

13:54:28 11 Q From the 1918 pandemic --

13:54:29 12 A No.

13:54:30 13 Q Flu pandemic --

13:54:31 14 A I'm not. I'm not familiar with this study. I don't even
13:54:35 15 think it's relevant.

13:54:36 16 Q Well, I didn't ask you that, Doctor. I'm asking if
13:54:39 17 you're familiar with it?

13:54:39 18 A I'm not familiar with it.

13:54:41 19 Q Okay. It goes on to say the reverse proof --

13:54:45 20 MS. WYRZYKOWSKI: Objection, your Honor. I
13:54:46 21 just want to note that this Exhibit isn't in full at this
13:54:49 22 point.

13:54:49 23 THE COURT: It is a full exhibit?

13:54:51 24 MS. WYRZYKOWSKI: It is not.

13:54:51 25 THE COURT: Yes, I know that.

13:54:54 1 MR. PICCRILLI: Well, at this point, your Honor
13:54:55 2 , I would move it as full.

13:54:57 3 MS. WYRZYKOWSKI: No objection.

13:55:01 4 THE COURT: 35 is full.

13:55:02 5 THE CLERK: Plaintiffs' 35 full.

13:55:02 6 **(PLAINTIFFS' EXHIBIT 35 WAS MARKED FULL)**

13:55:05 7 MR. PICCIRILLI: Can I just be clear about
13:55:07 8 this, 34 is also full?

13:55:09 9 THE CLERK: 34 is still for ID, Counsel.

13:55:11 10 MR. PICCIRILLI: Can I move 34 as well?

13:55:17 11 MS. WYRZYKOWSKI: I'm sorry, your Honor, I'm
13:55:19 12 just taking a moment to look at it. No objection.

13:55:24 13 THE COURT: 34 is full.

13:55:27 14 **(PLAINTIFFS' EXHIBIT 34 WAS MARKED FULL)**

13:55:28 15 Q To continue, the masks, contrary to expectation, were
13:55:34 16 worn cheerfully and universally, and also contrary to the
13:55:37 17 expectation of what should follow under such
13:55:40 18 circumstances, no effect on the epidemic curve was to be
13:55:43 19 seen. Something was plainly wrong with our hypothesis.

13:55:48 20 So is it your testimony, Doctor, that you think
13:55:50 21 because this is 100 years old and Dr. Kellogg, it's his
13:55:55 22 observations from back then, are not worth even
13:55:59 23 considering?

13:56:00 24 MS. WYRZYKOWSKI: Objection, your Honor. I
13:56:00 25 just want to note that we're talking about something that

13:56:04 1 Dr. McDonald has not had an opportunity to fully review
13:56:04 2 and is being asked specific questions with respect to
13:56:07 3 that. I'd ask that he be given an opportunity to read
13:56:10 4 the study.

13:56:11 5 THE COURT: I'm very confident that
13:56:13 6 Dr. McDonald can speak for himself. Overruled.

13:56:16 7 THE WITNESS: It's 100 year old study. We have
13:56:19 8 far better studies. I haven't looked at the study. I'm
13:56:21 9 not familiar with it. But I can assure you when I'm
13:56:24 10 looking to science to make public health recommendations
13:56:27 11 for Rhode Island, I am not looking at studies that are
13:56:31 12 100 years old. I can assure you of that. I'm looking at
13:56:35 13 contemporary studies that are done in our times.

13:56:37 14 There's so much difference about the 1918 pandemic
13:56:40 15 than about the current pandemic that I wouldn't be
13:56:43 16 looking at this, and I don't know what kind of masks they
13:56:46 17 were using. I don't even know if people had soap. I
13:56:48 18 don't know what their living conditions were like. I
13:56:50 19 don't even know if the influenza strain was really a
13:56:52 20 respiratory or droplet spread or also spread by contact.
13:56:56 21 I just don't know those things. So, no, I don't know the
13:57:01 22 study and I really can't give it any weight right now.
13:57:01 23 Q Doctor, would you agree with me that the last time in
13:57:05 24 this country that anybody tried to impose a mask mandate,
13:57:11 25 forestall an epidemic, was in the 1918 flu epidemic.

13:57:16 1 It's never been tried since then until now, correct?

13:57:18 2 A That's correct.

13:57:18 3 Q So for 100 years after Dr. Kellogg's report, no public
13:57:25 4 entity in this country even considered mandating people
13:57:30 5 wear masks, right?

13:57:30 6 A Right.

13:57:32 7 MS. WYRZYKOWSKI: Objection. Speculation.

13:57:34 8 THE COURT: The question is fair. Overruled.

13:57:37 9 Q And yet all of a sudden --

13:57:39 10 THE COURT: I'm sorry, Doctor, did you answer?

13:57:43 11 MR. PICCIRILLI: Yes, he said "right." He
13:57:43 12 agreed.

13:57:43 13 THE WITNESS: I did. Thank you, Judge.

13:57:43 14 THE COURT: Thank you.

13:57:46 15 Q You said right and meant yes.

13:57:50 16 A I meant yes. Thank you.

13:57:50 17 Q So, now, all of a sudden in this pandemic that started in
13:57:58 18 March 2020, public health officials in this country, some
13:58:03 19 of them like you, have decided to ignore 100 years of
13:58:07 20 history and suddenly impose mask mandates; is that true?

13:58:12 21 MS. WYRZYKOWSKI: Objection, your Honor. He's
13:58:14 22 asking him to opine about what other public health
13:58:16 23 officials do, what's specifically related to
13:58:19 24 Dr. McDonald.

13:58:20 25 THE COURT: Overruled. You can answer.

13:58:22 1 THE WITNESS: Yes, I'm absolutely going to
13:58:23 2 ignore a 100 year old study where there's much better
13:58:27 3 studies out there. Absolutely.

13:58:28 4 Q That wasn't the question.

13:58:30 5 A Okay.

13:58:30 6 Q The question was since that study, for the last 100 years
13:58:34 7 up until March of 2020, no public health official has
13:58:41 8 tried to impose a mask mandate to forestall an epidemic,
13:58:45 9 correct?

13:58:46 10 A Yes, that's correct.

13:58:46 11 Q Okay. In fact, there's an Exhibit in evidence, the CDC
13:58:51 12 itself said in February of 2020, masks don't work. Don't
13:58:56 13 mandate them, right?

13:58:57 14 A Yes, the CDC did say that. However, on the May 7th
13:59:04 15 Science Update, that is referenced in Exhibit B, they did
13:59:07 16 a very thorough review and then came out with a different
13:59:11 17 recommendation. Those are 65 different articles and
13:59:14 18 really presented the case very, I think efficiently, and
13:59:18 19 effectively on why they recommended masks.

13:59:20 20 Q Well, again, Doctor, we'll get to that. But my question
13:59:23 21 is for 100 years it was never, the recommendation
13:59:28 22 regarding not wearing masks or wearing masks, never
13:59:32 23 changed for 100 years?

13:59:34 24 A That's right, they didn't.

13:59:35 25 Q Okay. So something happened after March of 2020 to

13:59:40 1 change that perception, right?

13:59:42 2 A Well, yes, but something happened before March of 2020 to
13:59:47 3 change that perception.

13:59:48 4 Q All right. Doctor, you rely heavily on these MMWR's,
14:00:04 5 correct?

14:00:04 6 A Yes, they are some of the documents I looked at. Sure.

14:00:07 7 Q Well, most of what you had submitted in evidence, mostly
14:00:13 8 all of them are MMWR reports, right?

14:00:16 9 A Well, yes, but the science briefs are actually review
14:00:19 10 articles based on other articles that don't include
14:00:24 11 Morbidity and Mortality Weekly Report, so I definitely
14:00:26 12 look at the Morbidity and Mortality Weekly Report. It's
14:00:28 13 a very reliable journal that I believe is very efficient
14:00:31 14 and very effective.

14:00:32 15 Q And I think you testified earlier that you didn't, you
14:00:38 16 considered them better than a peer-review?

14:00:41 17 A I do.

14:00:41 18 Q Even though the testimony was and the evidence was that
14:00:47 19 those studies have to conform with the CDC policy;
14:00:51 20 correct?

14:00:51 21 A Well, yes. If you remember the 2011 document, it was
14:00:56 22 titled something like the history of MMWR. There's a
14:00:59 23 sentence that says it's not traditionally reviewed by
14:01:02 24 other peer-reviewed journals, but then they want to
14:01:04 25 explain what I think is a very heightened review, far

14:01:08 1 more reviewed than I've ever had for any article I've
14:01:08 2 ever published.

14:01:09 3 So it's a very extensive review. So, yes, it's a
14:01:12 4 very extensive review for anybody to be published in the
14:01:14 5 MMWR.

14:01:14 6 Q But it's reviewed internally within the CDC, correct?

14:01:18 7 A Well, it's reviewed by the CDC but we also are not CDC.

14:01:23 8 Q But it has to be approved by the CDC?

14:01:25 9 A Absolutely, it has to be approved by the CDC.

14:01:28 10 Q Do you have any concern that the MMWR report might be
14:01:35 11 compromised because of political pressure put on them by
14:01:38 12 the CDC?

14:01:39 13 A No.

14:01:40 14 Q Are you aware, Doctor, that there's currently an
14:01:44 15 investigation by Congress into the politicization of the
14:01:48 16 MMWR?

14:01:49 17 A No.

14:01:49 18 Q You're not aware of that?

14:01:51 19 A No.

14:01:51 20 Q If you were aware of that would that concern you about
14:01:57 21 their reliability?

14:01:58 22 A You know, Congress investigates a lot of things and the
14:02:01 23 political world is what it is, quite frankly.

14:02:04 24 Q So you're comfortable ignoring the possibility that these
14:02:12 25 MMWR reports are being skewed to represent the current

14:02:17 1 policy of the current presidential administration?

14:02:22 2 A So I didn't say that.

14:02:25 3 Q Okay. Well, if you knew that, if you knew that it was
14:02:28 4 possible that political pressure was being put on the CDC
14:02:33 5 and the MMWR to conform to political policy, would that
14:02:39 6 concern you about the reliability of these reports?

14:02:41 7 A You know, they're journals. They have references. You
14:02:45 8 can look at what they're saying. They are read, like
14:02:49 9 people like myself who are experts in the field, and I
14:02:52 10 can make my own determinations and I do every study that
14:02:55 11 they put out, I review. I sometimes even discuss them
14:02:59 12 with colleagues.

14:03:02 13 MR. PICCIRILLI: Can I have this marked next,
14:03:04 14 please?

14:03:04 15 THE CLERK: Plaintiffs' Exhibit 36 marked for
14:03:07 16 identification.

14:03:11 17 MR. PICCIRILLI: There's no objection, your
14:03:12 18 Honor.

14:03:12 19 THE COURT: Counsel, I'm sorry. The reporter
14:03:19 20 has left, left the building, now he's left the room. Now
14:03:22 21 he's left the camera on. I mean its nobody's
14:03:27 22 responsibility but the reporter. Sheriff, would you be
14:03:37 23 kind enough to take me the cell phone.

14:03:40 24 THE SHERIFF: Yes, Your Honor.

14:04:13 25 THE COURT: Sorry to do that to you, Counsel.

14:04:15 1 I don't want to interrupt your cross-examination.

14:04:19 2 MR. PICCIRILLI: That's okay.

14:04:19 3 THE COURT: Thank you. I was going to move
14:04:21 4 this as a full Exhibit, it's a government official
14:04:24 5 federal document. I think there's an objection.

14:04:27 6 MS. WYRZYKOWSKI: Yes, your Honor. Dr.
14:04:29 7 McDonald already testified that he was unaware of
14:04:31 8 Congress being involved in this, so he's now entering the
14:04:34 9 document as it is. I do not know if it's an official
14:04:36 10 document, I haven't seen it before. I'm trying to read
14:04:38 11 through it right now.

14:04:39 12 MR. PICCIRILLI: Well, I didn't make up the
14:04:41 13 letterhead.

14:04:44 14 THE COURT: This is marked 36 for I.D. How
14:04:49 15 would you like to proceed, Mr. Piccirilli?

14:04:52 16 **(PLAINTIFFS' EXHIBIT 36 WAS MARKED FOR**
14:04:55 17 **IDENTIFICATION)**

14:04:55 18 Q Doctor, if you read the first page of this document, the
14:05:00 19 beginning of the third paragraph. This is an
14:05:03 20 investigation of the Trump Administration, the prior
14:05:06 21 administration; correct?

14:05:07 22 A That's what it says, yes.

14:05:09 23 Q And --

14:05:10 24 MS. WYRZYKOWSKI: Your Honor, excuse me,
14:05:11 25 objection again. He's now giving him documents that

14:05:13 1 haven't been properly authenticated, and Dr. McDonald
14:05:16 2 said he did not know about an investigation being done by
14:05:20 3 Congress with respect to this matter.

14:05:22 4 THE COURT: That wasn't the question. He
14:05:23 5 answered the question.

14:05:24 6 MS. WYRZYKOWSKI: Right, he's unaware.

14:05:26 7 THE COURT: Okay.

14:05:27 8 MS. WYRZYKOWSKI: Of Congressional involvement,
14:05:28 9 and that's what this document is about, congressional
14:05:28 10 involvement.

14:05:30 11 THE COURT: Counsel, you don't like where the
14:05:33 12 cross-examination may be going but he's got a right to go
14:05:35 13 down the road and see how far he gets, right?

14:05:38 14 MS. WYRZYKOWSKI: Okay.

14:05:40 15 MR. PICCIRILLI: Thank you.

14:05:40 16 Q So again, this letter indicates that the U.S. Congress is
14:05:48 17 investigating the Trump Administration's reportedly
14:05:51 18 seeking to influence CDC reports published in the
14:05:55 19 Morbidity and Mortality Weekly Report, the MMWR. After a
14:06:02 20 May 2020 report on the Corona virus accurately described
14:06:02 21 --

14:06:06 22 THE COURT: Counsel, you're reading a letter
14:06:08 23 that's not in full.

14:06:09 24 MR. PICCIRILLI: I'm sorry.

14:06:11 25 Q So do you understand now that Congress is investigating

14:06:15 1 the MMWR and potential Trump Administration's influence
14:06:20 2 on that?

14:06:20 3 A That's what you said. I haven't read the document yet
14:06:23 4 but if they're investigating the previous Administration
14:06:26 5 that's up to Congress to decide what to do with that.

14:06:29 6 Q But, again, it doesn't enter into your calculation at all
14:06:32 7 as to the reliability of these MMWR, if in fact there's a
14:06:38 8 congressional investigation about their politicization?

14:06:40 9 A But you've already said it's about the previous
14:06:44 10 Administration. I don't know of any investigation.
14:06:46 11 Quite frankly, I read my own articles and make my own
14:06:49 12 decisions and I review the references often. So I'm not
14:06:52 13 worried about my own ability to read and interpret any
14:06:55 14 scientific article.

14:06:57 15 Quite frankly, every article I've ever read, I
14:06:59 16 always read to see if there's bias to the article or if
14:07:02 17 the authors are just wrong. I just know how to
14:07:05 18 critically review an article.

14:07:12 19 MR. PICCIRILLI: Again, your Honor, I would
14:07:13 20 just move that this is an official government record and
14:07:18 21 is exempt from any hearsay objection on that basis.

14:07:22 22 MS. WYRZYKOWSKI: Your Honor, my prior
14:07:24 23 objection and also it's a letter. I don't know if that
14:07:27 24 makes it an official government document.

14:07:31 25 THE COURT: Are you moving it full?

14:07:33 1 MR. PICCIRILLI: Yes.

14:07:34 2 THE COURT: It hasn't been authenticated.

14:07:37 3 MR. PICCIRILLI: I don't think so. Again, I
14:07:38 4 think as an official business record or government
14:07:41 5 record, it doesn't need to be authenticated.

14:07:53 6 THE COURT: It's not a self-authenticating
14:07:56 7 document, correct?

14:08:03 8 MR. PICCIRILLI: Your Honor, I think it's no
14:08:05 9 different than all of the other government documents.
14:08:07 10 All the MMWR's that have been admitted into evidence are
14:08:10 11 all coming from a -- they've been admitted because
14:08:14 12 they're official government records.

14:08:15 13 MS. WYRZYKOWSKI: No, your Honor. They were
14:08:17 14 admitted because the Doctor relied on them in part in
14:08:19 15 helping to formulate his decision with respect to his
14:08:20 16 opinion on the Corona virus pandemic.

14:08:23 17 MR. PICCIRILLI: But there's still -- a reason
14:08:27 18 they came in as an Exhibit is because they're exempt from
14:08:30 19 the hearsay rule as an official record.

14:08:32 20 THE COURT: No. You will remember that about a
14:08:36 21 week ago I said the two things that are important for
14:08:42 22 admitting a document in full are authentication and
14:08:46 23 probative value. Okay. Looking at 901(a)7, which talks
14:09:40 24 about public records, the Court needs evidence in
14:09:42 25 writing. It's authorized by law to be reported. Its

14:09:47 1 been reported. Well, reported public records report
14:09:51 2 stating the data compilation in any form. I don't think
14:09:56 3 it's that. This is from the public office, and it
14:10:03 4 doesn't appear to be certified, I'm looking for that.

14:10:13 5 And here's another rule which talks about government
14:10:16 6 documents. Rule 9 talks about self authentication, and
14:10:20 7 then it says document under seal.

14:10:41 8 I don't quite think it meets the requirements of
14:10:46 9 9022. It's not a certified document from 9024. It's not
14:10:51 10 a publication of Congress on 9025. It's not acknowledged
14:10:59 11 for 9028. 36 is a letter from -- for Congress. Well, it
14:12:01 12 looks like a letter, but copy machines do different
14:12:04 13 things now, multi-colored copy machines. It looks like
14:12:07 14 its on congressional stationary. It's addressed to
14:12:14 15 Secretary Azar and Director Renfield, dated 2020, and its
14:12:18 16 signed differently, by four different congress people.
14:12:26 17 Actually, seven.

14:12:30 18 MR. PICCIRILLI: I'd also point out, your Honor
14:12:31 19 , that there's a website listed in very small print, the
14:12:35 20 letterhead, Corona virus.house.gov. That's actually
14:12:39 21 where I got the document from, the official House
14:12:43 22 website.

14:12:44 23 THE COURT: It's not the original letter?

14:12:46 24 MR. PICCIRILLI: It's certainly not the
14:12:47 25 original letter.

14:12:48 1 THE COURT: Okay.

14:12:50 2 MR. PICCIRILLI: I don't know that there is an
14:12:53 3 original letter.

14:12:55 4 THE COURT: Well, it wouldn't strike me the
14:12:57 5 least. So what does it go to prove?

14:12:59 6 MR. PICCIRILLI: Your Honor, that these MMWR's
14:13:02 7 are subject to political pressure. Subject to --

14:13:06 8 THE COURT: I thought you were trying to prove
14:13:08 9 that there was an investigation by Congress.

14:13:10 10 MR. PICCIRILLI: Investigation as to the
14:13:11 11 potential politicization of MMWR reports. Now --

14:13:19 12 THE COURT: But there's no final report, and
14:13:21 13 the rules of evidence say the final report is far more
14:13:27 14 likely to be admissible.

14:13:28 15 MR. PICCIRILLI: I don't think the
14:13:30 16 investigation has been concluded, and I'm not necessarily
14:13:33 17 introducing it for the fact that they have proven
14:13:37 18 politicization but it's subject to potential
14:13:40 19 politicization.

14:13:41 20 And even though it was under the prior
14:13:43 21 administration, it's just as possible that the current
14:13:46 22 administration could be attempting to influence these
14:13:51 23 MMWR reports. That's what makes them different from
14:13:56 24 independently peer-reviewed journal articles. That's
14:14:00 25 what Dr. Bostom was trying to point out. These are not

14:14:03 1 peer-reviewed. They're basically House organized. They
14:14:09 2 are statements put out by the current administration's
14:14:14 3 CDC to support their current policy whether, and whether
14:14:21 4 or not that impacts. When someone reads these MMWR
14:14:26 5 reports, you have to take them with a grain of salt that
14:14:29 6 they're coming from the official government position.

14:14:32 7 THE COURT: I understand your purpose but
14:14:34 8 Exhibit 36 stays for identification.

14:14:36 9 MR. PICCIRILLI: Thank you, your Honor.

14:14:37 10 Q Let's talk about some of these MMWR's, Doctor. The first
14:14:48 11 one I'd like to show you is Exhibit C.

14:15:05 12 Doctor, I believe this was one of the first -- if
14:15:08 13 not the first MMWR report that was admitted by the State
14:15:13 14 and do you recall this document?

14:15:16 15 A I do.

14:15:16 16 Q Now, you thought this document was relevant because it
14:15:23 17 showed what?

14:15:24 18 A So it was one of many documents I looked at but we were
14:15:30 19 talking about universal masking and what was it about
14:15:33 20 mandating masks. So I thought it was relevant because
14:15:36 21 they had done a study on restaurants, and, you know, it's
14:15:38 22 an indoor experience.

14:15:41 23 So there was some relevance to schools so I looked
14:15:43 24 at the studies and I mentioned it.

14:15:44 25 Q Right. And I think you said you testified that it

14:15:47 1 influenced your decision on ultimately mandating masks?

14:15:51 2 A One of the many documents I looked at.

14:15:54 3 Q Can you go to the third page, in the second full
14:16:02 4 paragraph, under the summary. It says the findings in
14:16:06 5 this report are subject to at least three limitations.
14:16:14 6 Do you see that?

14:16:15 7 A You said it's on the third page?

14:16:17 8 Q I believe so. I'm sorry, no, the fourth page. I
14:16:20 9 apologize.

14:16:21 10 A No worries. Yes, I see it now.

14:16:24 11 Q After reviewing those limitations, one of them is that
14:16:35 12 although the models control for mask mandates,
14:16:38 13 restaurants and bar closures, stay at home orders and
14:16:43 14 gathering bans, the models did not control for other
14:16:45 15 policies that might affect case and death rates,
14:16:48 16 including the types of business closures, physical
14:16:52 17 distancing recommendations. Policies issued by
14:16:55 18 localities variance is granted by the State by certain
14:16:57 19 counties if variances were not made public.

14:17:00 20 Does that limitation at all inform your opinion as
14:17:04 21 to the reliability of this?

14:17:06 22 A Sure, it does.

14:17:08 23 Q It means it seriously limits, right?

14:17:10 24 A I don't know that it's seriously limited, but every
14:17:13 25 observational study has limitations. That's why it's

14:17:17 1 really rare. I can't actually think of one observational
14:17:21 2 study that made a causal relationship that was
14:17:24 3 definitive. That's where a lot of observational studies
14:17:26 4 together help form an association and then they need more
14:17:30 5 coupled forming a recommendation.

14:17:32 6 Q I understand it might make you more comfortable, but does
14:17:38 7 it make the rest of us more comfortable? You're
14:17:40 8 admitting that this report doesn't stand for what you
14:17:44 9 claim it stands for, but yet you still rely upon it
14:17:48 10 because it makes you comfortable in making your
14:17:49 11 recommendation. Is that your testimony?

14:17:49 12 MS. WYRZYKOWSKI: Objection, your Honor.
14:17:49 13 That's not what he said.

14:17:50 14 THE COURT: There's multiple questions. Could
14:17:52 15 you rephrase?

14:17:53 16 Q Just to be clear, Doctor, you concede that the study has
14:17:59 17 limitations that limit it's reliability; correct?

14:18:03 18 A Yes.

14:18:04 19 Q And yet you still feel comfortable relying on this
14:18:09 20 observational study to make something mandatory in public
14:18:16 21 schools, the wearing of masks?

14:18:18 22 A This was one of many documents that I included.

14:18:21 23 Q But I think you just conceded that all of these MMWR
14:18:24 24 reports suffer from the same limitation?

14:18:27 25 A No, I didn't say that.

14:18:28 1 Q Okay. Well, let's go to the next one, number D, letter
14:18:30 2 D, please. I'm sorry, do you have Exhibit D?

14:18:59 3 MR. PICCIRILLI: I'm sorry, Melissa.

14:19:00 4 THE CLERK: I'm sorry, counsel.

14:19:02 5 MR. PICCIRILLI: Exhibit D.

14:19:04 6 THE COURT: D as in David.

14:19:06 7 MR. PICCIRILLI: D as in David. Yes, I'm
14:19:07 8 sorry.

14:19:16 9 Q So, Doctor, this was the next --

14:19:18 10 THE COURT: Counsel, if you want that window
14:19:21 11 closed, just let us know.

14:19:23 12 MR. PICCIRILLI: Okay.

14:19:23 13 Q This was the next MMWR that you had admitted, and this
14:19:29 14 involved university students in St. Louis, Missouri;
14:19:34 15 correct?

14:19:34 16 A Yes.

14:19:34 17 Q And, again, you thought this was valuable in forming your
14:19:39 18 decision because of why?

14:19:39 19 A It's one of many studies I looked at and one of many
14:19:43 20 documents, but when you look at what they added to the
14:19:46 21 report was that compared with only the mask exposures,
14:19:50 22 close contacts with any unmasked exposures had higher
14:19:55 23 adjusted odds ratios of receiving a positive test result,
14:19:59 24 any additional exposure were associated with a 40 percent
14:20:00 25 increase in the odds of a positive test.

14:20:03 1 So they did a study, it's an observational study.
14:20:06 2 It's got limitations too. But it was one document that
14:20:09 3 was helpful as I was doing my review.

14:20:11 4 Q Again, if you go to Page 4. The first full paragraph
14:20:18 5 under the summary.

14:20:20 6 MS. WYRZYKOWSKI: Objection, your Honor. I
14:20:21 7 just have to know this, this exhibit isn't in full yet.

14:20:25 8 MR. PICCIRILLI: Exhibit D is not full?

14:20:26 9 MS. WYRZYKOWSKI: Not, it's not full yet. I'm
14:20:31 10 fine with them in since you're going to read from it but
14:20:31 11 I just wanted to clarify that.

14:20:36 12 MR. PICCIRILLI: I'll move it in full now.

14:20:36 13 MS. WYRZYKOWSKI: Okay. Thank you.

14:20:39 14 THE COURT: You want D full?

14:20:40 15 MR. PICCIRILLI: I have no objection to it
14:20:42 16 being full, your Honor.

14:20:43 17 THE COURT: Do you move it full?

14:20:44 18 MS. WYRZYKOWSKI: I move it in full, that
14:20:46 19 works. Thank you.

14:20:48 20 THE COURT: By agreement D is full.

14:20:50 21 THE CLERK: D is full.

14:20:50 22 **(DEFENDANTS' EXHIBIT D WAS MARKED FULL)**

14:20:53 23 MR. PICCIRILLI: Sorry about that, Judge.

14:20:55 24 Q Okay. Let's go to Page 4 of the findings of this -- in
14:21:01 25 this report are subject to at least five limitations;

14:21:03 1 correct?

14:21:04 2 A Yes.

14:21:04 3 Q Can you read the first limitation?

14:21:06 4 A Sure. First contact tracing data was self-reported,
14:21:12 5 which could introduce social desirability for recall bias
14:21:16 6 or inaccurate data regarding mask use.

14:21:20 7 Q So this is a study where people self-reported whether or
14:21:24 8 not they were wearing masks and what happened to them; is
14:21:26 9 that right?

14:21:26 10 A Yes.

14:21:27 11 Q Okay. And because of that one of the problems with
14:21:32 12 observational studies is people can report things which
14:21:36 13 may not be true?

14:21:37 14 A Yes.

14:21:38 15 Q Because they think it's what they want to believe or they
14:21:42 16 think it's what people want them to believe?

14:21:44 17 A Yes.

14:21:45 18 Q And recall bias, social desirability, that's what that
14:21:49 19 means, right?

14:21:50 20 A Yes.

14:21:50 21 Q Okay. So, again, you're relying upon studies that's
14:21:55 22 based upon people who self-report their condition,
14:22:00 23 admittedly may be lying about what they're reporting and
14:22:05 24 yet you think this is a valuable study to inform a
14:22:10 25 decision to mask children in schools?

14:22:13 1 A It's one of many studies that I used. You know, please
14:22:17 2 keep in mind, I'm one of the few physicians in the State
14:22:20 3 that is board certified in preventative medicine. I've
14:22:23 4 been trained to read scientific literature. I know how
14:22:27 5 to give weight to a particular study and how not to. So
14:22:30 6 it was one of many documents I looked at and one of many
14:22:33 7 studies I looked. I understand there's limitations.
14:22:35 8 Every observational study has limitations. I know that.
14:22:37 9 But I use the best available science I have to make the
14:22:40 10 best available recommendation I have, and my motive is to
14:22:44 11 protect the public as best I can.

14:22:46 12 Q Do you suffer from potential social desirability or
14:22:52 13 recall bias, is it possible, Doctor -- I'll ask you that
14:22:55 14 question first.

14:22:57 15 A Can you repeat the question, please?

14:22:59 16 Q Do you suffer from social desirability or recall bias
14:23:03 17 yourself?

14:23:04 18 A When you say "suffer from"?

14:23:06 19 Q Is it possible that your opinion regarding wearing masks
14:23:14 20 has corrupted a social desirability or recall bias on
14:23:19 21 your behavior?

14:23:19 22 A I'm not really sure what you're getting at, but if you
14:23:21 23 want me to admit that I'm a flawed human being and may
14:23:25 24 not be perfect and may have bias, I'm happy to admit
14:23:26 25 that. That's the whole point about bias. Sometimes we

14:23:29 1 have bias that's implicit. We don't know about it. This
14:23:31 2 is why I have colleagues and this is why I have other
14:23:34 3 peers that I work with, and they give me advice and we
14:23:37 4 talk together about things. But I'm not aware of
14:23:40 5 anything I've done in the pandemic to make me more
14:23:44 6 socially desirable and I'm not aware of having any bias
14:23:48 7 that hasn't been checked. I've had questions. I've had
14:23:52 8 conversations. I've had peers to help make better
14:23:55 9 decisions but I'm not aware of bias.

14:23:57 10 Q Do you doubt at all your opinion that masking children in
14:24:01 11 school worked?

14:24:02 12 A I believe it was the best recommendation at the time and
14:24:06 13 I still believe it is the best recommendation to make.
14:24:08 14 I'm confident right now that masking children in school
14:24:12 15 is preventing the spread of disease, keeping kids out of
14:24:16 16 hospitals and protecting them from having problems like
14:24:20 17 MIS-C, intensive care unit admissions and perhaps a
14:24:20 18 death.

14:24:24 19 So I'm very confident that it's a sound public
14:24:26 20 health recommendation.

14:24:27 21 Q You would agree, Doctor, that there's many public health
14:24:31 22 officials who disagree with that, right?

14:24:33 23 A I don't know if that's true, you making that statement,
14:24:37 24 but quite frankly what I see is political theater across
14:24:43 25 our country, and I don't know that the public health

14:24:46 1 physicians in those states have agreed with their
14:24:48 2 governors or agreed with their other elected officials.
14:24:51 3 I don't know that.

14:24:52 4 Q Do you know who Jay Bhattacharya is?

14:24:54 5 A I do not.

14:24:55 6 Q You don't know who Jay Bhattacharya is?

14:25:00 7 A No, I don't.

14:25:01 8 Q He's an epidemiologist from Stanford University?

14:25:04 9 A Okay. I don't know if I know anybody at Stanford
14:25:07 10 University.

14:25:07 11 Q Do you know who Martin Kulldorff is?

14:25:09 12 A No, I don't.

14:25:10 13 Q An epidemiology from Harvard University?

14:25:13 14 A I don't know him either.

14:25:14 15 Q You don't. You're not aware that both Jay Bhattacharya
14:25:18 16 and Michael Kulldorff do not believe masking children is
14:25:22 17 advisable or works?

14:25:24 18 A I'm unaware of that, no.

14:25:26 19 Q These are doctors from prominent universities in this
14:25:30 20 country. You don't think it would be important to maybe
14:25:33 21 get the other side of the, you know, people who may
14:25:36 22 disagree with you and see what they think about it just
14:25:39 23 to make sure that you're right?

14:25:40 24 A So I've read the best published science I could find, and
14:25:45 25 I have made the best recommendation that I could find,

14:25:49 1 based on my expertise and working with my colleagues,
14:25:52 2 quite frankly. The people having published articles
14:25:55 3 about this in scientific journals, I probably didn't see
14:25:59 4 what they had to say.

14:26:00 5 Q Do you know Marty Makary, Dr. Marty Makary from John
14:26:04 6 Hopkins University? Do you know who he is?

14:26:06 7 A No, I don't.

14:26:07 8 Q You weren't -- were you present when Dr. Bostom testified
14:26:11 9 about Dr. Makary's article that's admitted in full as
14:26:16 10 Exhibit 17, an article in the Wall Street Journal?

14:26:20 11 A I'm sure I was present for that, yes.

14:26:23 12 MR. PICCIRILLI: Can I show the witness
14:26:25 13 Exhibit 19, please ?

14:26:28 14 THE COURT: 19 or 17?

14:27:06 15 MR. PICCIRILLI: 29.

14:27:20 16 THE CLERK: Handing the witness Exhibit 29,
14:27:21 17 full.

14:27:22 18 Q BY MR. PICCIRILLI: Have you seen this document before,
14:27:32 19 Doctor?

14:27:32 20 A I haven't read it before.

14:27:33 21 Q So you didn't review that in preparation for your
14:27:36 22 testimony, even though Dr. Bostom testified about it?

14:27:38 23 A I didn't look at it. I didn't think it was important.

14:27:40 24 Q So the opinion of a doctor at John Hopkins University,
14:27:47 25 who also has a Masters in Public Health, you don't think

14:27:50 1 his opinion about masking is important or relevant?

14:27:52 2 A So it doesn't say on this document that this person whose
14:27:57 3 announced in the public health in the byline. It says by
14:28:00 4 Marty Makary and H. Cody Meissner. I didn't know who
14:28:03 5 they were. It's just an opinion commentary. And quite
14:28:07 6 frankly, I read a lot of material every day, and I only
14:28:10 7 have limited hours in my day, so I don't read everything
14:28:11 8 that I'm given.

14:28:12 9 Q Okay.

14:28:26 10 THE COURT: Doesn't the end of that page refer
14:28:28 11 to who the authors are?

14:28:31 12 MR. PICCIRILLI: I'm sorry, your Honor, I
14:28:31 13 didn't --

14:28:32 14 THE COURT: Doesn't the end of that, the last
14:28:34 15 page say who the authors are? Just like most editorials
14:28:39 16 identify the authors at the end.

14:28:42 17 THE WITNESS: It says Dr. Makary, professor at
14:28:44 18 John Hopkins School of Medicine, editor-in-chief. Like I
14:28:47 19 said, Judge, I didn't know that. So I didn't read it
14:28:51 20 because it's not in the byline.

14:28:57 21 MR. PICCIRILLI: Your Honor, I'd like to show
14:28:58 22 the witness Exhibit F, please.

14:29:13 23 THE CLERK: The sheriff is handing the witness
14:29:14 24 Exhibit F full.

14:29:16 25 Q Doctor, this is the next MMWR that was introduced, and it

14:29:26 1 involves a study in Georgia last fall, correct?

14:29:32 2 A Yes.

14:29:33 3 Q Why did you think this was relevant?

14:29:38 4 A Well, it looked at using masks in elementary schools,
14:29:43 5 multiple counties, and it looked at the impact of masking
14:29:46 6 and ventilation. It's the type of thing that was
14:29:49 7 relevant to us. It's a period of time before Delta but
14:29:52 8 it was one of many documents and studies I looked at.

14:29:55 9 Q Does this document purport to study the effectiveness of
14:30:02 10 mask wearing by students not staff?

14:30:11 11 A It really talks about both groups.

14:30:16 12 Q No, it doesn't, Doctor.

14:30:18 13 A It says teachers and staff members are required to use
14:30:21 14 masks -- you're right. Yup.

14:30:23 15 Q The study didn't determine whether or not masking of
14:30:28 16 students was effective, correct?

14:30:30 17 A Yes, you're right.

14:30:31 18 Q In fact, go to the fifth page of the document. If you
14:30:54 19 look at the right-hand paragraph, about eight lines down,
14:31:05 20 there's a sentence that says the 21 percent of lower
14:31:09 21 incident in schools that required mask use among students
14:31:12 22 was not statistically significant compared with schools
14:31:16 23 where masking was optional; correct?

14:31:18 24 A Yes.

14:31:19 25 Q And, in fact, this report was criticized by two other

14:31:24 1 epidemiologists. Do you know who Vinayak Prasad is from
14:31:29 2 the University of California in San Francisco?
14:31:32 3 A No.
14:31:32 4 Q Did you know that he criticized this report for not
14:31:37 5 emphasizing or including the fact that it did not stand
14:31:41 6 for the proposition that masking students worked?
14:31:45 7 A I already said I'm not aware of his criticism.
14:31:48 8 Q Do you know who Tracy Hoag (phonetic) is?
14:31:50 9 A No.
14:31:51 10 Q Okay. So the fact that this report specifically does not
14:31:58 11 show that masking works for students, you still found it
14:32:03 12 relevant to prove that masking works to prove for
14:32:07 13 students; is that your testimony?
14:32:09 14 A Yes. So like I said, I used this like I used a lot of
14:32:13 15 studies. I gave it weight that I thought was
14:32:17 16 appropriate, and it was something to help form my
14:32:19 17 recommendation.
14:32:27 18 MR. PICCIRILLI: Can I ask the witness be shown
14:32:30 19 Exhibit G, please?
14:32:43 20 THE CLERK: The sheriff is handing the witness
14:32:45 21 Exhibit G, full.
14:32:59 22 Q Again, Doctor, this was a study in Marin County,
14:33:14 23 California; correct?
14:33:14 24 A Marin County.
14:33:15 25 Q Marin County, I'm sorry. And you found this study to be

14:33:20 1 of value to you in informing your opinion about masking
14:33:24 2 students in schools for what reason?

14:33:27 3 A Well, it was an elementary school setting and they did a
14:33:37 4 study there, and I thought it was interesting. And I
14:33:40 5 think what you look at there a teacher is walking around
14:33:43 6 a classroom, not wearing a mask, symptomatic, but didn't
14:33:47 7 realize it, and unintentionally exposed a lot of
14:33:51 8 students. What it showed is a lot of kids got exposed
14:33:55 9 and infected. Half the class got infected. The kids
14:33:56 10 were already masked but the teacher wasn't.

14:33:59 11 And, you know, one of the things I pulled out of the
14:34:02 12 CDC Science Brief, Exhibit B, masks work best when
14:34:06 13 everybody is wearing them, and this is really a larger
14:34:09 14 concept. In order to have benefits from masks you need
14:34:12 15 source control and the filtration protection.

14:34:14 16 So you really look for everything with a mask. But
14:34:17 17 this is a good example of how in this case, because
14:34:20 18 someone didn't have good source control, the students
14:34:24 19 were at risk of getting infected, even though they were
14:34:27 20 wearing masks, and a lot of students got infected.

14:34:29 21 Q But again, Doctor, isn't it true in the limitations
14:34:34 22 summary of this report, that the study said they could
14:34:38 23 not prove that these infections took place at school, but
14:34:42 24 could have taken place outside in the community; isn't
14:34:45 25 that true?

14:34:46 1 A It's true. I don't know how likely it is though. One of
14:34:49 2 the things they didn't do in the study is they weren't
14:34:52 3 able to prove that the teacher had the Delta variant, but
14:34:56 4 that 90 percent of the students did have Delta and Delta
14:34:59 5 was the dominant strain. So it seemed more likely than
14:35:02 6 not that the transmission occurred in the school.

14:35:04 7 Q But that was just a guess?

14:35:08 8 A It's not a guess. I actually don't guess. It's an
14:35:11 9 interpretation and it's the recommendation I made. In
14:35:14 10 other words, when I look at data, I make an analysis to
14:35:17 11 critical thinking and try to make a determination.
14:35:19 12 That's why I thought the study was relevant.

14:35:23 13 MR. PICCIRILLI: Can I show the witness Exhibit
14:35:25 14 I, please?

14:35:40 15 THE CLERK: The sheriff is handing the witness
14:35:42 16 Exhibit I full.

14:35:43 17 Q Doctor, what was this Exhibit? What was the relevance to
14:35:53 18 this exhibit?

14:35:54 19 A So this talks about just cases in counties with or
14:35:58 20 without school mask requirements. They looked at the
14:36:02 21 time when Delta was the dominant strain in the United
14:36:07 22 States. It's ecological study, so you have to keep that
14:36:10 23 in mind. Ecological studies are really not going to give
14:36:12 24 you causality.

14:36:14 25 So what you really see is counties without school

14:36:19 1 mask requirements just quite frankly had more cases
14:36:22 2 compared to counties with school masks requirements. It
14:36:26 3 just talks about the mean change in daily number of
14:36:29 4 COVID-19 cases per 100,000 children and adolescents.

14:36:32 5 So it's a study that was relevant, so it's one of
14:36:35 6 the many I looked.

14:36:36 7 Q So just to be clear, what is an ecologic study?

14:36:40 8 A An ecological study is really a type of observational
14:36:44 9 study. They're not the best. It's actually a study to
14:36:47 10 give you an idea to do more studies. But you're trying
14:36:49 11 to see if there's any association, if you should dive
14:36:52 12 into the question further.

14:36:54 13 So you're looking at a population and it really just
14:36:57 14 determines -- there's omissions that there's many
14:37:00 15 confounding variables, so it may not even be true.

14:37:02 16 So it's a study that I give weight to but not much,
14:37:06 17 it was one of many studies I looked at.

14:37:08 18 Q So on Page 2, on the paragraph on the right where it
14:37:15 19 lists the four limitations of the study. The first
14:37:17 20 limitation says: This is an ecologic study and causation
14:37:21 21 can not be inferred.

14:37:22 22 A Yes, just what I said.

14:37:23 23 Q So it proves nothing?

14:37:25 24 A No, it says causation is not inferred. It's an --
14:37:29 25 ecological studies don't prove causation. It's

14:37:32 1 unequipped. People with my experience and training know
14:37:35 2 their ecological studies, but they sell it out for
14:37:38 3 people, but I knew that going into it.

14:37:40 4 Q In fact, wasn't this study criticized because it was very
14:37:44 5 selective in which counties they chose to study.

14:37:53 6 A I'm not aware of this. I think this discloses their own
14:37:58 7 limitations, like most good authors do, and they admitted
14:38:02 8 that there was a certain number of counties they looked
14:38:04 9 at, but you know quite frankly, the concept is
14:38:07 10 interesting but that's all it was. It was just an
14:38:10 11 interesting study. Again, one of many studies I looked
14:38:12 12 at. Again, I have a lot of information to make these
14:38:15 13 recommendations.

14:38:17 14 MR. PICCIRILLI: Can I ask the witness be shown
14:38:19 15 Exhibit J, please?

14:38:28 16 THE CLERK: The sheriff is handing the witness
14:38:30 17 J, full.

14:38:31 18 Q Doctor, what was the relevance of this study, in your
14:38:44 19 opinion?

14:38:44 20 A Well, one of the main things was really about getting
14:38:48 21 kids back to school, and this was one of the main things
14:38:50 22 here that was really important to get the kids back to
14:38:54 23 school. So that was one of the things that I thought was
14:38:56 24 important about this study.

14:38:58 25 You know, one of the things we learned from the

14:38:59 1 pandemic last year, last school year I should say is that
14:39:02 2 we really want the kids back in school, and that was
14:39:05 3 important, to get them in-person, every day. It's
14:39:07 4 important for their physical, emotional and educational
14:39:10 5 health.

14:39:10 6 But this looked at school closures. It was just,
14:39:15 7 again, another study, another observational study. It is
14:39:18 8 what it is. It's not perfect but it's one more study
14:39:21 9 that I looked at.

14:39:22 10 Q Actually, how was this study conducted?

14:39:24 11 A I beg your pardon?

14:39:25 12 Q How was this study conducted?

14:39:27 13 A I have to review it again.

14:39:32 14 Q Didn't they do Internet searches and look at school
14:39:38 15 surveys?

14:39:39 16 A Right.

14:39:40 17 Q And public facing web sites?

14:39:43 18 A Yes.

14:39:44 19 Q Media reports?

14:39:45 20 A Right.

14:39:46 21 Q And they list that in their limitation?

14:39:49 22 A Yes, they do.

14:39:50 23 Q On Page 2, right?

14:39:51 24 A Yup.

14:39:51 25 Q They also say that it doesn't account for the possibility

14:39:55 1 of serial errors in sources.

14:39:59 2 A Right.

14:40:00 3 Q What does that mean?

14:40:01 4 A Can you read -- I kind of loss what you said with some of
14:40:07 5 the road noise. Can you repeat the question again?

14:40:10 6 MR. PICCIRILLI: Should we shut the window,
14:40:10 7 Judge?

14:40:10 8 THE COURT: Of course.

14:40:18 9 (Pause taken)

14:40:18 10 Q So again the second page, under limitations, second HMM
14:40:29 11 which I don't know what that stands for?

14:40:30 12 A It's part of their search algorithm.

14:40:33 13 Q Hidden Markov Model is what it says.

14:40:33 14 A Yes.

14:40:37 15 Q Did that account for the possibility of serial errors in
14:40:40 16 sources. Do you know what that means?

14:40:42 17 A You're talking about errors that are confounded
14:40:47 18 potentially, so I mean they did since there's more cases
14:40:53 19 in the South, more school closures in the South. It's an
14:40:56 20 observational study, it was one of many I looked at it,
14:40:59 21 wasn't something I gave a lot of weight to but it was a
14:41:02 22 study.

14:41:02 23 Q Okay. Well, last point on this one. On the 3rd it looks
14:41:13 24 like they excluded smaller districts and only included
14:41:18 25 larger districts?

14:41:19 1 A Right.

14:41:20 2 Q That would be a problem, wouldn't it?

14:41:22 3 A I don't know. It didn't seem to effect the statistics
14:41:27 4 but it's a limitation. They admitted it.

14:41:30 5 Q Okay. Doctor, were you aware that the director of
14:41:53 6 health, Dr. Alexander Scott, sent a letter to school
14:42:03 7 districts back on August 18th regarding masking?

14:42:06 8 A I am aware of the letter.

14:42:09 9 Q You're aware of the letter?

14:42:09 10 A I am.

14:42:23 11 THE CLERK: Exhibit Number 37 for
14:42:25 12 identification.

14:42:25 13 **(PLAINTIFFS' EXHIBIT 37 WAS MARKED FOR**
14:42:44 14 **IDENTIFICATION)**

14:42:44 15 Q Doctor, is this the letter that was sent to the school
14:42:48 16 districts?

14:42:48 17 A Yes.

14:42:49 18 MR. PICCIRILLI: I move it as a full exhibit.

14:42:52 19 MS. WYRZYKOWSKI: No objection, your Honor.

14:42:53 20 THE COURT: 37 is full.

14:42:55 21 THE CLERK: 37 full.

14:42:56 22 Q Now, this was sent one day before the Governor issued his
14:43:00 23 Executive Order, correct?

14:43:01 24 A Yes.

14:43:02 25 Q Okay. Do you know why this letter was sent?

14:43:12 1 A Yes.

14:43:12 2 Q Why was it sent?

14:43:14 3 A To impart the recommendations that is in the letter and
14:43:17 4 it was really coming to address an issue that was
14:43:20 5 happening prior -- we were hearing the school districts
14:43:24 6 were kind of a cup holder. There wasn't a clear
14:43:27 7 direction and they were being asked to actually make
14:43:29 8 these really large decisions on their own is what we were
14:43:32 9 hearing from a lot of school districts, and what we did
14:43:35 10 is we looked at some of the current information we had
14:43:37 11 here and the director looked at the current information,
14:43:39 12 I think one of the key points in the letter is just
14:43:43 13 highlighting the change. When she says that the July 4th
14:43:46 14 Rhode Island was experiencing moderate rate of COVID-19
14:43:50 15 transmission for the seven day average of 11.2 cases per
14:43:54 16 100,000, and then it goes on to say we have a high level,
14:43:58 17 in other words 187 cases per 100,000. New
14:44:01 18 hospitalizations have more than quadrupled by the week,
14:44:04 19 within that period. We expect our rates to increase over
14:44:08 20 the coming weeks.

14:44:09 21 So one of the things the director was doing was
14:44:11 22 highlighting that the pandemic had changed. Keep in
14:44:14 23 mind, this is one way to communicate with all the folks
14:44:17 24 from the school world at once in this a letter.

14:44:19 25 So she did this and made some recommendations about

14:44:23 1 masks and it was really important to just make that
14:44:26 2 recommendation. Now I don't know why it was coincident
14:44:28 3 with the Executive Order. I do know that writing letters
14:44:31 4 takes time, getting them edited in the way they want
14:44:35 5 takes time. So I don't know why there was a one day
14:44:37 6 separation of time with this. I don't have that
14:44:39 7 information.

14:44:39 8 Q Doctor, you testified that you were involved in the
14:44:45 9 drafting of the enactment of the emergency rules
14:44:51 10 regarding masking in schools back on September 23,
14:44:54 11 correct?

14:44:54 12 A Yes.

14:44:55 13 Q That was over a month after this letter, right?

14:44:57 14 A Right. The regulation you're speaking about?

14:44:59 15 Q Yes.

14:45:00 16 A Yes, I was involved in it.

14:45:01 17 Q Why didn't you do the regulation on August 18th, if it
14:45:05 18 was such an emergency?

14:45:06 19 A Well, the executive order was done and then the
14:45:09 20 regulations came later, very different processes.

14:45:12 21 Q Why didn't you pass the emergency regulation on August
14:45:16 22 18th, if it was such a matter of eminent peril?

14:45:20 23 A So an emergency regulation has to be signed off by the
14:45:25 24 Governor, as well as the Director, and the Executive
14:45:27 25 Order was done first, then the emergency regulation was

14:45:31 1 done second.

14:45:32 2 The executive order was the quickest way to do it,
14:45:35 3 and then the emergency regulation, we took more time to
14:45:40 4 do so that was the only reason.

14:45:41 5 Q So there was such an emergency to do the emergency
14:45:44 6 regulations that you waited over a month to do it?

14:45:47 7 A It was covered in the Executive Order.

14:45:50 8 Q Well, if it's covered in the Executive Order, why did you
14:45:53 9 need the emergency regulation?

14:45:54 10 A Because executive orders expire in 30 days and an
14:45:58 11 emergency regulation will last longer and they can renew.

14:46:00 12 Q So the Executive Order can be renewed also, right?

14:46:05 13 A Yes. The emergency regulation had more detail in it, and
14:46:07 14 it was a little bit different in wording. So it actually
14:46:10 15 had a fair amount of direction and nuisances to the
14:46:14 16 school districts and just trying to be more helpful.

14:46:16 17 Q We'll get back to that. In this letter, Director
14:46:24 18 Alexander Scott, and forgive me, does she go by Scott or
14:46:31 19 Alexander Scott?

14:46:31 20 A She goes by Dr. Alexander Scott.

14:46:33 21 Q Obviously, doctor?

14:46:34 22 A Yes, Dr. Alexander Scott.

14:46:36 23 Q She specifically references three states in this letter.

14:46:42 24 Do you know what those states are?

14:46:44 25 A Can you point me to the sentence that you're talking

14:46:47 1

about?

14:46:48 2

Q Fourth paragraph, second to last sentence?

14:46:51 3

A Yup, other states such as Tennessee, Louisiana and

14:46:57 4

Arkansas that have recently reopened school without the

14:47:02 5

mitigation measures have seen hospitals being put to the

14:47:06 6

limits. This is a scenario we have the power to avoid.

14:47:09 7

Yes, I see the sentence.

14:47:10 8

Q So Dr. Alexander Scott thought it was important to

14:47:13 9

compare Rhode Island to states like Tennessee, Louisiana

14:47:16 10

and Arkansas; correct?

14:47:17 11

A Yes.

14:47:18 12

Q Okay. And the thought was they are, I'm assuming those

14:47:21 13

are states that do not have mandatory masks in schools?

14:47:25 14

A Yes.

14:47:25 15

Q And the belief was that their hospital cases were

14:47:28 16

exploding when schools were open; right?

14:47:31 17

A Yes.

14:47:32 18

Q What happens to the hospitalizations in those states

14:47:37 19

since schools have been opened?

14:47:38 20

A I don't know.

14:47:39 21

Q Well, it was important enough to put in this letter. You

14:47:42 22

mean you haven't followed up to see if they're off the

14:47:45 23

charts?

14:47:45 24

A So I have a lot to do with the Department of Health. I

14:47:49 25

don't follow-up on every letter we write. I do know that

14:47:52 1 Covid bursts in certain parts of the United States right
14:47:55 2 now, but I haven't specifically followed up on
14:47:58 3 hospitalization rates in Tennessee, Louisiana and
14:48:00 4 Arkansas. I have enough trouble keeping track of my own
14:48:04 5 state and that's where I'm focussing my energy right now.

14:48:07 6 Q Your Department of Health included the comparison to
14:48:11 7 those three states. You found it important enough to
14:48:15 8 include it in a letter to every school district in the
14:48:18 9 state and then you simply forgot about it?

14:48:21 10 THE COURT: I'm sorry, I have to -- when you
14:48:23 11 say "you?"

14:48:24 12 MR. PICCIRILLI: I apologize, Judge.

14:48:25 13 THE COURT: Well, I'm not sure whether you're
14:48:27 14 referencing the Department?

14:48:29 15 MR. PICCIRILLI: I mean the Department, your
14:48:30 16 Honor.

14:48:31 17 Q Let me ask you this first, Doctor, this letter that was
14:48:35 18 sent by Dr. Alexander Scott, I'm assuming it was some
14:48:40 19 collaboration in preparing this letter?

14:48:41 20 A I had general awareness of it and I probably contributed
14:48:44 21 to it but I wasn't the last sign off on the letter.

14:48:47 22 Q Okay. But Dr. Alexander Scott thought it important
14:48:50 23 enough to include a comparison to three other states,
14:48:55 24 correct?

14:48:55 25 A Yes.

14:48:56 1 Q And yet it's your testimony you haven't done any follow
14:49:00 2 ups, you, yourself?

14:49:01 3 A Right.

14:49:01 4 Q To see what happened in those three states?

14:49:03 5 A That's right. I haven't followed up.

14:49:05 6 Q Do you know if anybody in the Department has done a
14:49:07 7 follow up to see what happened in those three states?

14:49:09 8 A I don't know.

14:49:09 9 Q If I told you that the hospital case rates decreased by
14:49:13 10 over 50 percent in every single one of those states since
14:49:16 11 schools were opened without a mask mandate, would that
14:49:20 12 effect your opinion about the effectiveness of masks?

14:49:22 13 A No.

14:49:22 14 Q Why not?

14:49:23 15 A Because it's an isolated little factoid. It doesn't
14:49:27 16 really matter. What I've shown, when I've given
14:49:31 17 testimony over these last several days it's the full body
14:49:33 18 of all the scientific evidence I could find that I made
14:49:37 19 the best public health recommendation on it.

14:49:39 20 I give a lot of weight to the Center for Disease
14:49:42 21 Control science brief. The one in particular on cloth
14:49:45 22 masks and the one on K-12.

14:49:47 23 There are very few articles, and I think they have
14:49:50 24 put together a very persuasive case. And, quite frankly,
14:49:54 25 there's a lot going on in this entire country and

14:49:56 1 vaccination rates have a lot of influence on this.

14:49:59 2 So, no, I don't particularly care about these three
14:49:59 3 states and what their hospitalization rates are because
14:50:03 4 they simply don't matter to me.

14:50:04 5 Q So Dr. Alexander Scott should not have mentioned that in
14:50:08 6 her letter?

14:50:09 7 MS. WYRZYKOWSKI: Objection, your Honor. We're
14:50:10 8 talking about someone whose not here. The question
14:50:12 9 should be posed to Dr. McDonald and what he can testify
14:50:14 10 to. He can't testify to Dr. Alexander Scott's state of
14:50:16 11 mind.

14:50:18 12 Q MR. PICCIRILLI: In his opinion, should she have included
14:50:20 13 this in her letter?

14:50:23 14 MS. WYRZYKOWSKI: Same objection, your Honor.

14:50:33 15 THE COURT: What does that have to do with
14:50:34 16 anything?

14:50:35 17 MR. PICCIRILLI: This is an official Department
14:50:37 18 of Health correspondence to school departments
14:50:41 19 emphasizing the need for masks.

14:50:43 20 THE COURT: But it's not a regulation. It
14:50:45 21 doesn't carry the force of the law.

14:50:48 22 MR. PICCIRILLI: Correct. But it goes to the
14:50:49 23 determination of the reasons that the Department of
14:50:53 24 Health was giving to other public entities for why they
14:50:58 25 want -- those that wanted those entities to pass masks

14:51:02 1 mandates. And one of the things that's supported in this
14:51:05 2 letter is a comparison to three states. They thought it
14:51:09 3 was important enough to put it in this letter. This
14:51:11 4 witness is now apparently testifying that he doesn't
14:51:14 5 think that's important.

14:51:15 6 So I'm asking him whether or not Dr. Alexander Scott
14:51:18 7 should have put this in her letter or not.

14:51:21 8 MS. WYRZYKOWSKI: Objection, your Honor, same
14:51:22 9 objection as previous.

14:51:25 10 THE COURT: It's cross-examination, I'll allow
14:51:35 11 it.

14:51:37 12 THE WITNESS: It's a statement of a letter,
14:51:39 13 people read letters. I think it's a fair statement to
14:51:42 14 make. It's reflecting what was in the news at the time.

14:51:44 15 I think the most important point in the letter is
14:51:47 16 however that we don't want children in hospitals. And
14:51:50 17 that hospital systems in other states are overwhelmed.

14:51:54 18 I think when you look at the paragraph before that,
14:51:56 19 which talks about how rate of cases have increased
14:51:59 20 rapidly, 11.2 cases per 100,000 for seven days to 187
14:52:04 21 cases per 100,000 for seven days. You don't have to be a
14:52:08 22 math genius to see that's a really big jump and quite
14:52:11 23 frankly --

14:52:13 24 MR. PICCIRILLI: Your Honor, it's not
14:52:13 25 responsive to the question.

14:52:15 1 THE COURT: Thank you. I think he's answered
14:52:17 2 the question. Next question.

14:52:18 3 Q Actually, Doctor, there is one study that Dr. Alexander
14:52:27 4 Scott references in this report, correct? If you look at
14:52:34 5 Page 2 in the footnote?

14:52:36 6 A Yes, I do see that.

14:52:39 7 Q Do you know what that study is?

14:52:41 8 A Yes, I do.

14:52:45 9 Q What is the study?

14:52:47 10 A It's Exhibit D, the Science Brief on cloth masks, that
14:52:55 11 was from May 7, 2021.

14:52:57 12 Q Okay. I'm looking at the footnote. There's a study by
14:53:06 13 Lindsley.

14:53:06 14 A I'm sorry, I looked at the URL. That's a different
14:53:09 15 study. The Lindsley study is a different study.

14:53:12 16 Q I'm sorry, footnote one is what I meant.

14:53:15 17 A Yup.

14:53:15 18 Q Do you know what that study is?

14:53:17 19 A I do know this study.

14:53:20 20 Q What is that study?

14:53:21 21 A It's a study where they looked at people simulating
14:53:24 22 coughs and how effective masks were. In other words,
14:53:28 23 there was a study, it was an experimental study by the
14:53:31 24 CDC, where they actually simulated with a mannequin a
14:53:34 25 cough to see how effective masks would be after testing

14:53:37 1 it for source control. In other words, preventing
14:53:39 2 particles from going out. That's what that study was.

14:53:42 3 Q It was a study with mannequins?

14:53:43 4 A Yeah, you can do studies -- it was an experiment, yup.

14:53:47 5 Q And what did they do?

14:53:49 6 A They simulated coughs. There's been several studies like
14:53:54 7 this where they've used artificial ways of simulating
14:53:59 8 coughs to judge mask effectiveness. This isn't the only
14:54:01 9 one. There's been several really simple studies done
14:54:04 10 just to show people that masks do reduce things coming
14:54:07 11 out of people's mouth. That's why it's an effective
14:54:10 12 source control, so it's one study that was referenced.

14:54:21 13 MR. PICCIRILLI: I'm sorry, I believe I only
14:54:22 14 have, I'm sorry, I believe I only have three copies of
14:54:30 15 this, your Honor. I don't have an extra copy for the,
14:54:36 16 Judge. I'm sorry.

14:54:40 17 THE CLERK: This is Exhibit Number 38.

14:54:52 18 MR. PICCIRILLI: I move this as a full Exhibit.

14:54:59 19 MS. WYRZYKOWSKI: I have no objection, your
14:55:02 20 Honor.

14:55:02 21 THE COURT: No objection?

14:55:03 22 MS. WYRZYKOWSKI: Yes, moving it in full.

14:55:04 23 THE COURT: Okay. 38 is full.

14:55:08 24 THE CLERK: Plaintiffs' 38 full.

14:55:08 25 **(PLAINTIFFS' EXHIBIT 38 WAS MARKED FULL) .**

14:55:10 1 MR. PICCIRILLI: And I apologize, your Honor,
14:55:11 2 for not having an extra copy for you.

14:55:13 3 THE COURT: That's all right.

14:55:15 4 Mr. PICCIRILLI: I'll just get to the relevant
14:55:16 5 point.

14:55:17 6 THE COURT: There is enough paper.

14:55:18 7 Q So on Page 4, again, going right to the limitation, the
14:55:29 8 first full paragraph. It says the findings in this
14:55:32 9 report are subject to at least five limitations; correct?

14:55:37 10 A Let me get to Page 4 first. I got it.

14:55:50 11 Q So the first limitation says: The dispersion of aerosols
14:55:56 12 in a room depends on air currents, which are a unique
14:55:59 13 setting. In this study the conference room air was well
14:56:02 14 mixed, which helped transport aerosols to the air
14:56:06 15 cleaners in the room with, I'm sorry, in rooms with poor
14:56:09 16 air mixing and potential stagnation zones, air cleaners
14:56:14 17 might be less effective.

14:56:17 18 Air flow patterns in real world settings, such as
14:56:20 19 classrooms, will vary among buildings and rooms and rooms
14:56:24 20 with different dimensions and with different ventilation
14:56:27 21 rates will also have different air flow patterns.

14:56:31 22 MR. PICCIRILLI: Your Honor, actually I do
14:56:33 23 quote this in my complaint as well. This is one of the
14:56:36 24 paragraphs in the complaint.

14:56:37 25 Q So that's one limitation, correct, Doctor?

14:56:40 1 A Yes.

14:56:40 2 Q So they have mannequins sitting inertly in a conference
14:56:45 3 room and they're blowing air around, right?

14:56:48 4 A Yes.

14:56:48 5 Q Not very real world like, is it?

14:56:50 6 A It's not.

14:56:51 7 Q Okay. Well, that's actually the second limitation. The
14:56:57 8 aerosol source mannequin in the study was kept in one
14:57:00 9 fixed location. In reality, potentially infectious
14:57:04 10 occupants could be anywhere in the room and might move
14:57:07 11 around occasionally?

14:57:08 12 A That's right.

14:57:08 13 Q Third, the study used only one source mannequin and three
14:57:13 14 receiver mannequins. By the way, they spelled manikin,
14:57:13 15 m-a-n-i-k-i-n. Is that the new gender neutral way to
14:57:13 16 refer to mannequin, do you know?

14:57:13 17 A I'm not pretending to be an expert on the spelling of
14:57:13 18 mannequin.

14:57:26 19 THE COURT: We probably have enough issues to
14:57:26 20 describe.

14:57:30 21 MR. PICCIRILLI: Thank you, Judge.

14:57:30 22 Q Additional sources and receivers could change the
14:57:34 23 dynamics of aerosol dispersion within a room.

14:57:37 24 Fourth, the study was limited to aerosol particles
14:57:40 25 of a certain size, small enough to remain airborne for an

14:57:44 1 extended time but large enough to carry pathogens.

14:57:47 2 However, particles outside the size range would behave
14:57:49 3 differently.

14:57:49 4 And then finally, the study only assessed aerosol
14:57:52 5 exposure, it did not directly examine disease
14:57:57 6 transmission.

14:57:57 7 So this is a study, the one study that Dr. Alexandra
14:58:02 8 Scott referenced in her letter to the school committees?

14:58:05 9 A Well --

14:58:05 10 Q That's it?

14:58:06 11 A It is. But if you look at the paragraph above she gives
14:58:10 12 the URL to Exhibit B, the Science Brief and cloth masks
14:58:15 13 which quote 65 studies. So, I mean, yeah.

14:58:17 14 Q So she thought the most important one to cite, the only
14:58:21 15 one to cite, specifically from all of those reports was a
14:58:24 16 mannequin study? That's the most important one that she
14:58:28 17 cited.

14:58:28 18 A I can't speak to whether it was most important. My guess
14:58:32 19 is it was the most important one, that's why she put the
14:58:35 20 Science Brief above it and referenced it. I think the
14:58:39 21 Science Brief was the most important one.

14:58:49 22 MR. PICCIRILLI: Your Honor, I think we need a
14:58:50 23 break.

14:58:51 24 THE COURT: That sounds like a good idea.

14:58:51 25 MS. WYRZYKOWSKI: Thank you.

14:58:54 1 THE COURT: While we're still on the record, it
14:58:56 2 is now two minutes to three. The Clerk and the
14:59:00 3 stenographer will have better time records as to when we
14:59:04 4 started at 1:40 or 1:45. Doctor, you can step down if
14:59:07 5 you want.

14:59:08 6 But in the meantime, Mr. Ford just came back into
14:59:11 7 the courtroom. Mr. Ford, I believe is his name, and
14:59:14 8 apparently he left his phone on, perhaps recording, for
14:59:21 9 what was that an hour fifteen. The Court has taken the
14:59:26 10 phone and will deal with it at a later time. Thank you.

14:59:31 11 THE SHERIFF: All rise.

14:59:41 12 (Break taken)

14:59:41 13 (Back on the record)

15:17:08 14 THE CLERK: I'd just like to remind the witness
15:17:10 15 that having been previously sworn in you are still under
15:17:13 16 oath.

15:17:14 17 THE WITNESS: Thank you.

15:17:26 18 MR. PICCIRILLI: Can I have this marked as the
15:17:29 19 next Plaintiffs' Exhibit.

15:17:30 20 THE CLERK: Exhibit Number 39 for
15:17:33 21 identification.

15:17:33 22 **(PLAINTIFFS' EXHIBIT 39 WAS MARKED FOR**
15:17:33 23 **IDENTIFICATION)**

15:17:47 24 Q Doctor, could you take a moment and look at this letter
15:17:50 25 and tell me when you're ready?

15:17:52 1 A Yes, I'm ready. How can I help?

15:18:44 2 Q Okay. Well, Doctor, have you seen this letter before?

15:18:46 3 A I've seen it right now.

15:18:48 4 Q Okay. Were you aware that the Rhode Island Association
15:18:52 5 of Pediatricians had sent a letter to school districts as
15:18:56 6 well.

15:18:56 7 A No, I wasn't aware.

15:18:58 8 Q Oh, you didn't know that Rhode Island Association had put
15:19:08 9 out a public statement about this, that they had sent
15:19:11 10 this letter, that they were echoing the advice of their
15:19:15 11 national AAP?

15:19:16 12 A So it's the Rhode Island chapter of the American Academy
15:19:19 13 of Pediatrics and it looks like they wrote a letter to
15:19:25 14 the school superintendents. They were sent August 8,
15:19:28 15 2021. I haven't seen it before, so I wasn't aware of
15:19:31 16 letter.

15:19:32 17 Q Do you know -- it looks like five doctors signed it?

15:19:35 18 A So I have met Dr. Peter Pogacar. I have met Dr. Greg Fox
15:19:42 19 and I've met Dr. Patricia Flanagan and I have met
15:19:46 20 Dr. Elizabeth Lange. I do not know Dr. Allison Brindle.

15:19:50 21 Q You don't know Allison Brindle. When you had your phone
15:19:55 22 conversation with the CEO's of various hospitals, she
15:19:59 23 wasn't one of the doctors on that call?

15:20:01 24 A Not that I know of.

15:20:02 25 Q Okay. All right. But in your dealings with these others

15:20:10 1 doctors, this letter never came up?

15:20:12 2 A No. I'm not a member of the American Academy of
15:20:17 3 Pediatrics, so I'm not a member of the Rhode Island
15:20:19 4 chapter either. So I don't really interact with them,
15:20:21 5 not that they're not nice enough people but I wasn't
15:20:24 6 aware of it.

15:20:25 7 Q So there's no requirement that a pediatrician belong to
15:20:29 8 the AAP?

15:20:29 9 A No, it's a professional organization. If you want to
15:20:31 10 join, you join. You just pay \$380 to join but I don't
15:20:31 11 belong to the AAP.

15:20:37 12 Q Interesting. By the way, well, since you can't
15:20:41 13 authenticate this, I guess, we'll have to wait.

15:20:44 14 Are you aware, Doctor, that you have heavily relied
15:20:49 15 upon the fact that not only the CDC but the AAP has
15:20:53 16 recommended masking in schools?

15:20:55 17 A Yes. The National American Academy of Pediatric has made
15:20:58 18 a recommendation of universal masking in schools.

15:21:00 19 Q Do you know what the American Association of Physicians
15:21:05 20 and Surgeons is?

15:21:07 21 A I've heard of it, yes.

15:21:08 22 Q Okay. Then you're aware that they take a contrary view
15:21:15 23 to the AAP, they do not believe that masking should be in
15:21:17 24 schools?

15:21:17 25 A I wasn't aware of that.

15:21:19 1 Q Would that fact, if it were true, would that inform your
15:21:25 2 opinion as to whether or not it would be recommending
15:21:28 3 masking in schools?

15:21:29 4 A No.

15:21:29 5 Q Because the AAP is okay -- the AAPS is not okay?

15:21:34 6 A Well, you said the American Association of Physicians and
15:21:37 7 Surgeons.

15:21:38 8 Q Yes.

15:21:38 9 A So I'm not aware of them having any expertise in public
15:21:43 10 health or pediatrics. I am more interested in relying on
15:21:46 11 public health professionals, like myself, my peers and my
15:21:51 12 colleagues, and they are an organization of some
15:21:54 13 expertise. So the group you're referencing doesn't have
15:21:56 14 any expertise in public health or pediatrics. So I
15:21:59 15 wouldn't find anything. You'd have to say all that is
15:22:01 16 useful but I'm quite frankly not aware they had a
15:22:04 17 position on this subject.

15:22:04 18 Q So only pediatricians have a valid opinion as to whether
15:22:09 19 masking in school is appropriate?

15:22:10 20 A So I didn't say that.

15:22:12 21 Q So --

15:22:14 22 THE COURT: But I think his question is is it
15:22:17 23 true?

15:22:17 24 THE WITNESS: No, it's not true. Others do
15:22:19 25 have valid opinions and a lot those sources are excited

15:22:24 1 working with people who weren't pediatricians. Many of
15:22:26 2 them were public health physicians, public health
15:22:29 3 experts, so certainly other people have very important
15:22:31 4 things to contribute who aren't pediatricians.

15:22:32 5 Q But not the AAPS?

15:22:34 6 A Yes, I'm really not that familiar with the organization,
15:22:37 7 but since they don't have expertise in pediatrics or
15:22:41 8 public health, I wouldn't think they have an opinion
15:22:42 9 here. Apparently, they do. I just don't know what it
15:22:45 10 is.

15:22:53 11 Q Okay. Doctor, earlier we were talking about whether or
15:23:07 12 not politics enters into this masking debate, correct?

15:23:11 13 A Yes, you did bring it up.

15:23:15 14 MR. PICCIRILLI: And, again, Judge, I apologize
15:23:17 15 I don't know -- oh no, I do have a copy.

15:23:22 16 THE COURT: Sure. While I let you distribute
15:23:24 17 the Exhibits and have it marked by the Clerk.

15:23:27 18 Mr. Forte, you left a phone here; is that correct?

15:23:30 19 MR. FORTE: Yes, sir.

15:23:31 20 THE COURT: You understand that we don't allow
15:23:33 21 recordings in the courtrooms normally, except for the
15:23:35 22 press.

15:23:36 23 MR. FORTE: Yes, sir, I apologize for any
15:23:38 24 inconvenience.

15:23:40 25 THE COURT: You didn't leave it on, did you?

15:23:42 1 MR. FORTES: I honestly, I got called out of
15:23:46 2 here and I apologize again.

15:23:53 3 THE COURT: Your apology is accepted. The
15:23:56 4 Sheriff will give you your phone back. Don't leave it
15:23:59 5 here again.

15:24:00 6 MR. FORTE: Thank you, Sheriff.

15:24:03 7 THE CLERK: Plaintiffs' Exhibit 40 marked for
15:24:06 8 identification.

15:24:06 9 **(PLAINTIFFS' EXHIBIT 40 WAS MARKED FOR**
15:24:07 10 **IDENTIFICATION)**

15:24:07 11 Q Dr. McDonald, take a look at this letter and let me know
15:24:16 12 when you're ready to respond.

15:24:26 13 A I'm ready. How can I help?

15:24:28 14 Q Okay. Have you seen this letter before?

15:24:31 15 A No.

15:24:31 16 Q This is a letter to Governor Daniel McKee on August 15,
15:24:37 17 correct?

15:24:37 18 A Yes.

15:24:38 19 Q So this never came up in any discussions you had with the
15:24:41 20 Governor?

15:24:41 21 A No.

15:24:42 22 Q Okay. This letter purports to be signed by the Rhode
15:24:46 23 Island Superintendent's Association, the NEARI; the
15:24:50 24 National Education Association of Rhode Island, which is
15:24:52 25 a teacher's union, the Rhode Island Federation of

15:24:55 1 Teachers and Health Professionals, another teachers
15:24:57 2 union, and the Rhode Island Association of School
15:25:00 3 Committees; right?

15:25:01 4 A Yes, that's what it says.

15:25:03 5 Q So this was a letter, signed at least by two of the
15:25:09 6 teachers unions in the State trying to influence the
15:25:11 7 Governor's decision on masking in school, right?

15:25:13 8 A Yes. That's what it appears to be, yes.

15:25:14 9 Q Does that concern you as a public health official that
15:25:18 10 teachers unions would be trying to lobby the Governor on
15:25:22 11 this issue?

15:25:22 12 A No.

15:25:23 13 Q So it's okay for teacher unions to lobby the Governor
15:25:28 14 about whether or not there's masks in school?

15:25:30 15 A I think it's okay for everybody to participate in
15:25:33 16 government.

15:25:33 17 Q Well, that's why we're here, Doctor, because we don't get
15:25:37 18 to participate in government. Everything that has been
15:25:39 19 done prior to masking is done by Executive Order or
15:25:44 20 emergency rules, which by definition excluded the public
15:25:48 21 participation, right?

15:25:48 22 A Yes.

15:25:49 23 Q But it seems like some people have extra access to the
15:25:52 24 Governor that regular people don't?

15:25:53 25 A I think anybody can write a letter to the Governor. I

15:25:58 1 don't know any reason to believe that other people can't
15:26:00 2 write letters and send the Governor. I imagine he would
15:26:03 3 read them. I can't speak for the Governor.

15:26:05 4 Q So, Doctor, I just want to try and understand the process
15:26:08 5 by which you advised the Governor. You testified earlier
15:26:12 6 you are part of some Covid intervention team?

15:26:14 7 A I said I was a part of the Covid leadership team.

15:26:17 8 Q I'm sorry, Covid what?

15:26:18 9 A Leadership Team.

15:26:20 10 Q Leadership Team, okay. And you testified who is on that
15:26:23 11 team, but you said it really, so could you repeat it?

15:26:26 12 A Sure.

15:26:27 13 Q And if you could bear with me and go a little slower?

15:26:31 14 A You bet.

15:26:32 15 Q So who is on this Covid leadership team?

15:26:35 16 A The Director, Dr. Nicole Alexander Scott.

15:26:40 17 Q Okay.

15:26:40 18 A The Executive Director is Tom McCarthy.

15:26:45 19 Q He's the executive director of what?

15:26:47 20 A Of the Covid Response Unit.

15:26:49 21 Q Oh, I'm sorry, okay.

15:26:50 22 A Sure.

15:26:50 23 Q Is he also serving in government in some other capacity?
15:26:55 24 Is it Governor's chief-of-staff or something?

15:26:57 25 A No. Tom McCarthy works for the Rhode Island Department

15:27:00 1 of Health. His main duty is to be the executive director
15:27:04 2 of the Covid unit.

15:27:05 3 Q Okay. But he works for the Department of Health?

15:27:07 4 A He works for the Rhode Island Department of Health.

15:27:09 5 Q In what capacity does he work?

15:27:11 6 A He's the executive director of the Covid unit.

15:27:14 7 Q That's his only job title?

15:27:16 8 A That's plenty of job for anyone.

15:27:18 9 Q I'm just trying -- well, Dr. Alexander Scott, she's the
15:27:22 10 director of the Covid leadership team and she's also the
15:27:26 11 Director of the Department of Health?

15:27:27 12 A That's right.

15:27:28 13 Q I just want to be clear. Who else is on this team?

15:27:30 14 A Leanne Lasher.

15:27:34 15 Q Lasher?

15:27:34 16 A L-a-s-h-e-r.

15:27:38 17 Q What's her position with the team?

15:27:40 18 A She's the data lead.

15:27:41 19 Q Data lead?

15:27:42 20 A Yes.

15:27:43 21 Q Does she hold any other positions in state government?

15:27:47 22 A She works for the Rhode Island Department of Health.

15:27:49 23 Q Okay. And what is the data lead? What does that person
15:27:53 24 do?

15:27:53 25 A She's in charge of all of our people who do data for the

15:27:57 1

Covid unit.

15:27:58 2

Q So for example, the data dashboard, she's in charge of that?

15:28:01 3

15:28:01 4

A She oversees a lot of the data. I don't know if she specifically oversees the dashboard but I think she does.

15:28:06 5

15:28:07 6

There's a lot of people who work on data, I can't name all of them. There's, I don't know, probably be 100 epidemiologists who do data for us. I just don't know.

15:28:11 7

15:28:14 8

15:28:18 9

Q Anybody else on this team?

15:28:21 10

A Yes, Jacqueline Rodriguez.

15:28:29 11

Q What's her position?

15:28:30 12

A She works to help with housing and other aspects of quarantine and isolation.

15:28:34 13

15:28:38 14

Q And does she work for the Department of Health as well?

15:28:41 15

A Yes.

15:28:42 16

Q Any other state agency?

15:28:45 17

A Not that I'm aware of.

15:28:47 18

Q Any other team members?

15:28:49 19

A Yes, Christine Goulet.

15:28:53 20

Q Uh-hum.

15:28:55 21

A She's the Deputy Director of the Covid unit.

15:28:58 22

Q And what's her function?

15:29:01 23

A She assists Tom McCarthy. She's the deputy director.

15:29:08 24

Q Anyone else?

15:29:10 25

A There's Kristin Sjahum, her last name is spelled

15:29:18 1 S-j-o-h-u-m.

15:29:18 2 Q How do you pronounce that?

15:29:21 3 A I pronounce it as Sjohum, but I don't know if that's

15:29:26 4 correct, sir.

15:29:26 5 Q Okay. That's fair.

15:29:27 6 A I've always just called her Kristin.

15:29:30 7 Q Okay, I understand. And her position?

15:29:31 8 A She's in charge of the vaccine data.

15:29:34 9 Q Also a Department of Health employee?

15:29:39 10 A Yes.

15:29:39 11 Q Okay. Anyone else?

15:29:40 12 A Matt Stark.

15:29:46 13 Q And his position?

15:29:49 14 A He's the administrative officer for the Covid unit.

15:29:52 15 Q Okay. Also from the Department of Health?

15:29:54 16 A Yes.

15:29:55 17 Q Okay. Anyone else?

15:29:57 18 A Maureen Wu

15:30:00 19 Q Gloom?

15:30:01 20 A Wu, W-u.

15:30:02 21 Q Wu, I'm sorry. And her position?

15:30:06 22 A Finance.

15:30:08 23 Q And what does that position entail?

15:30:10 24 A She works with Matt, helping us with purchasing,

15:30:14 25 following the State rules regarding how to purchase

15:30:16 1 things. There's a lot of work with purchasing.

15:30:18 2 Q Now, mask, that's the mask procurement provision or
15:30:23 3 something?

15:30:24 4 A I am not sure if you're referring to the master price
15:30:27 5 agreement.

15:30:27 6 Q The master price agreement, is that what you made?

15:30:29 7 A I don't believe I said either.

15:30:31 8 Q I apologize.

15:30:32 9 A No, that's okay. Maureen just helps with finance and
15:30:35 10 purchasing is what I said and following the purchasing
15:30:38 11 rules.

15:30:38 12 Q Fair enough. Anyone else?

15:30:40 13 A There are other people maybe but their names escape me at
15:30:48 14 the moment.

15:30:48 15 Q Now just to be clear, are these group of people that you
15:30:52 16 just mentioned, the Covid leadership team, are these the
15:30:55 17 people that meet with the Governor to advise him on the
15:30:55 18 Executive Order?

15:31:00 19 A So the only two people who I know who meet with the
15:31:02 20 Governor are the Director, Dr. Alexander Scott, and Tom
15:31:05 21 McCarthy.

15:31:05 22 Q So you don't meet with the Governor?

15:31:11 23 A I don't meet with the Governor often. I've met with the
15:31:15 24 Governor from time to time but generally I meet with Tom
15:31:18 25 McCarthy and the Director and they meet with the

15:31:19 1 Governor.

15:31:19 2 Q By the way, I didn't get your official position on this
15:31:23 3 team?

15:31:24 4 A I'm the Medical Director for the Covid unit.

15:31:26 5 Q Okay. So the way it works is you advise Dr. Alexander
15:31:36 6 Scott and Tom McCarthy, I'm sorry, is he a doctor?

15:31:40 7 A No.

15:31:40 8 Q Okay. And then the two of them advise the Governor?

15:31:44 9 A Yes.

15:31:45 10 Q Okay. So in any of your conversations with any of these
15:32:02 11 team members, did it come up that the teachers union in
15:32:07 12 the State were trying to influence the Governor to issue
15:32:11 13 an executive order?

15:32:12 14 A I'm not aware of any.

15:32:13 15 Q You've never heard of that before?

15:32:15 16 A No.

15:32:15 17 Q Okay. But it wouldn't bother you as the public health
15:32:20 18 director if teachers unions were trying to influence the
15:32:25 19 Governor to issue such an order?

15:32:27 20 A No, all the unions try to influence politicians. I let
15:32:32 21 the unions be the unions.

15:32:33 22 Q Okay. Fair enough.

15:32:39 23 MR. PICCIRILLI: We agree to admit this?

15:32:41 24 MS. WYRZYKOWSKI: No objection to 48 full, your
15:33:21 25 Honor.

15:33:24 1 THE COURT: Is it marked?

15:33:27 2 THE CLERK: It's marked for ID, your Honor.

15:33:30 3 THE COURT: Okay.

15:33:32 4 MR. PICCIRILLI: It can be full, your Honor.

15:33:34 5 THE COURT: I'm sorry, I didn't hear the
15:33:36 6 number. What number?

15:33:36 7 THE CLERK: 40, your Honor.

15:33:36 8 MR. PUCCIRILLI: Plaintiffs' 40 is full.

15:33:40 9 THE COURT: Yes, 40 is full.

15:33:41 10 THE CLERK: Plaintiffs' 40 is full.

15:33:45 11 MR. PICCIRILLI: Thank you.

15:33:47 12 **(PLAINTIFFS' EXHIBIT 40 WAS MARKED FULL)**

15:33:47 13 Q All right. Doctor, I'm going to switch gears here a
15:33:50 14 little bit and I want to get back to what other
15:34:05 15 information you accessed to help inform your decision
15:34:08 16 about masking, okay?

15:34:10 17 A Sure.

15:34:11 18 Q You testified to many, many MMWR reports and Science
15:34:15 19 Briefs, correct?

15:34:15 20 A Yes.

15:34:16 21 Q You've testified that you don't know who some of these
15:34:21 22 others national figures on public health are, correct?

15:34:24 23 A That's right.

15:34:25 24 Q But you did begin to testify that you believe there's
15:34:28 25 some politicization in some states about masking, right?

15:34:34 1 A Yes.

15:34:34 2 Q I'm assuming you mean a state like Florida?

15:34:38 3 A Yes.

15:34:38 4 Q Okay. And the basis of you believing it's politicized is
15:34:43 5 what?

15:34:43 6 A Well, I guess one of it was the direct conversation I had
15:34:47 7 with the former Florida Surgeon General, Dr. Scott
15:34:52 8 Rivkees, who told me it was politicized.

15:34:54 9 Q When did you have this conversation with him?

15:34:57 10 A Just a couple of weeks ago. He moved to Rhode Island
15:35:00 11 recently. I had met him before he became the Florida
15:35:04 12 Surgeon General. I don't remember why but he came by the
15:35:07 13 Department of Health one day before he was starting his
15:35:10 14 job as the Florida Surgeon General, and he saw something
15:35:11 15 I had done and he wanted to ask me a little bit about it,
15:35:14 16 and so I met him, chatted with him, and then he got a
15:35:19 17 Rhode Island license a few weeks ago. I remember his
15:35:21 18 name and we connected. He called me, so we talked.

15:35:25 19 Q Interesting. He never brought up the fact that Jay
15:35:32 20 Bhattacharya is one of the epidemiologists that advises
15:35:34 21 Governor DeSantis in Florida?

15:35:36 22 A No, he didn't.

15:35:36 23 Q But yet he told you it was politicized?

15:35:39 24 A He did. He talked about that no --

15:35:41 25 Q That's all I asked.

15:35:43 1 A Okay. Fair enough.

15:35:45 2 Q Okay. The new surgeon general in Florida, do you know
15:35:50 3 who that is?

15:35:50 4 A I saw his name in the news reports but I don't remember
15:35:54 5 his name.

15:35:54 6 Q Is it Joseph Ladapo?

15:35:56 7 A You would know better than I. It was in the news reports
15:35:59 8 but I just don't remember.

15:36:00 9 Q Did it come up in your conversations with Dr. Rivkees?

15:36:03 10 A No, it didn't.

15:36:04 11 Q Okay. So would you know that Dr. Ladapo is a -- is from
15:36:14 12 the university, UCLA Medical School?

15:36:18 13 A I didn't know that. I don't know his training. I don't
15:36:21 14 know if he's an expert in public health. I don't know
15:36:23 15 anything about him.

15:36:23 16 Q So you don't know that he has both a medical degree and
15:36:27 17 Masters of Public Health from Harvard University?

15:36:30 18 A I don't know anything about it. I don't know anything
15:36:32 19 about his training.

15:36:32 20 Q Okay. So you say you're aware of what's going on in
15:36:40 21 Florida, and I'm assuming you're aware that since schools
15:36:44 22 opened in Florida, with no mask mandate, cases have
15:36:49 23 dropped 81 percent, hospitalizations have dropped 81
15:36:53 24 percent. Are you aware that?

15:36:54 25 A I do not follow Florida hospitalization rates.

15:36:58 1 Q That didn't come up in your conversation with Dr. --

15:37:00 2 A No. He did tell me two thirds of the school districts
15:37:04 3 were actually using masks, in spite of the ban down
15:37:08 4 there, but this other, this other fact you bring up
15:37:11 5 didn't come up.

15:37:11 6 Q Okay. Do you study any other states, other than Florida?

15:37:19 7 A I don't know even know that I study Florida to be quite
15:37:24 8 candid with you. I try to keep an eye on the entire
15:37:26 9 pandemic throughout the United States, but I'm not
15:37:29 10 focussed on any one particular state other than Rhode
15:37:31 11 Island. That's my main responsibility.

15:37:33 12 Q Well, are you aware that there are a number of other
15:37:35 13 states that do not have mask mandates in school?

15:37:37 14 A I am aware of that.

15:37:38 15 Q Okay. Are all of those states making political decisions
15:37:42 16 about masking or are they making medical decisions?

15:37:45 17 A I don't know. When I last looked, I think there's about
15:37:48 18 17 states that have mask mandates. I think there's 30
15:37:53 19 some states that have, you know, the school district can
15:37:57 20 decide. I think there's eight states that have banded
15:37:57 21 masks.

15:38:00 22 So I just read what's in the news. That's what I
15:38:03 23 recollect on this matter. But I don't look at it
15:38:05 24 closely, that's my general recollection of it.

15:38:07 25 Q Well, Doctor, I mean you're a public health official, you

15:38:11 1 don't find it relevant or important to see what other
15:38:14 2 public health officials are doing in this country with
15:38:17 3 decisions they're making about masking in schools?

15:38:20 4 A I do, but only to a limited degree. There's really, you
15:38:24 5 know Rhode Island is different in many capacities than
15:38:26 6 other states. We're a very high dense population state,
15:38:31 7 so I really look at the unique features of Rhode Island
15:38:34 8 and, you know, there's a lot of literature now, a lot of
15:38:37 9 observational studies. There's the Science Brief put out
15:38:40 10 by the CDC. We have more than enough information to make
15:38:42 11 the best recommendations for the people who live in Rhode
15:38:44 12 Island. So that's what I go on. I do hear about other
15:38:48 13 states.

15:38:48 14 Q But you don't care?

15:38:49 15 A I care deeply about everybody and I do care for other
15:38:52 16 states.

15:38:52 17 Q But you don't care about the data coming from other
15:38:54 18 states. I mean that data could inform your opinion
15:38:56 19 couldn't it, Doctor?

15:38:57 20 A You know, I do the best I can to keep up with it, but
15:39:01 21 quite honestly I work seven days a week, as many hours a
15:39:05 22 day as humanly possible. But I don't look at ever piece
15:39:08 23 of data from every state.

15:39:10 24 What I'm saying to you is this is the state I'm
15:39:13 25 focussed on. This is the state that I'm most responsible

15:39:15 1 for. I am familiar with other states but I'm not
15:39:21 2 following the data from other states. The data
15:39:22 3 dashboard, we do plot data on New England states, which I
15:39:25 4 look at those. Then there's a sample of eight other
15:39:28 5 states we looked at; West Virginia is one of them,
15:39:32 6 Tennessee is another. There's other states, just going
15:39:34 7 back to the beginning, so we look at their data as well,
15:39:37 8 but Florida isn't one of them.

15:39:39 9 So we do look at a sample of other states around the
15:39:43 10 United States but it's not Florida.

15:39:45 11 Q Do you look at other countries and what they've done with
15:39:49 12 masking in schools?

15:39:49 13 A To an extent, sometimes, you know, but I'm more focussed
15:39:52 14 on Rhode Island.

15:39:53 15 Q So you're aware that there are a number of countries in
15:39:56 16 Europe, for example, that do not allow masks in schools,
15:40:00 17 correct?

15:40:00 18 A I've heard of this but I'm not studying that. I'm really
15:40:05 19 focussed on Rhode Island and what's best for the people
15:40:07 20 who live here.

15:40:10 21 MR. PICCIRILLI: And I apologize, your Honor,
15:40:12 22 all of these have highlights on them. I'd ask that they
15:40:19 23 be ignored. I understand it's probably not appropriate
15:40:23 24 but, unfortunately, all my copies have highlights on
15:40:26 25 them. I'd ask that this be marked as plaintiffs' next

15:40:30 1

exhibit.

15:40:30 2

THE CLERK: Plaintiffs' 41.

15:40:30 3

(PLAINTIFFS' EXHIBIT 41 WAS MARKED FOR

15:40:30 4

IDENTIFICATION)

15:40:44 5

Q Doctor, take a moment to review this and let me know when you're ready.

15:40:50 6

15:42:29 7

A So I scanned the article once. How can I be helpful?

15:42:31 8

Q So, Doctor, this looks like a correspondence or report that was published in the New England Journal of Medicine; correct?

15:42:37 9

15:42:40 10

15:42:40 11

A It's a letter to the editor.

15:42:42 12

Q Okay. Do you find that this document has any relevance to the issue of masking children in schools?

15:42:49 13

15:42:53 14

A In Sweden it looks like it does.

15:42:56 15

Q In Sweden they don't allow masking in schools, correct?

15:43:00 16

A I really don't know what's going on in Sweden. I haven't studied Sweden.

15:43:04 17

15:43:05 18

Q Well, this document indicates that Sweden doesn't allow masking in schools, right?

15:43:08 19

15:43:09 20

A If you could point out where it says that? I just scanned it once.

15:43:12 21

15:43:12 22

Q The last sentence in the first paragraph.

15:43:16 23

A Social distancing was encouraged in Sweden but wearing

15:43:22 24

face masks was not. So from what I understand about that

15:43:26 25

is that social distance was encouraged, mask wearing was

15:43:30 1 not encouraged.

15:43:30 2 Q And neither was mandated?

15:43:32 3 A Neither was mandated is what it sounds like, yes. I
15:43:36 4 thought earlier you said it was banned, maybe I heard you
15:43:39 5 incorrectly.

15:43:40 6 Q Okay. And this report indicates there have been no
15:43:44 7 COVID-19 deaths among children in Sweden, correct?

15:43:48 8 A Yes. That's right.

15:43:48 9 Q Yeah. And, again, would it be of relevance to you in
15:43:54 10 your opinion regarding masking to look at a country,
15:43:57 11 another country that does things a little differently
15:43:59 12 than we do, and determine that, you know, we don't
15:44:02 13 mandate masks and no children have died. Would that have
15:44:08 14 any relevance to your opinion?

15:44:09 15 A Sweden is a very different country. They have a whole
15:44:13 16 different economy, a whole different health care system.
15:44:16 17 There's a lot about Sweden that's different than the
15:44:18 18 United States.

15:44:18 19 So, you know, it's interesting. I'm happy for their
15:44:21 20 success but I wasn't familiar with this study and it
15:44:24 21 doesn't change my opinion.

15:44:25 22 Q But, Doctor, you're relying upon studies in California,
15:44:32 23 Marin County, and Maricopa County, Arizona, Georgia,
15:44:38 24 North Carolina. You're relying on studies all over the
15:44:42 25 country and every state has different health care

15:44:44 1 systems, right?

15:44:45 2 A Well, the health care system in the United States is
15:44:48 3 pretty similar. But generally a fee for service health
15:44:51 4 care system. And I do rely on those studies but also
15:44:54 5 rely on the CDC Science Briefs, which one put in 65
15:44:57 6 articles, the other one put in 98 articles. I didn't
15:45:00 7 read all the reference articles but I read most of them.

15:45:03 8 So I've actually read hundreds of articles about
15:45:05 9 this before I came to my recommendation.

15:45:07 10 Q And a lot of those articles, in fact almost all of those
15:45:11 11 articles, if not all of them, involve studies that have
15:45:15 12 nothing to do with Rhode Island?

15:45:17 13 A Well, one of them did. One of them was MMWR, about child
15:45:22 14 care settings, preschool, if you will, that we did at the
15:45:26 15 Rhode Island Department of Health. I wasn't one of the
15:45:29 16 authors on it, but Dr. Fine and another one of my
15:45:32 17 colleagues were and they showed that --

15:45:33 18 Q Is that an Exhibit in this case?

15:45:36 19 A It's a reference in the Science Brief, K-12. It's a
15:45:43 20 study that's actually called out in the text. But what
15:45:46 21 they showed us by doing the community mitigation measures
15:45:50 22 that we talked about, masking mainly, that they really
15:45:54 23 were able to show that they could reduce secondary
15:45:56 24 spread. In other words --

15:45:57 25 Q Doctor, I'm going to move to strike. We don't have the

15:46:00 1 report. If you want to produce the report we can go over
15:46:03 2 it.

15:46:03 3 A I'm just answering your question.

15:46:04 4 Q My question was was there a report in Rhode Island, and
15:46:07 5 you're testifying there was one?

15:46:08 6 A Yes, there was one.

15:46:09 7 Q Okay. But all of the other reports, I mean we're talking
15:46:14 8 dozens of reports that are reported in these MMWR's,
15:46:18 9 correct?

15:46:18 10 A Over -- hundreds.

15:46:19 11 Q Hundreds?

15:46:21 12 A Yes.

15:46:21 13 Q And only one of them is in Rhode Island?

15:46:23 14 A Right.

15:46:24 15 Q And yet your testimony is all you hear about is Rhode
15:46:27 16 Island, so you don't look at these other states. You
15:46:29 17 don't look at these other countries because all you hear
15:46:32 18 about is Rhode Island?

15:46:33 19 MS. WYRZYKOWSKI: Objection. That's not what
15:46:34 20 he said.

15:46:35 21 THE COURT: Overruled. It's cross-examination.

15:46:36 22 THE WITNESS: Yes, so what I said was my
15:46:38 23 responsibility is Rhode Island and I do look at studies
15:46:42 24 in the United States. I have seen some studies from
15:46:44 25 outside the United States, but I've seen some studies in

15:46:47 1 Israel, for example, which has some similarity to what
15:46:50 2 we're doing in Rhode Island because of population and
15:46:50 3 density.

15:46:53 4 But I admit I don't know what's going on in Sweden.
15:46:56 5 I've never been to Sweden, and I do know from what I hear
15:46:59 6 that Sweden is a very different country than the United
15:47:02 7 States?

15:47:02 8 Q Have you been to Marin County, California?

15:47:04 9 A I have.

15:47:05 10 Q Have you been to Maricopa County in Arizona?

15:47:07 11 A It's Maricopa County, Arizona. Yes, I actually have. I
15:47:11 12 used to live in Arizona. On my CV one of the places I
15:47:16 13 worked was on the Navajo Reservation at a public health
15:47:19 14 service hospital. So I have a lot of familiarity with
15:47:22 15 Arizona.

15:47:22 16 Q So Maricopa County, Arizona is just like Rhode Island?

15:47:25 17 A No, I didn't say that.

15:47:26 18 Q It's a lot different than Rhode Island? It's got a large
15:47:31 19 Native American population on reservations, correct?

15:47:34 20 A I don't think Maricopa County is on the Indian
15:47:38 21 reservations.

15:47:39 22 Q Do you they have a lot of undocumented citizens that come
15:47:43 23 over from Mexico, maybe that are living in Maricopa
15:47:47 24 County?

15:47:47 25 A So I don't know that to be true either.

15:47:50 1 Q You don't know the demographics of Maricopa County?

15:47:52 2 A I read one study and looked at it, you know, for school.

15:47:55 3 That's what I talk about. I've been to Maricopa County.

15:47:58 4 Q Doctor, there's no question pending.

15:48:00 5 A Okay.

15:48:01 6 Q As you stand here today, you can't compare Maricopa

15:48:05 7 County to Rhode Island because you don't know what the

15:48:08 8 demographics are in Maricopa County?

15:48:09 9 A I wasn't saying I was. I just looked at one study.

15:48:13 10 Q But you're willing to look at Maricopa County studies,

15:48:17 11 even though you don't even know the demographics of that,

15:48:19 12 but you're not willing to look at Sweden's studies

15:48:22 13 because you don't know the demographics of Sweden?

15:48:25 14 A So in the paper I did cite, they did full demographics.

15:48:30 15 I looked at the paper. Even scanning this paper, I

15:48:30 16 looked at it once, I scanned it briefly. I'm not saying

15:48:34 17 I don't care about Sweden. I'm not saying I don't want

15:48:36 18 to visit Sweden. I'm just saying Sweden is a different

15:48:39 19 country. They have an entire different health care

15:48:41 20 system and entire different culture --

15:48:43 21 Q But how do you --

15:48:43 22 A I don't know --

15:48:43 23 Q I'm sorry.

15:48:44 24 A What happens in Sweden really extrapolates for all the

15:48:48 25 United States. What I do know, when I look at my Rhode

15:48:51 1 Island data from last year from kids in schools, we did
15:48:54 2 not see secondary transmission in schools. We had a
15:48:58 3 5 percent transmission in schools. We know no masks are
15:48:58 4 effective in --

15:49:02 5 MR. PICCIRILLI: Your Honor, I move to strike.
15:49:03 6 This is again non responsive to my question.

15:49:06 7 THE COURT: Sustained. That will give me an
15:49:08 8 opportunity to go back to your prior motion to strike,
15:49:11 9 which was three or four minutes ago. I didn't respond.
15:49:13 10 You moved right into something else. And I wasn't sure
15:49:16 11 what you were moving to strike, and I didn't want to stop
15:49:19 12 your cross-examination.

15:49:19 13 I will agree that the prior answer went beyond the
15:49:22 14 question. But you got to give me a minute if you really
15:49:27 15 want me to strike something. We're beyond it now.

15:49:31 16 MR. PICCIRILLI: Thank you. All right. I
15:49:33 17 think we've lost at that line. I ask that this be
15:49:41 18 marked. I move that --

15:49:42 19 THE COURT: Is this a good time to break? I
15:49:44 20 need to talk to counsel.

15:49:46 21 MR. PICCIRILLI: Yes. Can I just move that 40
15:49:48 22 first as full? Any objection?

15:49:51 23 MS. WYRZYKOWSKI: I do object.

15:50:01 24 THE COURT: You object on what grounds?

15:50:03 25 MS. WYRZYKOWSKI: Your Honor, the Doctor

15:50:04 1 specifically testified that it's a study he did not rely
15:50:07 2 upon. It has a completely different health care system.
15:50:09 3 It's not a fee per pay system. He has not relied upon
15:50:13 4 it. It's a different country.

15:50:17 5 MR. PICCIRILLI: Your Honor, it's a published
15:50:19 6 correspondence in the New England Journal of medicine.
15:50:22 7 He may not have relied upon it but maybe he should have,
15:50:26 8 maybe he should have considered it. I think it's
15:50:30 9 relevant to the issue of whether or not masking works.

15:50:51 10 THE COURT: You suggest that masking works is
15:50:53 11 the issue here. This is the issue here, whether the
15:50:58 12 Governor has the power to authorize a mask requirement in
15:51:03 13 schools.

15:51:08 14 MR. PICCIRILLI: Yes, your Honor, but the
15:51:11 15 tangential issue of the basis for the Executive Order and
15:51:16 16 mandating the masks, what was the basis of that? And
15:51:20 17 also the issue of irreparable harm.

15:52:07 18 THE COURT: Exhibit 41 at this point stays for
15:52:20 19 identification, but there is something telling me that a
15:52:22 20 respected trade magazine has a higher level of authority.
15:52:29 21 I'm not sure whether it's authentication. I may be
15:52:33 22 getting confused with the hearsay rule.

15:52:40 23 MR. PICCIRILLI: I believe you're right, your
15:52:41 24 Honor, there is an exemption in the hearsay rule for
15:52:43 25 trade.

15:52:44 1 THE COURT: So that's an exemption to hearsay
15:52:46 2 but not necessarily for authentication but why don't we
15:52:55 3 save that for the next day. Certainly your right to move
15:52:58 4 it to be full once again is reserved. But the Court
15:53:03 5 questions -- well, isn't there a question that this
15:53:12 6 actually came from the New England Journal of Medicine?
15:53:14 7 Maybe I can forward it a little bit.

15:53:16 8 MS. WYRZYKOWSKI: I'm sorry, your Honor, I
15:53:16 9 missed that question.

15:53:16 10 THE COURT: Is there a question, is it
15:53:18 11 seriously debated that this article came from the New
15:53:24 12 England Journal of Medicine?

15:53:25 13 MS. WYRZYKOWSKI: No, I'm not making that
15:53:27 14 argument.

15:53:28 15 THE COURT: But can we agree that the New
15:53:30 16 England Journal of Medicine is a highly respected
15:53:34 17 authority?

15:53:35 18 MS. WYRZYKOWSKI: I don't know.

15:53:37 19 THE COURT: Okay.

15:53:38 20 MS. WYRZYKOWSKI: But, your Honor, I assume it
15:53:38 21 is.

15:53:41 22 MR. PICCIRILLI: I think the witness would say
15:53:42 23 yes.

15:53:43 24 MS. WYRZYKOWSKI: If the witness says yes, then
15:53:44 25 I can agree to that, but it's not a study. It's a letter

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to the editor.

THE COURT: Then I'll come back to this. At this point it is for identification but I'll let you argue it more, Mr. Piccirilli, if you'd like.

MR. PICCIRILLI: I understand.

MS. WYRZYKOWSKI: Thank you, your Honor.

THE COURT: Okay. Doctor, you're excused, and why don't we break for the day and try to break on time for once and I'll talk to counsel about a new date. Thank you.

MR. PICCIRILLI: Thank you.

MS. WYRZYKOWSKI: Thank you, your Honor.

A-D-J-O-U-R-N-E-D