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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 7

OCTOBER 19, 2021

APPEARANCES:

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Certified Shorthand Reporter

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 70
inclusive, are a true and accurate transcript
of my stenographic notes.

ANDREA IACOBELLIS, CSR
Court Reporter

14:11:41 1 directive for the Department of Health to issue a
14:11:44 2 universal mask protocol, and in that regulation the
14:11:48 3 Governor relied on three basis his constitutional
14:11:52 4 authority quarantine statute and the emergency of power
14:11:56 5 statute.

14:11:57 6 Over time this case has changed considerably since
14:12:01 7 then. First, it appeared from the State's initial brief
14:12:05 8 that the arguments of the constitutional authority had
14:12:09 9 been abandoned but they did mention this proclamation of
14:12:14 10 quarantine that they claim was an independent basis for
14:12:18 11 issuing some type of mask mandate. After reviewing the
14:12:24 12 State's latest brief, it appears that argument also been
14:12:30 13 abandoned in a sense that the mask debate itself would
14:12:36 14 somehow flow from the quarantine proclamation. So unless
14:12:40 15 I'm mistaken in that regard, I'm not going to spend any
14:12:43 16 more time on that.

14:12:44 17 But instead what the State did introduce, after our
14:12:48 18 case was filed, was an emergency rule passed by the
14:12:53 19 Department of Health. Interestingly, in reviewing this
14:12:58 20 case, it appeared to me that the universal masking
14:13:03 21 protocol that was issued on the same day as the original
14:13:07 22 emergency order on August 19th, expired on its own accord
14:13:12 23 on September 18th, and then there has been no renewal of
14:13:18 24 that universal masking protocol.

14:13:23 25 Instead the Department of Health apparently waited a

14:13:27 1 week or so until September 23rd to then issue the
14:13:30 2 emergency rule. So technically for almost a week or so
14:13:34 3 there was no masking protocol or emergency rule.

14:13:38 4 However, as this case progressed, the Executive
14:13:42 5 Order by statute has to be renewed every 30 days, and in
14:13:49 6 looking at the most recent renewal on October 15th, a
14:13:55 7 couple of things have changed. One thing has changed and
14:13:59 8 one thing remains the same. The Executive Order still
14:14:04 9 requires that 2187 is in effect, which is the universal
14:14:12 10 masking protocol, but that's not been followed. By the
14:14:17 11 State's own admission, they've abandoned the universal
14:14:21 12 masking protocol.

14:14:22 13 So why the Governor is renewing an executive order
14:14:26 14 directing the Department of Health to issue such a
14:14:27 15 protocol and it's not being followed is unclear to me as
14:14:31 16 to why the Executive Order is worded that way.

14:14:35 17 The other thing that became apparent, which wasn't
14:14:39 18 apparent to me when I filed this case, was that the
14:14:42 19 Governor now is referencing the March 9, 2020 Executive
14:14:49 20 Order, by then Governor Raimondo, Executive Order 20-02,
14:14:55 21 perhaps my own -- because of my own simple reading of
14:15:01 22 Executive Order 2186, where the Governor does mention
14:15:05 23 that happen order. It doesn't mention that it's still in
14:15:08 24 effect, but on October 15th the Governor is saying it
14:15:11 25 still is in effect. It says: Whereas March 9, 2020

14:15:15 1 Executive Order 20-02 was issued for a declaration of a
14:15:19 2 State of Emergency, due to the dangers to the health and
14:15:23 3 life posed by COVID-19, and that order has been extended
14:15:27 4 through at least October 30, 2021. That created more
14:15:35 5 confusion for myself, Judge.

14:15:37 6 Is the Executive Order 20-02 still in effect? If it
14:15:43 7 is, why do we need Executive Order 2186 declaring a new
14:15:50 8 disaster emergency? If there already had been one issued
14:15:53 9 back in March of 2020 and was still in effect at the time
14:15:58 10 2186 was promulgated.

14:16:03 11 As I argue in my brief, I think any argument that
14:16:07 12 the March 20 -- March 9, 2020, executive order is still
14:16:15 13 in effect is simply not permitted by the Emergency
14:16:19 14 Declaration Statute.

14:16:21 15 The General Assembly terminated that order by
14:16:26 16 limiting all such orders to 180 days. If the order is
14:16:33 17 still in effect, we're coming up close to 600 days of
14:16:37 18 being under that declaration of emergency. It is
14:16:42 19 illogical to me, and I'll leave it at that, how the State
14:16:45 20 can still be arguing that that order is in effect, but
14:16:48 21 then there's a new order in effect, and that the 180 days
14:16:53 22 doesn't apply to the old order, but it applies to the new
14:16:56 23 order. There's no logic to it.

14:17:05 24 With regard to what's really at issue in this case,
14:17:08 25 most practically for my clients, is when is this going to

14:17:12 1 end? When is this masking in schools mandate going to
14:17:20 2 end? We are now two months into this school year, and
14:17:25 3 believe me we are perfectly cognizant of the time it has
14:17:29 4 taken to present this case, but we have gotten no
14:17:34 5 indication from the State as to when this will end, no
14:17:41 6 metrics, no targets, nothing.

14:17:47 7 Dr. McDonald testified vaguely to a vaccine, when
14:17:53 8 children under 12 are permitted to take a vaccine, that
14:17:59 9 might be one consideration, when cases go down that might
14:18:02 10 be a consideration. But there's nothing firm. And what
14:18:08 11 was most shocking to us was, when the Doctor just kind of
14:18:13 12 flippantly said when these orders were renewed, that we
14:18:18 13 just sat around the table with the rest of the Covid team
14:18:22 14 and they all just said, yeah, we'll just continue this
14:18:24 15 again, without any debate, any discussion, nothing. That
14:18:28 16 seems to be quite an advocacy of their responsibilities
14:18:31 17 to renew, to review what has happened in this State over
14:18:38 18 the last few months, to see whether that really is --
14:18:41 19 whether this masking order really is necessary.

14:18:46 20 It brings me to what the State relies upon in their
14:18:51 21 brief for this emergency order. Interestingly, they've
14:18:58 22 abandoned more arguments. They've abandoned the
14:19:03 23 statements in the Executive Order, that they're modeling
14:19:08 24 shows 200 people will die at the end of September,
14:19:12 25 presumably because that didn't happen.

14:19:16 1 They abandoned, I think, the argument that hospitals
14:19:24 2 are actually have been overwhelmed. They are claiming
14:19:31 3 that they are projected to be overrun but that never
14:19:34 4 happened. They never had to open the hospital in
14:19:37 5 Cranston that they mentioned in the executive order.

14:19:43 6 And as I presented in my brief, the hospitals never
14:19:47 7 reached 100 percent capacity. And there has been no
14:19:53 8 evidence of the need for diversions from the emergency
14:19:58 9 orders that was presented.

14:20:07 10 The State also to seems to abandon some other
14:20:11 11 arguments. Initially, when Dr. McDonald testified to
14:20:15 12 things such as long Covid and MISC-C as concerns,
14:20:23 13 conditions that are of concern to children who catch
14:20:26 14 Covid, you might have lingering effects. Well, they
14:20:30 15 never introduced any evidence about either one of those.
14:20:33 16 They just seemed to -- those arguments seem to have been
14:20:36 17 abandoned. And I think most likely because what the
14:20:40 18 evidence has shown is this is not a disease that affects
14:20:44 19 children. No more than the seasonal flu. And in fact,
14:20:51 20 the undisputed evidence is that the seasonal flu is more
14:20:55 21 deadly than Covid for the average child.

14:21:00 22 THE COURT: Does it matter which is more deadly
14:21:02 23 or whether this is a risk to children and others?

14:21:07 24 MR. PICCIRILLI: Well, Judge, first of all,
14:21:10 25 whether it's a risk to children or others I think is a

14:21:13 1 very important point, because the impression that the
14:21:17 2 State gave right from the beginning in which they started
14:21:21 3 their case on was that this is very dangerous to
14:21:24 4 children, and Dr. McDonald testified, three children in
14:21:26 5 Rhode Island died because of Covid. The State's brief,
14:21:30 6 130,000 children are at risk in this State.

14:21:34 7 But as the evidence came out it became apparent that
14:21:37 8 the purpose of masking is not to protect children, it's
14:21:40 9 to stop the spread of the disease to potentially protect
14:21:45 10 other people, people who are more susceptible.

14:21:49 11 THE COURT: Including children?

14:21:50 12 MR. PICCIRILLI: Well, Judge, again I would
14:21:52 13 point out that the risk to children is so minuscule that
14:21:56 14 if that can be considered an emergency than everything
14:21:59 15 can be considered an emergency.

14:22:01 16 THE COURT: I'm not sure what a minuscule risk
14:22:04 17 to children is because children are so important in our
14:22:07 18 society. It doesn't even need to say how important
14:22:11 19 children are.

14:22:12 20 But the situation that the Covid team faced in
14:22:18 21 August, September 2021, described by Dr. McDonald of the
14:22:27 22 numbers increasing, the State wanting to get back to
14:22:31 23 in-school learning. It was a rogue predicament for them,
14:22:37 24 wasn't it, dealing with an unknown illness? Meaning,
14:22:41 25 it's known in part, we've had it for a year, but this is

14:22:44 1 not a pandemic that's been around for 30, 40 years.

14:22:48 2 MR. PICCIRILLI: That's true, Judge. And
14:22:53 3 certainly last year, when the masking was put in place,
14:22:58 4 as the State points out no one really complained about
14:23:02 5 it, because there was uncertainty back then as to what
14:23:07 6 the impact of this pandemic epidemic of Covid is.

14:23:14 7 But as Dr. McDonald testified at the very beginning
14:23:17 8 of the hearing, there's three criteria that define an
14:23:22 9 epidemic. Hospitals being overrun, no effective
14:23:27 10 treatment for the disease and no heard immunity. Those
14:23:31 11 were the three parameters that he indicated were -- were
14:23:37 12 what made this a novel corona virus. It being novel
14:23:42 13 because nobody had ever had it before. We didn't know
14:23:45 14 how people would react to the disease. We're well past
14:23:48 15 that. We know exactly how people react to it. We know
14:23:52 16 that 99.7 percent of people who die of this have at least
14:23:56 17 one comorbidity, 65 percent have six or more
14:24:00 18 comorbidities. We know that the -- very clearly that the
14:24:06 19 deaths that occur are in people who are older and have
14:24:11 20 comorbidities. We know that children are practically
14:24:14 21 immune to this, from getting sick. Is there some risk?
14:24:18 22 Yes. But there's a risk to everything in life with
14:24:21 23 children.

14:24:22 24 THE COURT: Well, we don't want to risk our
14:24:25 25 children, right? I'm sure you agree with that, Mr.

14:24:25 1

Piccirilli.

14:24:27 2

MR. PICCIRILLI: Of course not.

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THE COURT: And even one death of a child is

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too much, even if everybody in the State has to wear a

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mask to prevent that one death, that may be a reasonable

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thing, correct?

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MR. PICCIRILLI: I would respectfully disagree,

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Judge.

14:24:39 9

THE COURT: To save one child's life.

14:24:42 10

MR. PICCIRILLI: If everyone in the State has

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to wear a mask because of the potential of saving one

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life or actually saving one life?

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THE COURT: No, actually saving one life.

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MR. PICCIRILLI: But maybe we should all give

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up driving cars because that will certainly save lives.

14:24:57 16

Maybe we should ban fast food and alcohol and smoking

14:25:01 17

because that will certainly save lives.

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THE COURT: Well, perhaps I'm straying too far

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from the point. During an emergency regulation aren't

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all of those issues up to the executive? In a situation

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where there's a Pandora's Box, no one really knows the

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scope of this illness, particularly the Delta variant in

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August of 2021. Can't the State set reasonable

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limitations at least then?

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MR. PICCIRILLI: Well, reasonable but

14:25:33 1 unlimited? The State's position is they just need any
14:25:37 2 plausible basis to do this and no court should have any
14:25:41 3 ability to review that.

14:25:42 4 THE COURT: So you're saying "unlimited"
14:25:44 5 because it keeps getting renewed and we never know when
14:25:47 6 it's going to end. Your own words were, our real concern
14:25:51 7 is we don't know when this masking order is going to end,
14:25:54 8 right?

14:25:55 9 MR. PICCIRILLI: Yes, Judge.

14:25:56 10 THE COURT: Is that what you mean by unlimited
14:25:58 11 or is there something else?

14:25:59 12 MR. PICCIRILLI: Well, that it will never end
14:26:01 13 and that potentially it will continue to pop up again.
14:26:05 14 Dr. McDonald testified, when we talked about the flu,
14:26:10 15 about the seasonal flu over the last few years, and he
14:26:14 16 testified that, you know, we don't -- we never required
14:26:18 17 masking to save children from the seasonal flu. You
14:26:23 18 know, that's been true for years. If the statement were
14:26:28 19 to save one life, one child's life with masking, we would
14:26:32 20 have been doing that for years with the seasonal flu.

14:26:35 21 THE COURT: Well, one life was my example and
14:26:37 22 perhaps it was wrong. Although I still think it's right
14:26:40 23 for us all try to save one child's life in Rhode Island.
14:26:44 24 I'm fine with that. But apart from my own odd example,
14:26:49 25 in August of 2021 they don't know what's happening. Our

14:26:55 1 experts don't actually know what this Delta variant is
14:26:59 2 and how it may affect us; correct?

14:27:02 3 MR. PICCIRILLI: Well, I would disagree, Judge.
14:27:04 4 I mean I think that Dr. Bostom introduced an Exhibit,
14:27:08 5 Exhibit 6, which the State dismisses, but it makes it
14:27:11 6 quite clear that the Delta variant is not any more
14:27:14 7 dangerous than the original variant.

14:27:17 8 In fact, the CDC posted on its own website that
14:27:21 9 Alpha, I believe it had all four; alpha, beta, gamma,
14:27:25 10 delta. All were of the same -- I think the word, the
14:27:31 11 term was high consequence but not high concern. You
14:27:36 12 know, I think I presented that to the Doctor in his
14:27:39 13 testimony, and he agreed that's what the CDC has said.

14:27:42 14 So to suggest that the Delta variant is somehow
14:27:46 15 more, more dangerous than the original virus is just not
14:27:53 16 brought out by the facts. And quite frankly, Judge, the
14:27:56 17 one cite, the State repeats it again, it's as if it's an
14:28:00 18 undisputed fact, the Delta variant is 1,000 times more
14:28:04 19 contagious. And how dare Dr. Bostom go against the
14:28:09 20 collective wisdom of all the doctors that agree with
14:28:12 21 that.

14:28:13 22 They cited one study, Dr. McDonald cited one study,
14:28:16 23 I don't think it was even put into evidence, that came
14:28:19 24 out of China to suggest that it was 1,000 times more
14:28:24 25 contagious. Again, it's not borne out by the facts by

14:28:29 1 Exhibit 6, which is based upon the State's own data.
14:28:34 2 It's simply not borne out by the fact that it's more
14:28:37 3 contagious.

14:28:39 4 And even if it's more contagious, it doesn't prove
14:28:43 5 that it's more deadly or deadly in any different way.
14:28:50 6 The cases don't bear that out.

14:28:53 7 So I would, I would challenge any assertion that
14:28:58 8 somehow the Delta variant was some extraordinarily
14:29:04 9 different part of this disease that we didn't know how to
14:29:08 10 respond to.

14:29:10 11 THE COURT: Perhaps I should get to the bigger
14:29:13 12 questions then, because you're saying that the State has
14:29:15 13 not proved its case of showing that it's a real health
14:29:18 14 problem in the fall, in summer and fall of 2021. Is that
14:29:24 15 the appropriate standard to ask a Court to void an
14:29:28 16 emergency regulation for a proclaimed threat to public
14:29:35 17 health?

14:29:36 18 You're saying it's the State's obligation to come to
14:29:39 19 the court and to prove the merits of that during the
14:29:42 20 public emergency, as opposed to the challenger coming
14:29:46 21 forward and saying and this doesn't even meet the smell
14:29:53 22 test.

14:29:53 23 MR. PICCIRILLI: Judge, I would answer it, I
14:29:55 24 would respond this way, if I may. The State cites
14:30:00 25 Jacobson for that proposition, the proposition that any

14:30:04 1 rational basis for this type of health emergency, the
14:30:08 2 court should defer to the state authorities.

14:30:13 3 They also cited to the **Roman Catholic Diocese of**
14:30:18 4 **Brooklyn v. Cuomo** case, and they were very selective in
14:30:23 5 the way they cited to that case. They cited, as I
14:30:30 6 recall, "Stemming the spread of COVID-19 is
14:30:32 7 unquestionably a compelling state interest." But they
14:30:35 8 didn't write or cite the rest of that sentence. But it
14:30:40 9 is hard to see how the challenged regulations can be
14:30:43 10 regarded as "narrowly tailor." That's the second part of
14:30:48 11 a compelling state interest test.

14:30:53 12 In that case, practicing your religion and going to
14:31:00 13 church was at issue. That's a fundamental first
14:31:03 14 amendment right. I would suggest in this case, freedom
14:31:06 15 of your bodily integrity for not having to wear a mask,
14:31:11 16 to being forced to wear a mask, and these children
14:31:13 17 uniquely in this State, the burden is falling on them to
14:31:17 18 wear the mask and these children have to go to school.

14:31:19 19 There's a state law, they can't just not go to
14:31:23 20 school. They will be subject to truancy laws if they
14:31:26 21 don't go. And not every parent has the means or ability
14:31:30 22 to home school their children or send them to some
14:31:33 23 private school that may not have a mask mandate.

14:31:36 24 So this is a captive audience of children that this
14:31:39 25 burden is being put on, and I think the proper standard

14:31:42 1 is is there a compelling State interest? Absolutely. We
14:31:45 2 wouldn't dispute that there's a compelling interest to
14:31:48 3 stop the spread of an infectious disease. But is this
14:31:52 4 rule narrowly tailored to address that?

14:31:55 5 The State seems to be happy to keep the first part
14:31:58 6 of that test under **Jacobson**, but abandon the second part.
14:32:02 7 And when we do that, Judge, and at the risk of sounding
14:32:10 8 like I'm drawing up crazy, hypothetical scenarios, it
14:32:18 9 only took 22 years for the Supreme Court to then, based
14:32:21 10 on **Jacobson**, rule that the State had the power to
14:32:25 11 forcibly sterilize mentally challenged patients at a
14:32:28 12 state hospital.

14:32:30 13 I mean people forget that **Jacobson** lead to **Buck v.**
14:32:35 14 **Bell**, the most infamous case the U.S. Supreme Court ever
14:32:41 15 decides, with the statement that three generations of
14:32:45 16 imbeciles are enough. That case was cited by Nazi war
14:32:48 17 criminals in a number of trials as justification for
14:32:51 18 sterilizing the undesirables in Germany. Do we want to
14:32:54 19 rely on a case like that?

14:32:56 20 Again, is it overly rhetoric for me to talk like
14:33:01 21 that and make that analogy? The State, I mean they're
14:33:04 22 not forcibly sterilizing children they're putting masks
14:33:08 23 on, but at what point do we draw the line and say that we
14:33:13 24 have to have a more narrowly tailored approach to this,
14:33:18 25 one that considers the rights of these poor children.

14:33:23 1 You know, when we get to the irreparable harm
14:33:26 2 argument, it still amazes me how little interest the
14:33:30 3 State has and the absolute concerns of these parents of
14:33:35 4 their children have about wearing a mask. Yet
14:33:39 5 Dr. McDonald can get up there and say at the very end of
14:33:42 6 his testimony, over the weekend I read this study in
14:33:45 7 China where kids love to wear masks.

14:33:47 8 Somehow a study in China about kids liking to wear
14:33:52 9 masks, unnamed study from a communist country. How can
14:33:56 10 you possibly trust what's written in that study? He's
14:34:00 11 willing to do that but he's not willing to listen to
14:34:02 12 these parents themselves. He dismisses their concerns.
14:34:09 13 At one point, Judge --

14:34:11 14 THE COURT: Maybe you should help the Court and
14:34:14 15 explain how the Health Department should have narrowly
14:34:20 16 tailored it.

14:34:21 17 MR. PICCIRILLI: Judge --

14:34:22 18 THE COURT: Or how it is not narrowly tailored.

14:34:25 19 MR. PICCIRILLI: Judge, they could have easily
14:34:27 20 convened a normal regulatory hearing where they would
14:34:27 21 have --

14:34:30 22 THE COURT: No, the language of the regulation
14:34:32 23 itself you said is not narrowly tailored. I'm not
14:34:36 24 talking about the procedure. These are only during
14:34:38 25 school days, in school sessions, only among people who

14:34:43 1 are unvaccinated. They're all unvaccinated in the
14:34:45 2 school. They have to wear a mask when they're near
14:34:48 3 others. And the same time you want to bring them all to
14:34:51 4 school, so you have to substitute in the masks. There
14:34:57 5 are three or four different problems that Dr. McDonald is
14:34:59 6 trying to address at the same time.

14:35:01 7 By "narrowly tailored," you mean they also have to
14:35:05 8 wear the mask at home? Do they have to not go near
14:35:10 9 another child? Tell me how it could have been more
14:35:10 10 narrowly tailored.

14:35:16 11 MR. PICCIRILLI: I would suggest that those are
14:35:19 12 more restrictive not more narrowly. But the narrowly
14:35:23 13 tailoring is the response to Covid, not the response to
14:35:27 14 children in schools. The State has the ability to --

14:35:29 15 THE COURT: The policy which must be -- it's
14:35:30 16 the regulation, which must be narrowly tailored to meet
14:35:33 17 the risk, correct?

14:35:35 18 MR. PICCIRILLI: Correct. And the State has
14:35:37 19 addressed Covid infections, amongst the most vulnerable.
14:35:41 20 There are vaccinations for people who are vulnerable.
14:35:45 21 There are -- they're going to have a third booster now,
14:35:48 22 if you're over 65 or you have some medical conditions you
14:35:52 23 can get a third booster shot now.

14:35:54 24 There are monoclonal treatments for people, older
14:35:57 25 people who have a greater risk of Covid.

14:36:02 1 THE COURT: Which Dr. McDonald said were not
14:36:04 2 available for children.

14:36:06 3 MR. PICCIRILLI: Right. They're unnecessary
14:36:06 4 for children because children don't get sick from this
14:36:09 5 disease to any great degree.

14:36:09 6 THE COURT: Well, they can transmit it.

14:36:13 7 MR. PICCIRILLI: Again, that's really, when you
14:36:16 8 boil right down to it, Judge, because it's clear that the
14:36:19 9 children are being asked to do this, to stop the spread,
14:36:25 10 potentially leading to other people who are vulnerable,
14:36:28 11 and the risk benefit analysis. If they went through a
14:36:31 12 normal regulatory proceeding they would consider the risk
14:36:35 13 to children who are being forced to do this, compared to
14:36:38 14 the potential benefit, and we haven't even gotten into
14:36:43 15 whether or not the evidence of masks is working.

14:36:45 16 Again, we called science to the matter because we
14:36:48 17 challenge whether or not masks work. And I would
14:36:52 18 suggest, your Honor, the burden isn't on us to prove
14:36:55 19 masks don't work. It's on the State to prove that they
14:36:58 20 do, at least to some degree.

14:37:00 21 And when you have the public health officials in the
14:37:03 22 State try to claim that it would be unorthodox or
14:37:06 23 unethical to have randomized control trials for children
14:37:10 24 wearing masks, and yet then he didn't even admit to
14:37:15 25 knowing what the regulations were for children in

14:37:17 1 randomized control trials, or the fact that, gee, we just
14:37:21 2 had a randomized control trial for the Pfizer vaccines
14:37:25 3 for five year olds, for 2,200 children; 1,100 of them had
14:37:29 4 a placebo and 1,100 of them had the vaccine. That was a
14:37:34 5 randomized control trial. That was somehow unethical for
14:37:35 6 conducting a randomized control trial --

14:37:37 7 THE COURT: What's the difference? Most
14:37:39 8 children were not getting vaccines. It was a test group
14:37:42 9 and the parents agreed to put the child through the test,
14:37:45 10 because the parents had already gotten the vaccine, I
14:37:49 11 assume, or seen the value of the vaccines.

14:37:51 12 This is a situation you can't have a control group,
14:37:54 13 as Dr. McDonald explained it, because the control group
14:37:58 14 has to be exposed in school to others and not have masks
14:38:02 15 on.

14:38:06 16 MR. PICCIRILLI: I would imagine that there
14:38:08 17 are plenty of parents who would be being willing to
14:38:11 18 participate in that experiment, just as they would be
14:38:12 19 willing to participate in a vaccine experiment.

14:38:15 20 THE COURT: But it's the whole as a society,
14:38:17 21 we're trying to stop it from getting transmitted. It's
14:38:21 22 not the person wearing the mask, it's the student sitting
14:38:25 23 next to him. It's the teacher. It's all the other
14:38:28 24 resource people that they see, who don't want the child
14:38:31 25 to transmit the disease to them. It's not only the

14:38:34 1 person wearing the mask at risk, it's the transmission.

14:38:38 2 MR. PICCIRILLI: Correct, Judge. And if you
14:38:43 3 are a teacher who has been vaccinated, if you're a
14:38:48 4 teacher who has natural immunity, the risk is minimal to
14:38:52 5 you, either catching it or getting sick from it.

14:38:56 6 So again, you're imposing a burden on a child, on
14:39:00 7 all these children and for -- just to feel better, to
14:39:07 8 feel safer as a teacher? Again, shouldn't these issues
14:39:12 9 be debated in a normal regulatory hearing and not in a
14:39:17 10 courtroom, Judge?

14:39:17 11 But by going the emergency route they've stifled any
14:39:22 12 such debate about that. Any of the classic debate that
14:39:27 13 you would have in a regulatory proceeding, where people
14:39:30 14 would come forward and provide conflicting or competing
14:39:33 15 views of these issues. They shut that completely down.

14:39:37 16 THE COURT: Is there realistically, is there
14:39:40 17 time to do that in August of 2021?

14:39:42 18 MR. PICCIRILLI: They could have done it back
14:39:44 19 in September of 2020. They should have done it.

14:39:47 20 THE COURT: Could have but with the moving
14:39:49 21 pandemic, with things going up and down and up and down
14:39:50 22 it was in August of '21, early August if I recall it
14:39:53 23 correctly, that the Department of Education said we want
14:39:56 24 to go back to in-school learning. They had masks before.
14:40:01 25 We want to do a couple of other things, change to 3 foot

14:40:05 1 distance but we want to go back to in-school learning.

14:40:07 2 MR. PICCIRILLI: That actually happened in
14:40:09 3 June, at the end of June.

14:40:10 4 THE COURT: Okay, in August and July. And then
14:40:14 5 August the variant was going on, clearly.

14:40:18 6 MR. PICCIRILLI: Clearly, there was something
14:40:20 7 happening with Delta, the Delta variant, during July and
14:40:25 8 August.

14:40:26 9 Again, should that have been anticipated or not?
14:40:31 10 You just -- they had one year to convene a hearing to
14:40:37 11 determine whether or not masks should continue, under
14:40:40 12 what circumstances they continue. Could they be limited
14:40:44 13 to certain circumstances, if there's an outbreak at a
14:40:49 14 school or extra high incidents in a particular location.
14:40:53 15 That was originally, I believe the original
14:40:56 16 recommendation with regard to masking, only target those
14:41:00 17 areas of high concern.

14:41:02 18 THE COURT: And now, Mr. Piccirilli, you've had
14:41:05 19 another three months. I get your concern.

14:41:08 20 MR. PICCIRILLI: And they still haven't
14:41:10 21 convened anything, as Dr. McDonald has testified. He
14:41:12 22 still, they still haven't convened anything. You know,
14:41:15 23 the three cases cited by the State for giving deference
14:41:20 24 to the administrative agencies for emergency rule. One
14:41:23 25 of them involved breathalyzer tests, which apparently the

14:41:29 1 Federal Court had ruled them unenforceable for some
14:41:32 2 reason. The State issued an emergency rule to validate
14:41:36 3 those tests while they work out the new rule.

14:41:44 4 The other case, the one that's most interesting is
14:41:47 5 the title of the case. The State issued an emergency
14:41:51 6 rule years ago limiting how much you can charge for a
14:41:54 7 title fee and then nothing. And the emergency rule just
14:42:00 8 sat there and everybody thought it was still in
14:42:03 9 existence, years and years later. They never, they never
14:42:08 10 tried to make it a permanent rule.

14:42:10 11 And that's when the Supreme Court of this State
14:42:14 12 quoted the disgraceful ineptitude of a state agency,
14:42:20 13 issuing an emergency rule and then just sitting on it and
14:42:24 14 doing nothing with it, disgraceful ineptitude. And even
14:42:28 15 in the **Bateman** case, Judge, which again, we're talking
14:42:31 16 about breathalyzer tests, \$20 title fees and banning a
14:42:41 17 flavored vaping product, not fundamental rights in any
14:42:44 18 one of those cases, I would suggest.

14:42:47 19 In the vaping case, the State issued an emergency
14:42:53 20 rule. I may have misread the case. I thought there was
14:42:57 21 a brief period of time where there was a temporary
14:42:59 22 restraining order because they hadn't published it
14:43:02 23 properly, but then ultimately the State fixed that and
14:43:05 24 then they published it, and the emergency rule stayed in
14:43:08 25 effect for 120 days, and then the State issued a final

14:43:11 1 rule. They went through the regulatory process,
14:43:14 2 presumably the evidence that the vaping companies tried
14:43:19 3 to introduce at the preliminary injunction hearing,
14:43:23 4 presumably was presented during the normal regulatory
14:43:25 5 process. The State made a final rule, whether that final
14:43:30 6 rule was challenged or not, under the normal
14:43:32 7 administrative procedures act, apparently not, maybe the
14:43:35 8 evidence was overwhelming at those regulatory hearings
14:43:39 9 that the dangers of flavored vaping far outweighed any
14:43:41 10 benefits of society by having them.

14:43:46 11 That's not being done here. The State has --
14:43:49 12 Dr. McDonald has said under no uncertain terms they
14:43:52 13 haven't convened a regulatory hearing. They don't intend
14:43:54 14 on convening a regulatory hearing. Why not? Are they
14:44:01 15 afraid of what might come out in a regulatory hearing?
14:44:05 16 Is that why they don't want to do it? I don't know. But
14:44:08 17 that's not how these emergency rules are supposed to
14:44:10 18 work.

14:44:11 19 THE COURT: I didn't hear him say what it
14:44:12 20 intended on. The Department wasn't intending on setting
14:44:14 21 a regulatory hearing, but I'll leave his testimony to
14:44:17 22 speak for itself.

14:44:19 23 MR. PICCIRILLI: I will try. That might be my
14:44:21 24 interpretation of it but it certainly, it certainly
14:44:23 25 didn't seem to indicate that there was any plan to do

14:44:26 1 that.

14:44:26 2 THE COURT: I'll give you that.

14:44:28 3 MR. PICCIRILLI: So --

14:44:35 4 THE COURT: So the Court is therefore supposed
14:44:38 5 to step in and say stop, you have an emergency order
14:44:42 6 during a pandemic, a time of a statewide crisis. And the
14:44:46 7 Court is in the position of therefore saying stop, the
14:44:49 8 emergency order does not exist any more. Is that what
14:44:53 9 you're suggesting?

14:44:54 10 MR. PICCIRILLI: Yes, I am, Judge, and I'm
14:44:58 11 suggesting it for a number of reasons, whether or not
14:45:06 12 society is in an emergency situation, the rule of law
14:45:10 13 doesn't go out the window.

14:45:12 14 THE COURT: No, but when it's an emergency
14:45:15 15 situation, a hurricane, military action, which is what
14:45:18 16 this -- what the emergency regulation is under, I
14:45:23 17 believe, I believe it's under a military subsection of
14:45:25 18 the General Laws when there's a time of pandemic, when
14:45:29 19 there's a time of statewide crisis, doesn't it make more
14:45:33 20 sense for the executive branch to run without -- and to
14:45:40 21 establish an emergency order, without needing to have to
14:45:43 22 review in advance by the Legislature or by the Judiciary.
14:45:50 23 Preserving everyone's rights to challenge and reserving
14:45:51 24 the Legislature's right to come back and say this
14:45:55 25 regulation no longer exists.

14:45:57 1 MR. PICCIRILLI: Well, of course there are
14:46:00 2 certain emergencies that no one is going to challenge.
14:46:03 3 You know, I use the analogy of a hurricane. A weather
14:46:08 4 forecast, a hurricane is coming, the Governor orders the
14:46:11 5 coastline temporarily evacuated and closed down. Whose
14:46:16 6 going to challenge that? That lasts for days, at most.
14:46:19 7 It's an obvious situation. You're not invoking someone's
14:46:25 8 -- attacking someone's fundamental rights. That's
14:46:29 9 another magnitude then saying, you know, well, hurricanes
14:46:32 10 are perpetually an emergency to the State, and therefore,
14:46:37 11 I'm going to have a permanent declaration of emergency
14:46:40 12 regarding hurricanes, because there's only the potential
14:46:43 13 they can be very deadly, and under that emergency rule
14:46:46 14 I'm going to order that all housing along the coast be
14:46:50 15 evacuated permanently, for some indefinite period of
14:46:52 16 time. Clearly that I would think people should have the
14:46:57 17 right and would challenge. Again --

14:47:01 18 THE COURT: So at least initially the executive
14:47:03 19 order should be deemed valid, initially.

14:47:06 20 MR. PICCIRILLI: I think given some common
14:47:08 21 sense, anyone's common sense would know whether or not
14:47:11 22 the emergency rule, and clearly in March of 2020 no one,
14:47:15 23 no one challenged the need for an emergency rule or an
14:47:19 24 executive order for that matter.

14:47:21 25 By the way, the State never issued an emergency rule

14:47:24 1 by the Department of Health. They apparently just relied
14:47:27 2 on the Executive Order all that time. So there was no
14:47:30 3 moment of peril back then to do the emergency rule. My
14:47:33 4 suggestion is the only eminent peril that the State had
14:47:36 5 suddenly on September 23 of this year was the stance that
14:47:39 6 this Court was going to vacate the Executive Order, and
14:47:43 7 that was the eminent peril they were faced with. Why did
14:47:46 8 they wait a year and a half to issue the emergency rule
14:47:49 9 regarding masking? They should have done it back in
14:47:52 10 August of 2020.

14:47:56 11 But as time goes by, I think clearly, and the
14:48:02 12 imposition that's put on people has to be taken into
14:48:08 13 account, again, when the Executive Order was issued
14:48:12 14 originally back last year, the Governor issued -- she
14:48:17 15 waived the requirement for open meetings laws for
14:48:19 16 example. They allowed us to do -- take meetings, public
14:48:22 17 meetings on Zoom, like this. That really did not impact
14:48:28 18 anyone's fundamental rights. Everybody thought that was
14:48:30 19 a good idea and it went on. By the way, that's ended.
14:48:34 20 The State of the emergency is now we have to have public
14:48:37 21 meetings again. So there's not such an eminent peril
14:48:41 22 that the State has stopped all public open meetings.

14:48:46 23 So what happened March of last year was clearly an
14:48:52 24 emergency and unknowns. We had those three factors; the
14:48:56 25 fear of hospitals being overrun, no treatment and no

14:49:00 1 immunity. It turned out the hospitals really didn't get
14:49:04 2 quite as overrun as they feared, and Dr. Boston -- we
14:49:08 3 introduced an Exhibit showing that they overestimated
14:49:11 4 hospitalizations by a factor of ten back in April of last
14:49:16 5 year, a good thing, a good thing. But clearly whatever
14:49:20 6 modeling they were using was not very accurate.

14:49:24 7 And again, we have treatments now to deal with this,
14:49:27 8 and we probably have some degree of heard immunity. I
14:49:31 9 mean another amazing fact that we learned in this hearing
14:49:35 10 was that the State doesn't even attempt to determine who
14:49:37 11 has natural immunity. They don't test.

14:49:40 12 Again, these children who are going to school right
14:49:43 13 now could be tested to see if they got it. A number of
14:49:45 14 them had Covid. They presumably have some natural
14:49:49 15 immunity to Covid right now, but we don't know because
14:49:52 16 the State refuses to even engage in any investigation of
14:49:55 17 that.

14:49:56 18 The only thing they rely upon is vaccinations. You
14:50:01 19 know in the dashboard, again which they have, you know
14:50:05 20 apparently have abandoned at this point. There were a
14:50:08 21 number things that Dr. McDonald initially pointed out
14:50:12 22 that was very important.

14:50:13 23 One of them was community immunity, and there was a
14:50:16 24 percentage, 68 percent or so or 70 percent of community
14:50:20 25 immunity that's determined. And I asked him is that just

14:50:22 1 vaccinations or does that include natural immunity? And
14:50:25 2 I thought he said that did include natural immunity, but
14:50:28 3 now I don't know. How can they know that if they don't
14:50:32 4 test for it?

14:50:33 5 And he completely abandoned that when I started
14:50:38 6 questioning things like the estimated prevalence of
14:50:40 7 infection. They had that model that suddenly showed that
14:50:43 8 it was going down, and suddenly on August 16th it started
14:50:47 9 going up and then the model disappeared. He had no
14:50:50 10 explanation for that and said, well, I don't really rely
14:50:53 11 upon that that much. I have other data that I look at.

14:50:57 12 The hospital projections, the same thing, they had a
14:50:59 13 14 day hospital projection that they had, thought that
14:51:02 14 was very important, and then suddenly the projections
14:51:05 15 disappeared from the dashboard. And again the Doctor
14:51:08 16 said, well, we don't really rely upon that that much. I
14:51:09 17 have other things I look at.

14:51:12 18 You know, it's constantly changing issues that the
14:51:20 19 Doctor is looking at. He refused to look at a study from
14:51:25 20 Sweden. I'm sorry, there are three Exhibits at some
14:51:28 21 point I want to try address. I thought they were full
14:51:32 22 Exhibits, 41, 44, 47, but I don't want to belabor the
14:51:32 23 point of this argument.

14:51:36 24 He said, well, in Sweden they have a different
14:51:39 25 health care system, and yet he's willing to look at an

14:51:43 1 unnamed study in China about whether or not kids like to
14:51:46 2 wear masks. That's reasonable?

14:51:48 3 He refuses to look at what happened in southern
14:51:52 4 states where they did not have a mask mandate, where
14:51:56 5 hospitalizations after schools opened have plummeted. He
14:52:00 6 said I only worry about Rhode Island. And you're looking
14:52:06 7 at studies on China? But you're only -- you refuse to
14:52:11 8 look at what the experience is in southern states that do
14:52:14 9 not have masks mandates in schools. You refused to look
14:52:17 10 at that data.

14:52:19 11 Even though his boss, Dr. Alexander Scott, in her
14:52:21 12 letter to school committees specifically cited cases
14:52:26 13 rising in southern states that did not have mask
14:52:29 14 mandates. She wrote that in that letter. I didn't write
14:52:32 15 it. He didn't write it. The Director of Health wrote
14:52:35 16 it. It was relevant to her to convince school
14:52:38 17 departments to have a mask mandate. Don't do what
14:52:41 18 they're doing down south because those cases are going
14:52:44 19 through the roof down south.

14:52:45 20 And then when that proved not to be true the State
14:52:48 21 just ignores it and says, never mind, we don't want to
14:52:52 22 talk about that. That's not intellectual honesty.
14:52:56 23 That's predetermined. You have a predetermined view,
14:53:00 24 masks work, and you will only look at studies that
14:53:03 25 support what you believe. That's, I mean that's the very

14:53:09 1 definition of confirmation bias. That's why you have --

14:53:13 2 THE COURT: Didn't he look at all studies?

14:53:15 3 MR. PICCIRILLI: I'm sorry, Judge?

14:53:16 4 THE COURT: Didn't he testify that he would
14:53:18 5 look at all studies and that he does consider many of the
14:53:21 6 studies.

14:53:22 7 MR. PICCIRILLI: He did say it, I think on
14:53:23 8 occasion that he would look at anything but then he never
14:53:26 9 did. He claimed to not know who Dr. Bhattacharya and
14:53:30 10 Dr. Kulldorff are. Yet he claims he talks to the prior
14:53:34 11 Florida Surgeon General, who apparently now lives in
14:53:38 12 Rhode Island that he's friendly with, and he admitted
14:53:41 13 politics -- you don't want to get into politics that are
14:53:45 14 involved in Florida. They're crazy people down there.
14:53:48 15 They let politics drive the issue of whether or not to
14:53:51 16 wear masks. But somehow we're immune from politics up
14:53:55 17 here in Rhode Island? Somehow the CDC is immune from
14:53:58 18 politics from the executive branch? Only Rhode Island is
14:54:03 19 pure and unsullied by politics interfering with public
14:54:08 20 health decisions. When we have a letter from the two
14:54:11 21 teachers union in this State demanding that the Governor
14:54:14 22 do something about wearing masks in school, that's not
14:54:17 23 political?

14:54:18 24 So, again, Dr. McDonald was very selective in what
14:54:24 25 he decided to look at and to say that -- and he refused

14:54:28 1 to acknowledge people like Dr. Marty Makary from Johns
14:54:33 2 Hopkins, Dr. Bhattacharya from Stanford, Dr. Kulldorff
14:54:36 3 from Harvard. He claims he doesn't even know who these
14:54:39 4 people are. How is that keeping an open mind? Everybody
14:54:43 5 knows that they are highly respected epidemiologists that
14:54:47 6 have a different view on masking than he does. So he
14:54:51 7 just ignores them. He pretends that they're not even
14:54:54 8 there. That's not having an open mind here.

14:54:57 9 Again if they were -- and not an emergency rule that
14:55:00 10 was written by lawyers in a back room of the Department
14:55:02 11 of Health with no public input, as opposed to having a
14:55:06 12 public hearing where they have to put forward their
14:55:09 13 proposed rules and allow people, like a Dr. Bhattacharya,
14:55:13 14 to issue a statement saying don't follow this rule
14:55:17 15 because here are all the studies that say masks don't
14:55:19 16 work or are potentially harmful or that the benefit for
14:55:23 17 mandating this far outweighs the risk to these poor
14:55:28 18 children, who are going to have potentially long lasting
14:55:33 19 effects from these -- from being forced to wear masks.
14:55:37 20 No, we're not going to do that.

14:55:41 21 Again, I respectfully suggest we would not be here
14:55:46 22 today, people would have confidence, I think, in whatever
14:55:50 23 the decision the Department of Health had, if they had an
14:55:52 24 open public discussion in a public hearing where people
14:55:56 25 could present their views, as to the appropriateness of

14:56:01 1 masking children. That discussion has been completely
14:56:05 2 cut off, and we have to come here to this Court to try to
14:56:08 3 get those points out, points that should be made there.
14:56:13 4 I'm sorry, Judge, for going on about that.

14:56:25 5 THE COURT: I don't want to juggle your
14:56:28 6 thoughts but were there some Exhibits you wanted to make
14:56:31 7 full?

14:56:31 8 MR. PICCIRILLI: Judge, again, I apologize.

14:56:34 9 THE COURT: Go where you want to go.

14:56:36 10 MR. PICCIRILLI: -- for making the assumption
14:56:37 11 that there were full. I thought there were. So Exhibit
14:56:39 12 41, I think was the Sweden study that was in the New
14:56:43 13 England Journal of Medicine. As I recall, your Honor,
14:56:45 14 the question was whether or not the New England Journal
14:56:47 15 of Medicine was a scholarly publication of some repute.
14:56:55 16 I thought that was pretty self-evident and I thought that
14:56:59 17 was going to be admitted under that basis. I don't know
14:57:02 18 if the State still has some objection to that.

14:57:04 19 THE COURT: So which ones are you asking for,
14:57:07 20 41?

14:57:07 21 MR. PICCIRILLI: 41, 44, which was a NEDOC
14:57:12 22 study, with regard to NEDOC overstating the overcrowding
14:57:19 23 of emergency rooms, which I have written right on the
14:57:23 24 Exhibit, full.

14:57:27 25 And then 47, which is the State regulation, school

14:57:32 1 health regulations, which quite frankly, I don't think
14:57:35 2 need to be an Exhibit. I think we just made them an
14:57:37 3 exhibit out of convenience.

14:57:38 4 There was some confusion, I had an older version
14:57:41 5 that was on the Department of Ed website. Apparently,
14:57:44 6 there was a more updated version on the Secretary of
14:57:47 7 State's website. In fact, I think one of the State
14:57:49 8 attorneys actually gave me the correct one and we agreed
14:57:53 9 to introduce that one and take the old one out. So I
14:57:53 10 didn't think there was any issue with regard to the
14:57:57 11 school health regulations number 47 either.

14:57:58 12 THE COURT: Let's give the Clerk and the State
14:58:01 13 just a minute to go through the Exhibits while you're
14:58:03 14 talking. If you can address something else, we'll come
14:58:06 15 back to those three exhibits.

14:58:06 16 THE CLERK: 47 is already full, your Honor.

14:58:09 17 THE COURT: 47 is remarked full.

14:58:26 18 MR. PICCIRILLI: Your Honor, would you like me
14:58:27 19 to continue?

14:58:29 20 THE COURT: If you had anything else to say, I
14:58:31 21 just wanted to give them a chance to get caught up.

14:58:36 22 MR. PICCIRILLI: Judge, and again, I think just
14:58:43 23 to get back to the issue of I think at one point the
14:58:49 24 State suggests that we concede that we're not challenging
14:58:52 25 the fact that cases are going up in the State. And in

14:58:55 1 and of itself that maybe true, but there's no evidence
14:58:59 2 that someone, just because cases are going up that means
14:59:02 3 people are getting sick or going to the hospital or
14:59:06 4 dying.

14:59:08 5 THE COURT: My concern is as, you know, the
14:59:11 6 situation is changing every day still. Within the next
14:59:14 7 week there's a possibility that they'll be able to
14:59:17 8 vaccinate children, some children not all children, some
14:59:21 9 children in school.

14:59:22 10 But the situation is changing every day, just as it
14:59:26 11 has done since August, and perhaps since its done since
14:59:30 12 March of 2020. And my question, what I'm trying to
14:59:37 13 determine is am I supposed to be reviewing the emergency
14:59:42 14 regulation that was enacted in September? Or are you
14:59:47 15 asking me to question the emergency regulation as being
14:59:50 16 renewed or rewritten again and again? Or are you just
14:59:55 17 questioning the entire procedure of the Department?

14:59:58 18 MR. PICCIRILLI: Can I say all three?

15:00:00 19 THE COURT: Okay. That's fine.

15:00:01 20 MR. PICCIRILLI: I mean I do think there's, I
15:00:04 21 mean I think we have a legitimate argument as to the way
15:00:08 22 the Executive Order was enacted. I'm still, I'm still at
15:00:12 23 a loss to know exactly what executive order, the original
15:00:17 24 declaration of emergency is in existence or not. If so,
15:00:21 25 why do we need a new one? Why, if the executive order

15:00:25 1 says issue a mask protocol and that protocol hasn't been
15:00:28 2 issued, what's the point of still having an executive
15:00:31 3 order? It seems to me its ended its usefulness because
15:00:36 4 the State is not following it.

15:00:39 5 As for the emergency rule, yeah, I think I have
15:00:44 6 series concerns and questions. I think the timing of it
15:00:46 7 is obvious. They didn't try to do that until after we
15:00:50 8 filed this lawsuit. They had a year and a half to issue
15:00:53 9 that emergency rule, a year and a half to say there was
15:00:55 10 eminent peril. There may not have been eminent peril on
15:01:00 11 June 29th of this year, but there was eminent peril in
15:01:03 12 September of 2020, when some schools were open in-person,
15:01:06 13 many were. There was just as much eminent peril back
15:01:11 14 then but they didn't bother doing anything about it. It
15:01:13 15 wasn't until there was this risk that the emergency order
15:01:15 16 was going to go away that they tried to do it that way.
15:01:21 17 Again, the eminent peril being we might win our lawsuit
15:01:25 18 not because of Covid.

15:01:29 19 And since then the dire situation has not played out
15:01:37 20 with the way the State put it forth. The fact that the
15:01:44 21 Governor renewed the executive order twice, without even
15:01:47 22 mentioning one fact; cases are still high, people are
15:01:53 23 still dying, nothing. He mentioned nothing in those two
15:01:58 24 subsequent renewals as if, you know, he doesn't have to.
15:02:03 25 How dare you make me have to write something down as

15:02:07 1 justifying what I'm doing.

15:02:10 2 And again this gets to -- Judge, one last point,
15:02:15 3 which I know is uncomfortable for some. Dr. McDonald
15:02:24 4 mislead this Court, intentionally mislead this Court as
15:02:28 5 to the seriousness of Covid as it relates to children.
15:02:32 6 He tried to convince this Court, make the argument, that
15:02:35 7 three children to this date have died of Covid because of
15:02:40 8 Covid.

15:02:40 9 It wasn't until we called him on that that he
15:02:44 10 changed his story and said, well, that's by the CDC
15:02:48 11 definition. And what's the CDC definition? We all heard
15:02:52 12 it back last year when Dr. Burke said on national TV, any
15:02:56 13 death with Covid is a Covid death. And some of us
15:03:00 14 suspected, wow, that's really going -- that's really
15:03:03 15 going to make it really hard to really understand how bad
15:03:07 16 Covid is, if we're just going to assume anybody who dies
15:03:11 17 with Covid died because of Covid. And Dr. McDonald's
15:03:13 18 response to that, well, that was the standard we set a
15:03:16 19 year and a half ago. It's too late to change it now.
15:03:21 20 Okay, that was a remarkable statement. You did something
15:03:24 21 wrong back then because you did it wrong back then you
15:03:27 22 don't want to change it now?

15:03:28 23 And the purpose -- don't forget, that misleads the
15:03:31 24 public. It creates a fear in the public that they think
15:03:37 25 their child will likely die if they get Covid. Their

15:03:44 1 children will likely die. They should be reassuring
15:03:48 2 parents in the State that your child has a better chance
15:03:51 3 of getting struck by lightning on a playground and dying
15:03:56 4 than dying of Covid. That should be a reassurance to
15:03:59 5 parents.

15:04:00 6 Instead they create this false sense of fear. Why?
15:04:03 7 Because that false sense of fear is what's convincing
15:04:06 8 parents to willfully go along with this mask mandate.
15:04:10 9 Because if they really knew the truth maybe some of those
15:04:13 10 parents would say maybe this really isn't an appropriate
15:04:17 11 thing to do, forcing my kid to wear a mask when they're
15:04:17 12 not at risk at all.

15:04:20 13 You know and again, Dr. McDonald made another
15:04:24 14 remarkable statement about changing the culture, when he
15:04:28 15 brought up about masking the flu. Well, we're not,
15:04:31 16 culturally we're just not there yet. Culturally we're
15:04:35 17 not there about making kids wear masks, even during a
15:04:40 18 normal flu season.

15:04:41 19 When I hear that I hear, these masks are never going
15:04:45 20 to go away. There's always going to be an excuse to keep
15:04:49 21 the kids in masks to stop the flu that happens every
15:04:52 22 year, a much more potentially deadly disease to children
15:04:58 23 than Covid is.

15:05:00 24 The same logic that's going to apply to masking
15:05:04 25 children for Covid, which certainly applies to masking

15:05:08 1 them for the flu, is that the new cultural norm that
15:05:13 2 we're going to have in this country, that all children
15:05:15 3 will always wear masks in school, during any respiratory
15:05:20 4 virus season. Is that what we signed up for here? Are
15:05:26 5 we going to do that by executive order? Not have a vote
15:05:30 6 on it? Not have a public hearing on it? We're gonna do
15:05:31 7 it secretly behind closed doors. That's the fear.

15:05:38 8 And I'll leave it with this, the current opinion in
15:05:47 9 the formal case from last year, why are some stakes in
15:05:53 10 this Court's modest decision in Jacobson for a towering
15:05:55 11 authority that overshadows the constitution during a
15:05:58 12 pandemic. In the end I can only surmise that much of the
15:06:01 13 answer lies in a particular judicial impulse to stay out
15:06:05 14 of the way in times of crisis, but if that impulse may be
15:06:08 15 understandable or even admirable in certain
15:06:11 16 circumstances, we may not shelter in place when the
15:06:15 17 constitution is under attack. Things never go well when
15:06:19 18 we do.

15:06:23 19 I would suggest, your Honor, it is emphatically the
15:06:27 20 province of the judiciary to ensure that state officials
15:06:36 21 keep in mind their constitutional obligations, as well as
15:06:40 22 their obligations to deal with an emergency. And to
15:06:44 23 suggest that only the Legislature should be the check on
15:06:47 24 that. I will remind the Court again what I wrote in my
15:06:52 25 brief, Carrie Buck was sterilized pursuant to a

15:06:57 1 legislatively enacted regulation or statute. You cannot
15:07:03 2 simply rely on the General Assembly to be in check when
15:07:08 3 people's fundamental rights are under attack. Things
15:07:11 4 never go well when we do. Thank you.

15:07:14 5 THE COURT: Thank you, Mr. Piccirilli. Does
15:07:17 6 the State agree that Exhibits 41 and 44 may be full?

15:07:21 7 MR. FIELD: Judge, for the reasons that we
15:07:23 8 stated at trial, at the hearing, we do object to those.
15:07:28 9 Dr. McDonald had no personal knowledge of those, so we
15:07:31 10 maintain our objection to those and the evidence has
15:07:34 11 closed several weeks ago.

15:07:37 12 THE COURT: It is over. Mr. Piccirilli's
15:07:41 13 request, 41 and 44 stay for identification.

15:07:48 14 MR. PICCIRILLI: I'm sorry, I thought 44 was
15:07:49 15 full?

15:07:50 16 THE COURT: I thought Melissa said 47 full and
15:07:52 17 was marked full. Am I right, Melissa? Feel free to
15:07:52 18 correct me.

15:07:55 19 MR. PICCIRILLI: I should have moved it at the
15:07:58 20 time. I wrote down full and maybe I miswrote, I
15:08:00 21 apologize.

15:08:01 22 THE CLERK: 44 is ID and 47 is full.

15:08:04 23 THE COURT: Okay. Thank you. 41 remains for
15:08:08 24 I.D. Who would like to argue for the State?

15:08:11 25 MR. FIELD: I would, your Honor. Thank you.

15:08:11 1 THE COURT: Thank you.

15:08:15 2 MR. FIELD: I'm not going to engage in a point
15:08:17 3 blank point back and forth. I do want to impress upon
15:08:27 4 that what I'm going to focus on is the legal arguments,
15:08:34 5 both the arguments that were presented today and in court
15:08:37 6 and in papers. I'd rather not go back and forth and
15:08:41 7 rebut those. I don't think I need to. I want to focus
15:08:45 8 on the law, and I just don't want my lack of doing so to
15:08:49 9 be seen as any sort of acquiescence or agreement to those
15:08:55 10 points.

15:08:55 11 THE COURT: That's quite alright. I understand
15:08:57 12 that both parties have written extensive and very well
15:09:00 13 written briefs. I thank you for that. But there's a lot
15:09:02 14 in there, so you're not leaving anything out. Don't
15:09:06 15 worry about that.

15:09:07 16 Mr. Field, the Court was concerned about whether or
15:09:10 17 not the State failed to write it's emergency regulation
15:09:20 18 indicating what the risk was, indicating what the risk to
15:09:27 19 -- what the risk was and the eminent threats.

15:09:36 20 MR. FIELD: Sure.

15:09:36 21 THE COURT: Several months after the same
15:09:38 22 Department had been told in the Vapor Tech case, you
15:09:43 23 shouldn't pass an emergency rule without identifying what
15:09:48 24 the eminent peril to public health and safety is. It
15:09:52 25 doesn't seem like it's in this emergency rule either.

15:09:56 1 MR. FIELD: Well, respectfully, I would
15:09:58 2 disagree. Looking at the emergency regulation and it's
15:10:01 3 paragraph 7.1(a). The very first paragraph of the
15:10:06 4 regulation. And what it says is the authority upon which
15:10:15 5 this regulation was promulgated. And then it says that
15:10:21 6 the purpose of this regulation was to protect students, a
15:10:23 7 significant portion of whom are still ineligible for
15:10:27 8 vaccination against COVID-19 and reducing transmission of
15:10:30 9 the new COVID-19 variant in the school setting and
15:10:34 10 beyond.

15:10:35 11 THE COURT: That's the eminent peril?

15:10:38 12 MR. FIELD: That's the publication of it in the
15:10:40 13 regulation, yes.

15:10:41 14 THE COURT: Why doesn't it say the Department
15:10:43 15 finds it to be -- this to be an eminent threat? Why not
15:10:49 16 just say it? And leave the Court out of this awkward
15:10:53 17 situation of having to question whether or not the
15:10:55 18 Department has found an eminent threat.

15:10:58 19 MR. FIELD: Well, yeah, I mean there's no
15:11:00 20 question it could have articulated those words and, you
15:11:03 21 know, just like Judge Stern did, could articulate those
15:11:06 22 words. But I would direct the Court to the **Rizzo Ford**
15:11:09 23 case which is --

15:11:12 24 THE COURT: Isn't it unfair to the Court to be
15:11:13 25 placed in a very odd situation of having to question an

15:11:17 1 emergency regulation, during the emergency, and question
15:11:20 2 whether or not there's a threat? Why didn't the
15:11:23 3 Department just say it's a threat?

15:11:25 4 MR. FIELD: Well, I mean first of all I think,
15:11:26 5 during the circumstances in which it was issued everybody
15:11:29 6 recognized what the threat was, even the plaintiffs
15:11:32 7 seemed to acknowledge that at the time period that this
15:11:35 8 was issued --

15:11:36 9 THE COURT: If that were the case, and I don't
15:11:38 10 mean to cut you off, if that were the case then, after a
15:11:40 11 month and after a challenge by Mr. Piccirilli and a good
15:11:43 12 number of parents and students, why doesn't the
15:11:46 13 Department say, hey, we don't want to get into the Vapor
15:11:49 14 Tech trap here. We're going to pass an emergency
15:11:52 15 regulation that says exactly what the threat is and when
15:11:56 16 we're doing that we got to advertise it for full hearing
15:12:00 17 on a full regulation. We're going to go through the
15:12:03 18 steps.

15:12:03 19 MR. FIELD: Well, to go through the full steps,
15:12:05 20 even the plaintiffs acknowledge, would take at a minimum
15:12:08 21 60 days, and I just say at a minimum because the
15:12:12 22 regulation would have to be advertised for 60 days and,
15:12:16 23 I'm sorry, would have to be advertised for 30 days, then
15:12:19 24 there's a 30 day notice and comment period. That doesn't
15:12:23 25 even take into consideration the time period that, you

15:12:26 1 know, it might take to think about what to put in the
15:12:29 2 regulation or to take into consideration the public
15:12:32 3 comment. But at the very minimal, even the plaintiffs
15:12:34 4 acknowledge there's a 60 day minimal.

15:12:37 5 And that 60 day minimum wouldn't have -- wouldn't
15:12:41 6 allow the Department of Health to -- something would have
15:12:46 7 to be in place, pursuant to the Governor's Executive
15:12:51 8 Order, Executive Order 87, to address the mask situation
15:12:55 9 and all the issues that we've been talking about for
15:12:58 10 several days and weeks.

15:12:59 11 THE COURT: So what the Department intends to
15:13:01 12 do is simply to renew this again and again, without ever
15:13:04 13 going to a final order?

15:13:06 14 MR. FIELD: No. I think what is intended is
15:13:08 15 that this regulation by its own terms is going to expire
15:13:13 16 either within 45 days, the later of 45 days, or when the
15:13:18 17 Executive Order 87 expires.

15:13:21 18 And the 45 days, if I calculated it right comes out
15:13:25 19 to Sunday, this coming Sunday, I think it's the 7th or
15:13:29 20 the 8th. And assuming the executive order still
15:13:35 21 continues past that date, then the emergency regulation
15:13:38 22 will continue until the executive order continues and at
15:13:41 23 that point it would expire.

15:13:43 24 And under the, I call it the budget amendment, but
15:13:47 25 the language that was added this legislative session, the

15:13:51 1 executive order would have to expire no later than
15:13:56 2 sometime in mid-February, mid-February 2022.

15:14:03 3 And I just want to direct the Court to the **Rizzo**
15:14:07 4 **Ford** case --

15:14:07 5 THE COURT: So if you want to do a permanent
15:14:10 6 order, you should start the procedure now.

15:14:13 7 MR. FIELD: If DOH and the State want to do a
15:14:16 8 permanent order than that ammunition will be well taken.
15:14:20 9 Yes, that's absolutely true.

15:14:22 10 THE COURT: Okay. I interrupted you.

15:14:25 11 MR. FIELD: And the landscape, I think as your
15:14:28 12 Honor alluded to, is likely to change in the next weeks
15:14:32 13 and months. You know, it may change again -- it may
15:14:37 14 change for the better with vaccinations being, starting
15:14:40 15 to become available. It may also swing in another
15:14:44 16 direction, as happened on July 4th, you know, we thought
15:14:48 17 that we were headed in a good direction and then things
15:14:52 18 changed, you know, unexpectedly. But I did want to
15:14:55 19 direct the Court.

15:14:56 20 THE COURT: The landscape is going to change.
15:14:59 21 We know there's going to be some vaccinations, we presume
15:14:59 22 there's going to be some vaccinations. We presume it's
15:15:03 23 going to be some children. Also, I think it's fair to
15:15:04 24 say that some children will not take it just because it's
15:15:07 25 hard to get 100 percent compliance. With all of these

15:15:10 1 things spinning about shouldn't the Department come up
15:15:13 2 with a permanent regulation? You can always scale back
15:15:19 3 88 days in. Instead of just emergency regulation of the
15:15:22 4 day.

15:15:24 5 MR FIELD: Yeah, I don't think it's an
15:15:26 6 emergency regulation of the day. I think what happened
15:15:28 7 is that the Governor issued his executive order on August
15:15:32 8 19th, and I think the data and the reason for that is
15:15:35 9 pretty well before the Court, and certainly in all of the
15:15:38 10 memoranda.

15:15:39 11 The Department of Health on that same day issued a
15:15:41 12 protocol, which had a life of about 30 days, and that was
15:15:46 13 pursuant to the executive order, and when that expired,
15:15:50 14 DOH issued the emergency regulation, you know, to
15:15:54 15 continue in what we had been doing. You know, and again,
15:15:58 16 all of this has a life line, because it's tied to the
15:16:02 17 executive order, to Executive Order 87, which is going to
15:16:05 18 expire pursuant to the budget amendment at some point in
15:16:09 19 mid-February.

15:16:10 20 And just to address your Honor's question, I
15:16:13 21 directed your Honor to the original question. I directed
15:16:16 22 the Court to the first paragraph on the emergency
15:16:20 23 regulation. But there's another point also, and this
15:16:23 24 didn't come in during testimony but addresses the Court's
15:16:26 25 question, the emergency regulation requires that a

15:16:30 1 statement, I'm sorry, that a statement of the Agency's
15:16:33 2 peril be placed on the record with the Secretary of State
15:16:38 3 and the Agency's own website.

15:16:40 4 And I'm just looking at -- looking at the other
15:16:44 5 monitor, and when you go to the Secretary of State's
15:16:49 6 website, when you click on the DOH regulation there's a
15:16:54 7 -- there's a page called overview. I can send the Court
15:16:58 8 the link if it wishes. But under the overview, under the
15:17:03 9 overview it also says, there's a sentence or a heading
15:17:07 10 that says, brief statement of reason for finding eminent
15:17:11 11 peril. And under that heading it says: To protect
15:17:14 12 students, a portion of whom are still ineligible for
15:17:18 13 vaccination. Has the same wording that's in the
15:17:20 14 regulation. But it does have the finding of eminent
15:17:23 15 peril language that your Honor was asking about earlier.
15:17:26 16 That's on the website.

15:17:27 17 And it sort of gets me back to the Rizzo Ford case,
15:17:31 18 that's the Rhode Island Supreme Court case, and that was
15:17:35 19 a situation where the plaintiffs challenged because the
15:17:38 20 eminent peril was not in a regulation, it was in a cover
15:17:41 21 letter, sort of akin to what I just described on the
15:17:44 22 website. And the Rhode Island Supreme Court said that
15:17:47 23 was fine. It could be in a cover letter. It didn't need
15:17:50 24 to be in the regulation whatsoever.

15:17:52 25 And, frankly, and this is at Page 220 of **Rizzo Ford**,

15:17:59 1 **893 A.2d 220** is the pinpoint. But the Court makes
15:18:05 2 observation of what the eminent peril is and the language
15:18:09 3 that's used by the -- I think it's the DOT in this case,
15:18:15 4 and that's written by the Rhode Island Supreme Court,
15:18:17 5 doesn't say eminent peril. It says, the consuming public
15:18:21 6 would be without a forum to address infractions of
15:18:25 7 Chapter 31-531-5.1. The industry would be unregulated
15:18:29 8 and the Department would be powerless to combat unfair
15:18:33 9 business practices that occurred daily in the sale,
15:18:36 10 manufacture and distribution of new and used automobiles,
15:18:38 11 and the Supreme Court affirmed that.

15:18:45 12 THE COURT: Well, first off, I looked at the
15:18:45 13 website. We looked at the website and tried to --
15:18:49 14 actually, I was looking at it trying to figure out the
15:18:52 15 effective dates and how long these regulations would
15:18:54 16 last, and I'll say that was quite confusing, and I'm not
15:18:59 17 going to cite it because I don't presume that that
15:19:03 18 website is going to be the same if this case is under
15:19:06 19 appeal, so I'm really speaking where there's no record,
15:19:10 20 and that's unfair to any higher court.

15:19:14 21 But several months ago Judge Stern said look in the
15:19:21 22 regulation, and here we got a whole new regulation
15:19:25 23 without the statement of eminent peril. It's just
15:19:28 24 surprising to me that the Department hasn't learned their
15:19:31 25 lesson because it's uncomfortable for the Court, whether

15:19:34 1 or not its appropriate or not is another thing. It's
15:19:36 2 uncomfortable for the Court in the midst of the pandemic
15:19:39 3 to question an emergency regulation from the Department
15:19:42 4 of Health. It's my job to do it. The Court will do it,
15:19:47 5 but it's just -- I don't understand why the Department
15:19:54 6 set itself up that way, after having learned its lesson
15:19:58 7 several months ago. But I know the Department is
15:20:02 8 extremely busy and has done a great deal over the past
15:20:05 9 year and a half. I get that. I think everyone in the
15:20:08 10 State understands that they've been put under tremendous
15:20:11 11 pressure. I'll leave it at that.

15:20:15 12 MR. FIELD: Thank you, your Honor. I was going
15:20:18 13 to address and walk through, just because I think that
15:20:24 14 Plaintiffs' arguments have been so misguided on the
15:20:27 15 effect of the budget amendment. I'm not sure if the
15:20:31 16 Court needs to hear arguments on that.

15:20:33 17 The main point that I wanted to make, and this is
15:20:36 18 the reason why I e-mailed the version of the budget
15:20:40 19 amendment copy to the Court and to the parties this
15:20:43 20 afternoon was 30-15-9 contains two separate sections.
15:20:51 21 One is to declare a state of emergency, and that is
15:20:56 22 Section B. Section B is dedicated to declaring a state
15:20:59 23 of emergency. And Section E, which is on -- which is on
15:21:05 24 the -- which is on page, what's labeled as Page 4, are
15:21:12 25 the powers that the Governor can exercise once he or she

15:21:16 1 has declared a state of emergency.

15:21:18 2 And the main point that I think has been misguided
15:21:23 3 is that when the General Assembly added Section E this
15:21:28 4 past legislative session, and that's on Page 7, that
15:21:33 5 section pertains exclusively and expressly to Subsection
15:21:37 6 E. It says right there, powers confer upon the Governor
15:21:41 7 pursuant to preclusions of Subsection E of this section.
15:21:44 8 Those are the ones that shall not exceed 180 days.

15:21:48 9 That doesn't apply, the 180 day clock doesn't apply
15:21:52 10 to Subsection B. Subsection B is where the Governor
15:21:58 11 declares a state of emergency, and that's the first
15:22:01 12 sentence of Subsection B: A state of emergency shall be
15:22:06 13 declared by executive order or proclamation of the
15:22:09 14 Governor if he or she finds a disaster has occurred or
15:22:13 15 that this occurrence or the threat thereof is eminent.

15:22:17 16 So the Plaintiffs made argument, throughout this
15:22:19 17 case it has been there's this 180 day clock, that 180 day
15:22:25 18 clock doesn't allow the Governor to issue a state of
15:22:28 19 emergency. All by virtue of this budget amendment the
15:22:34 20 Governor can't issue any executive orders related to
15:22:39 21 Covid. That's just fundamentally incorrect, as a matter
15:22:43 22 of statutory construction. It's 100 percent wrong. The
15:22:46 23 General Assembly did nothing with respect to Subsection
15:22:48 24 B. It's untouched. And that's why I provided the copy
15:22:52 25 that I e-mailed this morning because there's just no

15:22:52 1 addition to that.

15:22:57 2 The additions are on Page 7 of -- the amendments are
15:23:00 3 on Page 7, and those apply only to Subsection E, okay.
15:23:06 4 So what affect does that have on this case and how does
15:23:12 5 it apply? When the Governor issued his executive order
15:23:15 6 declaring a state of emergency, that's 2186, there is no
15:23:19 7 sunset to that. What the sunset is is when the Governor
15:23:25 8 issues executive orders pursuant to his declaration of
15:23:29 9 emergency. For instance 2187 and the mask requirement,
15:23:33 10 and that's why I said that that is going to expire at
15:23:36 11 some point in mid-February, because that's the 180 day
15:23:40 12 clock.

15:23:41 13 But the 2186, which is the declaration, does not
15:23:44 14 expire. It doesn't terminate. Unless of course the
15:23:48 15 General Assembly convenes by concurrent resolution, and
15:23:51 16 that was really the difference between the two.

15:23:54 17 Subsection B always had a way to terminate. The way
15:23:58 18 to terminate was by General Assembly concurrent
15:24:01 19 resolution, up until the budget amendment passed, any
15:24:03 20 Executive Order that had been issued pursuant to a state
15:24:05 21 of emergency pursuant to Subsection E, there was no
15:24:08 22 sunset provision, and that's why the General Assembly
15:24:11 23 added that this past legislative session. So now those
15:24:16 24 executive sessions expire, I'm sorry, those executive
15:24:18 25 orders expire after 180 days from the date of the state

15:24:22 1 of emergency.

15:24:23 2 So having said that, and that's the core argument of
15:24:27 3 why the plaintiffs say the Executive Orders are improper.
15:24:30 4 There is no -- there is no expiration date hanging over
15:24:36 5 the declaration of emergency. And once that -- once the
15:24:41 6 lawfulness of that is established, or maybe more
15:24:46 7 accurately once the plaintiffs can't demonstrate that
15:24:49 8 that 81, I'm sorry, 2186 was not unlawfully issued, then
15:24:56 9 the Governor has 180 days pursuant to that declaration of
15:25:00 10 emergency to issue other executive orders. And that's
15:25:03 11 what he did with the mask requirement, which is 2187.

15:25:11 12 Concerning this Court's reviewability of the
15:25:17 13 Executive Order, the declaration of emergency. I looked,
15:25:20 14 your Honor, I've never seen a declaration of emergency
15:25:26 15 being challenged in this State. The plaintiffs certainly
15:25:30 16 hasn't put forward one. We cited federal case law that
15:25:34 17 it's a political question, and I would suggest to this
15:25:38 18 Court that it's not reviewable judicially. Just like,
15:25:44 19 just like a Governor who may make a judicial selection,
15:25:47 20 there's a check on that, the check is the General
15:25:51 21 Assembly, the Senate.

15:25:53 22 In this case, the check on the Governor declaring a
15:25:56 23 state of emergency is again General Assembly. But
15:26:00 24 there's no manageable standards as the cases talk about
15:26:05 25 for which this Court can or should determine whether or

15:26:09 1 not a disaster occurs.

15:26:11 2 And even to go a step further, what Subsection B
15:26:16 3 says, and specifically I want to talk about Line 29 on
15:26:20 4 the first, what is labeled Page 3, the first page: A
15:26:25 5 state of emergency shall be declared by an executive
15:26:27 6 order or proclamation of the Governor if he or she finds
15:26:31 7 a disaster. That's what the Governor did. Government
15:26:36 8 McKee found a disaster. He articulated in his
15:26:40 9 declaration of emergency why he found a disaster. On
15:26:44 10 Page 4, lines 4 to 5 and 6 says what has to be in the
15:26:49 11 declaration of emergency. The Governor checked those
15:26:52 12 boxes. And respectfully, no other judicial overview,
15:26:59 13 whether or not the Governor has found a disaster, that's
15:27:03 14 for the General Assembly.

15:27:05 15 Now even though I don't think the Court should get
15:27:08 16 into this, you know, has the Governor properly found a
15:27:11 17 disaster? The answer to that is just unequivocally, yes.

15:27:16 18 August 19th was when he declared the state of
15:27:18 19 emergency. We presented the charts and the grafts, which
15:27:23 20 as your Honor already showed, you know, we're in the
15:27:27 21 upward trajectory. And Delta is different. It's
15:27:34 22 different because of the virus load.

15:27:36 23 Now I know plaintiffs can say, well, it's just some
15:27:39 24 unnamed China study. I don't remember, frankly,
15:27:42 25 Dr. McDonald saying that it was tied exclusively to a

15:27:46 1 viral load. It was tied exclusively to one unnamed China
15:27:51 2 study.

15:27:52 3 But his testimony, which was unrebutted, is that the
15:27:55 4 viral load is 1,000 times greater for Delta virus. It's
15:28:02 5 more contagious. It's three or four times more
15:28:05 6 contagious. And the proof of all of this is the numbers,
15:28:08 7 and this was in the testimony and this was also in the
15:28:15 8 Governor's declaration of emergency. On July 4th we had
15:28:18 9 11.2 new cases per 100,000, over a seven day average, and
15:28:25 10 22 hospitalizations on July 4th.

15:28:28 11 A couple days before the Governor issued his
15:28:31 12 declaration on August 16th we had 195 new cases and 103
15:28:36 13 hospitalizations, so something is causing that. And the
15:28:39 14 only thing that makes sense, even from a layperson's
15:28:44 15 point of view like my own, and DOH and Dr. McDonald
15:28:48 16 testified that they sequence the virus and whose getting
15:28:51 17 the virus so they can track it, and they know it's the
15:28:55 18 Delta virus because of this. It's because of the Delta
15:28:59 19 virus and that was the increase in the numbers.
15:29:03 20 Dr. McDonald testified that on August 9th, which was a
15:29:06 21 week before or ten days before the declaration of
15:29:09 22 emergency, seven of the ten hospitals were dangerously or
15:29:12 23 severely overcrowded. August 11th, Rhode Island hit over
15:29:18 24 100 new cases per 100,000 over a seven day average. Why
15:29:24 25 is 100 cases significant? Under the CDC guidance and

15:29:30 1 their categorization, 100 cases is the highest level.
15:29:35 2 It's high prevalence. We haven't dipped below 100 cases
15:29:40 3 since August 11th. I looked this morning, and whether it
15:29:44 4 was today's numbers or yesterday's numbers, I think we
15:29:46 5 were at like 143 or 141 as of yesterday.

15:29:52 6 And even Dr. Boston's Exhibit 6, which, you know, we
15:29:58 7 took issue with in our papers, but even that Exhibit
15:30:04 8 makes mention or says that the peak point for Delta,
15:30:09 9 there were 243 cases. So even that Exhibit, and this
15:30:13 10 gets to the Court's point of, you know, isn't one life
15:30:17 11 enough? But even in Dr. Boston's Exhibit 6 talks about
15:30:22 12 243 cases of Covid at a peak period of time when 100
15:30:27 13 cases is high prevalence.

15:30:30 14 And then Dr. McDonald talked about the conversation
15:30:33 15 that he had with all the hospital officials on August
15:30:36 16 12th. So all of this data is coming to DOH and
15:30:40 17 Dr. McDonald. The Covid team is talking about it, and on
15:30:44 18 top of that they're getting reports from on the ground
15:30:48 19 hospital people about what the affect is to them.
15:30:51 20 Hospitals are overcrowded. They can't handle it. And
15:30:54 21 I'll let the rest of the testimony stand for itself
15:30:57 22 because I just don't remember it off the top of my head.

15:30:59 23 So faced with that and that schools were going to be
15:31:03 24 opening in a couple of weeks, and as Dr. McDonald said,
15:31:08 25 this school year was unquestionably going to be different

15:31:09 1 than prior years because all students were going to be
15:31:13 2 attending schools. They weren't going to be remote,
15:31:16 3 which meant there couldn't be a six-foot social distance,
15:31:19 4 it had to be down to three. There was no reason not to
15:31:23 5 eliminate masks. You know said differently, masks were
15:31:26 6 necessary. Dr. McDonald testified in his expert medical
15:31:31 7 opinion to a medical degree of certainty, they were
15:31:32 8 necessary.

15:31:32 9 And even last year when there weren't as many
15:31:37 10 students, and there was six-foot social distancing, Rhode
15:31:41 11 Island schools experienced, according to Dr. McDonald a
15:31:44 12 5 percent spread rate.

15:31:45 13 So faced with those circumstances there's no
15:31:47 14 question that DOH acted reasonably, and Governor McKee
15:31:52 15 acted reasonably when faced with those facts and those
15:31:56 16 circumstances and a more contagious Delta virus to
15:32:01 17 continue the mask requirement in schools.

15:32:09 18 The plaintiffs have said in their memorandum and
15:32:15 19 today that kids just don't get sick. They don't die from
15:32:18 20 Covid, um, I just don't know what to say to that, your
15:32:22 21 Honor. Even in their papers, I mean Dr. McDonald
15:32:26 22 testified that that's not true. It's not true throughout
15:32:30 23 country. It's not true in Rhode Island. The plaintiffs
15:32:32 24 say in their papers they acknowledge that 500 children
15:32:36 25 have died from Covid throughout the country. I may have

15:32:40 1 missed it but I don't believe that since March of 2020
15:32:44 2 that 500 children have been struck by lightning playing
15:32:48 3 on the playground. It hasn't happened.

15:32:53 4 And even if children are not ending up getting sick
15:32:58 5 or dying from Covid, as the Court already pointed out or
15:33:02 6 observed, they're still transmitting. They're
15:33:06 7 transmitting it to other people, and that's part of what
15:33:10 8 DOH is trying to minimize, not just children getting sick
15:33:15 9 and possibly dying, but also children spreading it to
15:33:19 10 other people, and just the spread of Covid in particular.
15:33:22 11 That's been DOH's strategy throughout. This DOH strategy
15:33:27 12 when there was a mask requirement for everybody before
15:33:30 13 vaccination became prevalent. It's DOH's strategy now
15:33:35 14 with respect to vaccines, get vaccinated.

15:33:38 15 And somehow the plaintiffs seem to sort of minimize
15:33:42 16 all of these interests by saying that you're only at risk
15:33:45 17 if you have a comorbidity. Those are the only type of
15:33:50 18 people who get sick.

15:33:52 19 First of all, they're entitled to live also.
15:33:55 20 They're entitled to live healthy and prosperous lives.
15:33:59 21 So, you know, casting them aside and just saying that if
15:34:03 22 they get sick, that's their fault, that has not been the
15:34:07 23 DOH perspective.

15:34:08 24 Secondly, children have those types of situation
15:34:11 25 too. Unfortunately, not every child who goes to school

15:34:15 1 is healthy, so DOH is also looking to protect those
15:34:19 2 children.

15:34:21 3 And, you know, it was a little ironic also, your
15:34:26 4 Honor, DOH's strategy throughout this, well, let me say
15:34:33 5 this a different way. I think Rhode Island has been
15:34:37 6 relatively fortunate throughout this pandemic. There's
15:34:42 7 been a lot of testimony about the number of children in
15:34:44 8 Rhode Island who died because of Covid or didn't die
15:34:48 9 because of Covid or who were in the hospital because of
15:34:51 10 Covid, and somehow the fact that Rhode Island hasn't had
15:34:56 11 a child who has died from Covid, or that at times our
15:35:00 12 numbers are relatively low, somehow seems to be a signal
15:35:04 13 that, you know, Rhode Island children or Rhode Island as
15:35:08 14 a whole doesn't face a peril or an eminent peril.

15:35:15 15 And I think Dr. McDonald's testimony summed this up
15:35:17 16 better than I could sum this up, but the testimony was
15:35:22 17 that Rhode Island's strategy has been to have multiple
15:35:26 18 layers; vaccination, masks, social distancing,
15:35:30 19 ventilation. That's for the reasons that the Court has
15:35:32 20 already observed, vaccination. Vaccination isn't an
15:35:35 21 option here for children, or at least as of this point in
15:35:38 22 time right now it's not an option.

15:35:40 23 So for the plaintiffs to suggest that we should be
15:35:44 24 taking masks away from children, while still having them
15:35:48 25 in a less socially distant spacing than they were a year

15:35:55 1 ago is just irresponsible.

15:36:06 2 Just looking through my notes, your Honor. The
15:36:09 3 plaintiff made mention that the Governor's Executive
15:36:14 4 Order required a protocol be issued by DOH, and according
15:36:19 5 to the argument today, I think it was alleged that there
15:36:21 6 is no protocol. The protocol is the regulation.

15:36:25 7 The protocol was in place for about a month, I think
15:36:29 8 it expired on September 18th or 19th. The regulation
15:36:34 9 issued on the 23rd of September, that's the protocol.

15:36:39 10 And the regulation does make some differences, as I
15:36:45 11 remember the protocol for instance didn't take into
15:36:50 12 consideration children taking off a mask or either eating
15:36:57 13 or playing a brass instrument or some other sorts of
15:37:01 14 situations, the regulation does take that into
15:37:05 15 consideration. So there were some minor edits that were
15:37:08 16 made based on the regulation that was issued.

15:37:13 17 Going back to the regulation for a moment, I think
15:37:19 18 I've already addressed the eminent harm or the eminent
15:37:25 19 peril. The plaintiff makes mention of, you know, why
15:37:34 20 didn't this issue a year ago. Well, I mean it didn't
15:37:39 21 issue a year ago because the Governor's Executive Order
15:37:42 22 applied. It applied across the board. It didn't issue
15:37:46 23 in July or June because the numbers were down and we
15:37:50 24 thought Covid was heading in a separate direction.

15:37:52 25 And the reason why there was eminent peril and it

15:37:56 1 issued in September was because the protocol was no
15:38:00 2 longer in place. It needed something to take that place,
15:38:03 3 the 60 days, the 60 day -- a minimum of 60 days where a
15:38:11 4 regulation could be promulgated and kids were in school,
15:38:16 5 and we've already talked about what the numbers were.

15:38:21 6 I think the Vapor Technology case, which your Honor
15:38:25 7 has obviously reviewed, talks about not being a
15:38:29 8 definition of eminent peril and providing great deference
15:38:33 9 to the agency, what an eminent peril should be. I'm not
15:38:37 10 sure that DOH even meets the deference of this situation,
15:38:41 11 but according to that case, and the APA, DOH is entitled
15:38:45 12 to that deference. The court cannot substitute its own
15:38:49 13 judgment for the judgment of the DOH, as to whether or
15:38:52 14 not it was in eminent peril.

15:38:55 15 THE COURT: I'm not sure that either Judge
15:38:57 16 Stern or I or this Court should just give deference and
15:39:04 17 try to figure out what the eminent peril is. I think
15:39:09 18 regulations, the statute, statutory scheme is designed so
15:39:14 19 that they say what the eminent peril is and I think that
15:39:17 20 Judge Stern said that, and I believe that's why a new
15:39:20 21 emergency regulation was enacted. I just didn't want you
15:39:29 22 take it the wrong way. Particularly for an emergency
15:39:30 23 regulation, I get that as I've indicated before, but the
15:39:36 24 Court has some role. I think the Court really has some
15:39:36 25 role.

15:39:41 1 MR. FIELD: Yes, so with respect to the
15:39:44 2 regulation, I think that's true. Respectfully, with
15:39:48 3 respect to the State of Emergency, the EO, I don't think
15:39:51 4 that that's true. I think that belongs with the General
15:39:51 5 Assembly.

15:39:54 6 But talking about the regulation right now and, you
15:39:58 7 know, this is my -- it's on me if this is, if this is the
15:40:02 8 where the Court goes. But the Court had also indicated
15:40:07 9 early on, before we even started testimony, that the
15:40:11 10 Court didn't want things continually shifting. And, you
15:40:20 11 know, there were certainly opportunities for DOH to issue
15:40:25 12 an amended regulation or an amended protocol during the
15:40:29 13 course of this case. And frankly, I didn't think that
15:40:34 14 was appropriate, your Honor, while this was still in
15:40:36 15 play. And I just didn't, in light of your Honor's
15:40:40 16 comments, I didn't want that to be lost on the Court
15:40:43 17 either.

15:40:48 18 THE COURT: Well, the Court never issued an
15:40:52 19 order against the Department. Certainly I wanted to make
15:40:55 20 sure that I understood what was going on and try to
15:40:58 21 consider the case in that light and not have a continuing
15:41:01 22 different light.

15:41:03 23 But as some things have broken, and it's an
15:41:06 24 emergency regulation having to do with the eminent peril
15:41:09 25 to people's health, whom am I to say don't step in and

15:41:14 1 change it. It may be inconvenient for me. It may be
15:41:17 2 harder for me to figure out, but the more important thing
15:41:20 3 is to fulfill your statutory obligation.

15:41:24 4 MR. FIELD: And respectfully, I do think that
15:41:26 5 we have filled the statutory obligation. The language in
15:41:30 6 the regulation doesn't say eminent peril, your Honor is
15:41:33 7 correct. But there's nothing in the statute that says it
15:41:36 8 has to say eminent peril. It just has to state the
15:41:39 9 reason or the findings for the eminent peril and I do
15:41:41 10 think that that paragraph does relate that.

15:41:44 11 And then on the website it does have the language
15:41:47 12 eminent peril under -- the heading says eminent peril and
15:41:52 13 then it provides the finding. So I do think that it's
15:41:55 14 there, you know, it could have been better but I do think
15:42:02 15 that it's there. And particularly, when reference is
15:42:05 16 made to the Rizzo Ford case, which the Supreme Court
15:42:09 17 upheld, it's there.

15:42:18 18 Couple additional things, the Plaintiff has noted
15:42:24 19 and argued that renewals of the Executive Order don't
15:42:30 20 make any findings. Again, there's just no requirement
15:42:34 21 for that under the law. The findings that have to be
15:42:37 22 made under the law, at least when the executive order,
15:42:40 23 I'm sorry, when the declaration of emergency was
15:42:43 24 originally issued are set forth by statute, and the
15:42:48 25 Governor checked those boxes. There's nothing that says

15:42:51 1 when the Governor renews a declaration of emergency that
15:42:55 2 the Governor has to restate certain findings or make
15:43:00 3 additional findings. The plaintiff also, I would say
15:43:06 4 as to the constitutional issue with us, it hasn't been
15:43:09 5 plead. It was not plead in the complaint. It was never
15:43:13 6 discussed until the Plaintiffs memorandum that was filed
15:43:17 7 last week, and to the extent that it is considered, I
15:43:21 8 would just note that the more -- I think what people
15:43:32 9 would suggest might be the more invasive intrusions,
15:43:36 10 which would be vaccination over a mask mandate or a mask
15:43:40 11 requirement, has been upheld by the First Circuit.

15:43:43 12 This weekend the Second Circuit issued a summary
15:43:47 13 decision vacating a New York District Court, a New York
15:43:51 14 District Court had held that a vaccination requirement
15:43:54 15 for healthcare workers only was unconstitutional under
15:43:58 16 the religious clause, not under due process. And the
15:44:04 17 Second Circuit issued a decision, summary decision this
15:44:07 18 weekend, that that was being vacated with a further
15:44:10 19 opinion to follow.

15:44:11 20 And also this weekend the U.S. Supreme Court refused
15:44:14 21 to step in on the main case, which was from the First
15:44:18 22 Circuit, and issued injunctive relief in that case.

15:44:24 23 So I think I would submit that if the First Circuit,
15:44:27 24 the Second Circuit and the United States Supreme Court
15:44:29 25 are not issuing injunctive relief with respect to a

15:44:33 1 vaccination requirement, this Court should not be issuing
15:44:37 2 it for the mask requirement.

15:44:39 3 I do want to address briefly the three other
15:44:42 4 factors; irreparable harm, balancing of equities and
15:44:45 5 status quo. The irreparable harm arguments, your Honor,
15:44:53 6 the State presented evidence, and Dr. McDonald testified,
15:44:57 7 that there's no harmful effects or adverse effects to
15:45:02 8 wearing masks. And most of the testimony during this
15:45:07 9 hearing concerned testimony relating to what was
15:45:12 10 happening at the schools. In other words, how school
15:45:15 11 officials were enforcing it, not with respect to whether
15:45:19 12 masks were harmful or not.

15:45:21 13 And respectfully, well, you know, the parents, I
15:45:24 14 have a great deal of respect to the plaintiffs and the
15:45:27 15 parents, and they may be experts with respect to their
15:45:31 16 children. As a causation matter and as a medical matter
15:45:34 17 and as a legal matter, there was no evidence that was
15:45:37 18 presented that the masks were harmful to their children.

15:45:42 19 And again, Dr. McDonald presented studies and his
15:45:45 20 own testimony that masks were not harmful or provided
15:45:49 21 adverse effects. And as a matter of fact, what I recall
15:45:53 22 Dr. McDonald testifying was that he had looked for and
15:45:59 23 searched for journals and studies that showed adverse
15:46:06 24 effects and that he didn't see any.

15:46:08 25 And while even putting aside Dr. McDonald's

15:46:12 1 testimony and putting aside my argument on this point, I
15:46:16 2 think probably the most dramatic statement was by the
15:46:20 3 plaintiffs in their memorandum on Page 26 where the
15:46:23 4 plaintiff say there's no medical professional that can
15:46:27 5 say with any certainty that these children are not
15:46:31 6 suffering harm.

15:46:32 7 And the plaintiffs by their very own admission are
15:46:38 8 -- first of all, they're shifting the burden onto the
15:46:40 9 State to say there is no harmful effects. But they need
15:46:42 10 to come into court on this preliminary injunction and
15:46:45 11 demonstrate to the Court that there are harmful effects.
15:46:48 12 That's their burden at this stage and it's stronger, it's
15:46:52 13 a heavy burden, and they haven't done that by their own
15:46:56 14 admission.

15:46:57 15 THE COURT: Well, I just have to correct that
15:46:59 16 because while they may not have introduced scientific
15:47:03 17 evidence, but for what Dr. Bostom said. They did submit
15:47:07 18 the parents testimony, which indicated directly what the
15:47:12 19 children were going through. It is a heavy burden for
15:47:16 20 them. There's no doubt they're suffering as a result of
15:47:19 21 that, whether or not it's long-term harmful, whether or
15:47:23 22 not these are irreparable. I give you that that could be
15:47:29 23 a question because they didn't submit testimony from a
15:47:32 24 medical professional nor may we even know at this point.

15:47:38 25 But I don't think the State or the Court can

15:47:43 1 seriously question that the children in the public
15:47:44 2 schools wearing masks every day have been through a lot
15:47:47 3 and we all are. Perhaps they're suffering more than the
15:47:53 4 rest of us. I can stop this any time, get up, open up a
15:47:58 5 window or walk around. They can't. And how someone in
15:48:02 6 elementary school or junior high school can do that every
15:48:05 7 day, that is surprising to me, and they're going through
15:48:11 8 a lot.

15:48:15 9 MR. FIELD: Judge, I'm not going to disagree
15:48:17 10 with that. I think that we're all going through a lot.
15:48:20 11 You know, the testimony has been portrayed as, you know,
15:48:24 12 some people like wearing masks. I don't think anybody
15:48:27 13 likes wearing a mask and I don't think that's what
15:48:29 14 Dr. McDonald said.

15:48:31 15 But, you know, just like your Honor observed that
15:48:34 16 your Honor can walk around, leave the office, open up a
15:48:37 17 window. I don't think it should be lost on anybody
15:48:41 18 either that children are not in that situation, and
15:48:44 19 there's good and bad that comes from that.

15:48:47 20 The bad is that Covid is particularly, at least what
15:48:54 21 DOH understands it to be and I think other sources too,
15:48:58 22 one is particularly susceptible of catching Covid
15:49:03 23 indoors, indoors in closed spaces where they're with
15:49:09 24 other people. And the fact that children are in that
15:49:12 25 type of environment is the basis for the masking

15:49:16 1 requirements or as part of the basis.

15:49:18 2 That's not to minimize your Honor's concerns. I
15:49:20 3 get it. I think we all get it. But, you know, there's a
15:49:26 4 reason for it and the reason as has been already stated,
15:49:33 5 there's a compelling interest to stop the spread of
15:49:36 6 Covid, and I don't think anybody disagrees with that
15:49:39 7 either. These are difficult decisions that are being
15:49:41 8 made through challenging circumstances and there's
15:49:45 9 serious consequences.

15:49:47 10 I'm not looking to minimize the plaintiffs'
15:49:49 11 testimony either. I think they're looking after the best
15:49:53 12 interest of their children, and I think DOH is looking
15:49:56 13 after the best interest as the public as a whole, as it
15:50:01 14 should.

15:50:01 15 So the balancing of equities, I think that -- I sort
15:50:05 16 of just lead into that, the balancing of the equities I
15:50:09 17 think strongly favors the State on this. Judge Stern
15:50:14 18 talked about in the Vapor Technology case about the
15:50:17 19 public interest and the State's interest in trying to
15:50:21 20 curtail the injuries. He talked about in that case that
15:50:26 21 there were 1,600 injuries in vaping and 30 deaths since
15:50:30 22 August 19th. I'm sorry, since August 2019. He issued --
15:50:35 23 I don't remember what the time period was for that
15:50:38 24 reference, but it pales in comparison to the public
15:50:44 25 health threat that Covid has presented, state officials

15:50:47 1 and national officials, and the Court is well aware of
15:50:50 2 those numbers.

15:50:51 3 And then the status quo I do want to address. I'm
15:50:56 4 going to reference your Honor's decision. I think that
15:50:59 5 was in my memo. But your Honor's decision from 2009 in
15:51:05 6 **Local 2234 vs. Lombardi**. This was a case where Mayor
15:51:11 7 Lombardi ordered a fire station, Fire Station 3, to be
15:51:15 8 closed. He ordered that I think on December 1st, 2009.
15:51:20 9 He ordered it to be closed by December 3, 2009, and at
15:51:26 10 the end of your Honor's decision there's a section on
15:51:28 11 maintaining the status quo. And your Honor says that
15:51:35 12 that the Court had issued a restraining order ordering
15:51:38 13 that the fire station remain open, but that it had done
15:51:42 14 that on the understanding that what the status quo was,
15:51:48 15 what the current situation was, was that the fire station
15:51:51 16 was open during that point in time, and your Honor cited
15:51:54 17 to the court complaint.

15:51:56 18 After that, when this case moved to the preliminary
15:52:00 19 injunction, the Court wrote during the preliminary
15:52:02 20 injunction hearing, it became clear to the Court that
15:52:07 21 Station 3 had already been closed by the Town prior to
15:52:10 22 the initiation of this litigation.

15:52:12 23 The status quo, the last peaceful situation prior to
15:52:16 24 litigation was a closed fire station. And that's the
15:52:20 25 situation we have here. Litigation here started on

15:52:23 1 September 16, I'm sorry, yes, September 16. The Governor
15:52:27 2 issued his Executive Order declaring a state of emergency
15:52:32 3 and the mask requirement on August 19th. Nearly a month
15:52:36 4 before the plaintiffs filed the lawsuit.

15:52:38 5 So the status quo, the last peaceful situation of
15:52:42 6 this, has been a month before this lawsuit was filed that
15:52:47 7 masks were required for all persons entering schools or
15:52:51 8 inside schools, pursuant to Executive Orders 2186 and 87.
15:52:57 9 And even going further beyond that, I know that there was
15:53:01 10 certainly a period during the summertime where masks were
15:53:05 11 not intended to be held in schools, to be used in schools
15:53:08 12 or required in schools.

15:53:09 13 But masks being required in schools since Covid,
15:53:14 14 when Covid started in March of 2020, schools shutdown, my
15:53:18 15 understanding is from that point, that point in time to
15:53:22 16 the end of that school year, the entirety of last school
15:53:26 17 year, which was a hybrid so, you know, some kids were in
15:53:30 18 some were out, but masks were required that entire school
15:53:34 19 year and masks have been required this entire school
15:53:37 20 year.

15:53:38 21 So for the Plaintiffs to suggest that the status quo
15:53:42 22 was some period during the summer time, I think just
15:53:45 23 belies the reality of the situation and the law.

15:53:50 24 So for all those reasons, your Honor, we would ask
15:53:53 25 that the Court deny the preliminary injunction.

15:53:57 1 THE COURT: Thank you.

15:53:59 2 MR. FIELD: Thank you, your Honor.

15:54:01 3 THE COURT: First, I'm going to take this under
15:54:05 4 advisement. I'll issue a written decision, hopefully as
15:54:08 5 soon as possible. I'm trying my best. We're trying our
15:54:10 6 best to get this done. Is there anything else?

15:54:12 7 Both parties then rest and the case is submitted.
15:54:17 8 All right, Mr. Piccirilli?

15:54:17 9 MR. PICCIRILLI: Yes, your Honor.

15:54:19 10 THE COURT: Okay. Great. Thank you, Mr.
15:54:21 11 Field. Thank you for your arguments today and thank you
15:54:24 12 for your zealous representation of your clients. There's
15:54:27 13 no question that all of you, and I include Ms.
15:54:32 14 Wyrzykowski as well, some day I'll be able to pronounce
15:54:34 15 your name correctly. All of you worked very hard to
15:54:36 16 present this case to the Court and very well on behalf of
15:54:41 17 your clients, so thank you all. I'll issue a decision as
15:54:45 18 soon as I can.

15:54:46 19 MR. PICCIRILLI: Thank you, Judge.

15:54:46 20 MR. FIELD: Thank you.

15:54:47 21 THE COURT: And the Court is now in recess.
15:54:49 22 Thank you.

15:54:49 23 **A-D-J-O-U-R-N-E-D**

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