

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 4

OCTOBER 6, 2021

APPEARANCES:

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FOR THE PLAINTIFFS

MICHAEL FIELD, ESQUIRE
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Andrea Iacobellis, CSR
Certified Shorthand Reporter

I N D E X

<u>WITNESSES</u>	DIRECT	CROSS
DR. ANDREW BOSTOM	4	
DR. JAMES MCDONALD	48, 94	

E X H I B I T S

PLAINTIFFS'	IDENTIFICATION	FULL
21		4
23		7
24		12
25		16
27		20
31		43
DEFENDANTS'	IDENTIFICATION	FULL
M	68	
L1		88

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 112
inclusive, are a true and accurate transcript
of my stenographic notes.

ANDREA IACOBELLIS, CSR
Court Reporter

1

October 6, 2021

11:07:28

2

THE CLERK: Resuming the matter of

11:07:33

3

PC-2021-05915, Richard Southwell, et al vs. Daniel McKee.

11:07:39

4

THE COURT: Okay. We're continuing with

11:07:42

5

Dr. Bostom; is that correct?

11:07:43

6

MR. PICCIRILLI: Correct.

11:07:44

7

THE COURT: If you can come back up, please.

11:08:08

8

THE CLERK: I would just like to remind the

11:08:10

9

witness having been previously sworn in you are still

11:08:12 10

under oath. If you could just please state your name for

11:08:12 11

the record, please.

11:08:13 12

THE WITNESS: Andrew Bostom.

11:08:15 13

THE CLERK: Thank you.

11:08:16 14

CONTINUED DIRECT EXAMINATION BY MR. PICCIRILLI

11:08:19 15

Q

Dr. Bostom, I think we left off last time talking about

11:08:27 16

Covid mortality issues, and I'm going to show you now

11:08:36 17

Exhibit 21, which we have an agreement will be admitted

11:08:44 18

as full; correct?

11:08:49 19

MS. WYRZYKOWSKI: I'm sorry, yes.

11:08:53 20

THE COURT: Exhibit 21 is full.

11:08:55 21

THE CLERK: Plaintiffs' 21 full.

11:08:57 22

(PLAINTIFFS' EXHIBIT 21 WAS MARKED FULL)

11:08:57 23

Q

BY MR. PICCIRILLI: Doctor, can you explain what this

11:09:00 24

document is?

11:09:00 25

A

This is just taking data again from the Rhode Island

11:09:04 1 Department of Health website itself, the large Google
11:09:09 2 doc, and they have a break down, basic demographic
11:09:15 3 breakdown, and so if you look at it, since the beginning
11:09:18 4 of the pandemic through at least last Wednesday, they'll
11:09:22 5 update today again, I guess. Eighty percent of the Covid
11:09:25 6 deaths are among those greater or equal to 70 years old,
11:09:29 7 and 57 percent of the deaths are among those greater or
11:09:33 8 equal to 80 years old. And it's interesting to note that
11:09:36 9 the life expectancy in the state is about 79.9 years, so
11:09:42 10 about almost 50 percent of the deaths are occurring at or
11:09:46 11 above the life expectancy.

11:09:48 12 The other important information from that, which you
11:09:53 13 can get from the website not in this section, they have a
11:09:57 14 separate section about deaths and cases that occurred in
11:10:04 15 congregate care settings, including nursing homes or
11:10:08 16 elder assisted living facilities, and almost 50 percent
11:10:12 17 of the deaths in the State have occurred in those
11:10:14 18 facilities. So it's a very heavily age stratified
11:10:14 19 disease.

11:10:21 20 Q Thank you, Doctor. Next will be Exhibit 23, which I
11:10:25 21 believe is also agreed to as full?

11:10:27 22 MS. WYRZYKOWSKI: Agreed.

11:10:33 23 Q Again, Doctor, is this a document that you prepared?

11:10:36 24 A Yes.

11:10:37 25 Q Can you explain how you prepared it and what it shows?

11:10:42 1 A Yes. So the raw data in the figure are just case data
11:10:50 2 abstracted from again the large Google docs that's at the
11:10:54 3 Rhode Island Department of Health website for Covid. And
11:10:58 4 what you can see are various little indicators for when
11:11:02 5 mask mandates, mask mandates was first put in place and
11:11:07 6 then various extensions. And then there's a couple of
11:11:11 7 points in November of last year where you can see now
11:11:17 8 they have another extension of the mask mandate but also
11:11:21 9 survey data which indicates that Rhode Islanders were,
11:11:25 10 actually at the time the highest compliance in the United
11:11:29 11 States at 96 percent or "wearing the mask every time they
11:11:35 12 go out." So very high degree of compliance.

11:11:37 13 And what this actually shows is that there's really
11:11:40 14 no relationship, the virus behaves on its own, the cases
11:11:44 15 accumulate on their own independent of the mask mandate,
11:11:47 16 the extension of the mask mandate, the compliance with
11:11:51 17 the mask mandate. And, in fact, there's a huge spike,
11:11:55 18 the biggest we've had, hopefully will ever have, at a
11:12:00 19 point where the mask mandate is 96 percent in place and
11:12:04 20 the mask mandate has been extended for the fourth or
11:12:08 21 fifth time.

11:12:09 22 And, again, it just reiterates what actually was
11:12:12 23 observed 100 years ago by Kellogg, who was then the chief
11:12:20 24 public health officer, microbiologist, chief public
11:12:24 25 health officer in the State of California, and he was

11:12:27 1 reflecting upon their experience with the 1918 pandemic,
11:12:31 2 and he published a paper --

11:12:32 3 MS. WYRZYKOWSKI: Objection, your Honor, move
11:12:33 4 to strike, hearsay. It's not referenced in the document
11:12:37 5 either.

11:12:37 6 MR. PICCIRILLI: Doctor, do you have an
11:12:39 7 opinion?

11:12:41 8 THE COURT: We'll end the question there.

11:12:47 9 Q MR. PICCIRILLI: Okay. We'll end the question there,
11:12:51 10 Doctor, for now. Let me ask you this, Doctor --

11:12:53 11 THE COURT: I'm sorry, Mr. Piccirilli, I'm
11:12:54 12 missing something. You're now on Exhibit 22? I didn't
11:12:59 13 get the number.

11:13:01 14 MR. PICCIRILLI: That was 23. We had done 22
11:13:04 15 yesterday out of order.

11:13:06 16 THE COURT: I got you. And this is agreed
11:13:08 17 full?

11:13:10 18 MR. PICCIRILLI: Yes, 23 is agreed to be full.

11:13:12 19 THE COURT: By agreement 23 is full.

11:13:14 20 THE CLERK: 23 full.

11:13:17 21 **(PLAINTIFFS' EXHIBIT 23 IS MARKED FULL)**

11:13:17 22 Q Doctor, do you have an opinion as to whether or not masks
11:13:21 23 work to stop the spread of Covid?

11:13:23 24 A Yes.

11:13:24 25 Q And what do you base that opinion on?

11:13:26 1 A Um, to a certain extent, you know, observations like
11:13:30 2 these, but these are really what we call hypothesis
11:13:35 3 generating data. The way you would argue for or against
11:13:41 4 an interpretation that they don't work for the -- for
11:13:45 5 example, let's go back to the first mask mandate on the
11:13:47 6 figure. One could argue when this first issued on
11:13:53 7 April 18th it was a fact related to the fact that the
11:13:56 8 mask mandate was issued, that it only went up slightly
11:14:00 9 and then it began to go down, one could hypothesize that.

11:14:04 10 And this is the problem with observational data, you
11:14:08 11 can hypothesize frankly anything you want, but where the
11:14:11 12 rubber meets the road is when you do a randomized
11:14:15 13 controlled trial, for example, of masking.

11:14:19 14 Q So now, Doctor, do you also in your profession, in your
11:14:27 15 daily work, read articles from other epidemiologists from
11:14:35 16 other public health officials regarding the effectiveness
11:14:40 17 of masks?

11:14:41 18 A Yeah, all the time. Yes.

11:14:42 19 Q You started to reference a Dr. Kellogg. Can you tell us
11:14:45 20 who Dr. Kellogg is?

11:14:48 21 A Yes, he was the chief public health official in northern
11:14:51 22 California during the 1918 flu pandemic.

11:14:56 23 Q And was there an issue regarding masking of the
11:15:01 24 population during that pandemic in northern California?

11:15:05 25 A Oh, there absolutely was.

11:15:06 1 Q And what did Dr. Kellogg ultimately conclude?

11:15:11 2 MS. WYRZYKOWSKI: Objection, your Honor,
11:15:12 3 hearsay, and there's no underlying document to support
11:15:15 4 this statement.

11:15:17 5 MR. PICCIRILLI: The witness can testify as an
11:15:19 6 expert based on what he has reviewed as to --

11:15:25 7 THE COURT: And what's the basis for his
11:15:26 8 conclusion? You should ask that first.

11:15:27 9 Q Again, Doctor, I'm sorry, you come to the conclusion that
11:15:32 10 you don't believe masks have an effect on the spread of
11:15:36 11 COVID-19?

11:15:36 12 A Yes.

11:15:37 13 Q And you base that upon your reviewed data that we've
11:15:43 14 already talked about; correct?

11:15:44 15 A Yes. It's based on the experience with, well, like this
11:15:48 16 figure demonstrates. And also based upon the principal
11:15:54 17 of the lack of efficacy of masks vis-à-vis respiratory
11:15:59 18 virus in general, like influenza which is a very similar
11:16:05 19 particle. They're both about 100 nanometers.

11:16:05 20 Q And so, again, in forming your opinion about the
11:16:10 21 effectiveness or non effectiveness of masks, have you
11:16:14 22 also researched articles that other doctors,
11:16:20 23 epidemiologist, public health officials have written
11:16:24 24 about the subject?

11:16:25 25 A Yes.

11:16:26 1 Q And Dr. Kellogg wrote an article about the effectiveness
11:16:30 2 of masks?

11:16:31 3 A In the American Journal of Public Health published in
11:16:34 4 1920.

11:16:34 5 MS. WYRZYKOWSKI: Objection, your Honor. I'm
11:16:34 6 going to go with time frame and hearsay and relevancy on
11:16:36 7 this. We're talking about a study from 1920. It's over
11:16:41 8 100 years old, clearly medicine and science has developed
11:16:41 9 since that point in time.

11:16:43 10 THE WITNESS: It hasn't vis-à-vis masks.

11:16:47 11 THE COURT: If I can rule on the objection
11:16:50 12 without interruption. I don't know if it's related but
11:16:59 13 certainly we should look at it.

11:17:01 14 MR. PICCIRILLI: Thank you, your Honor.

11:17:02 15 Q So can you tell us what Dr. Kellogg wrote about the
11:17:08 16 subject back 100 years ago?

11:17:10 17 MS. WYRZYKOWSKI: Objection, your Honor, unless
11:17:11 18 I misunderstood. I thought we were talking about
11:17:14 19 bringing in the underlying article.

11:17:16 20 THE COURT: That would be hearsay.

11:17:18 21 MR. PICCIRILLI: Your Honor ruled, I think
11:17:19 22 yesterday, the witness, an expert witness, can rely upon
11:17:25 23 documents that he's reviewed that are not in evidence.

11:17:28 24 THE COURT: Well, but you're asking the Court
11:17:30 25 to rely on the finding whether or not Dr. Kellogg

11:17:33 1 concluded something. This is important.

11:17:36 2 THE WITNESS: I have the article here.

11:17:38 3 MR. PICCIRILLI: We have the article here.

11:17:39 4 THE COURT: You really got to talk to counsel
11:17:42 5 before instead of interrupting during an objection.

11:17:42 6 MR. PICCIRILLI: I'm sorry.

11:17:50 7 THE COURT: Sustained at this point.

11:18:02 8 MR. PICCIRILLI: We'll move on.

11:18:05 9 THE COURT: It's important. If you want to
11:18:07 10 take a five minute break.

11:18:09 11 MR. PICCIRILLI: We can come back to it, Judge.
11:18:10 12 I'll finish with what we have.

11:18:13 13 THE WITNESS: I'd like to take a 5 minute
11:18:16 14 break.

11:18:17 15 THE COURT: That's okay. That's my fault,
11:18:18 16 Doctor. Are you doing okay today? Come on, let's get
11:18:20 17 through this.

11:18:21 18 MR. PICCIRILLI: Thank you.

11:18:22 19 Q Judge, I'll show you -- Doctor, I'll show you the next
11:18:27 20 Exhibit 24, which I also believe is a full exhibit.

11:18:32 21 MS. WYRZYKOWSKI: Correct. We have no
11:18:33 22 objection.

11:18:34 23 THE COURT: Thank you. 24 is full.

11:18:36 24 THE CLERK: Plaintiffs' 24 full.

11:18:41 25 **(PLAINTIFFS' EXHIBIT 24 WAS MARKED FULL)**

11:18:41 1 Q Doctor, what is this article?

11:18:43 2 A So this is from an actual peer reviewed journal published
11:18:47 3 by the CDC called Preventing Chronic Disease. And to cut
11:18:52 4 to the chase, what it looks at is the vast cohort of
11:18:58 5 hospitalized patients through a registry that was
11:19:03 6 analyzed.

11:19:03 7 And if you go to the relevant table, which would be
11:19:25 8 right, so it would be on Page 9, all the way to the right
11:19:32 9 hand side. It says the column that is marked "died." If
11:19:38 10 you look at it you will see that what is quite striking
11:19:44 11 about Covid is that 99.1 percent of the population has at
11:19:51 12 least one major comorbidity.

11:19:55 13 And if you go down a little further, you can see
11:19:58 14 that basically pooling those with six to ten, or those
11:20:04 15 with greater than ten comorbidities, it comes to 64
11:20:09 16 percent of the people. So this is a disease of high
11:20:15 17 comorbidity and that's the purposes of the --

11:20:17 18 THE COURT: Of the what?

11:20:17 19 THE WITNESS: People with multiple, multiple
11:20:19 20 comorbidities.

11:20:26 21 THE COURT: With multiple?

11:20:28 22 THE WITNESS: Comorbidities, chronic
11:20:29 23 conditions.

11:20:29 24 Q So what the article refers to as underlying conditions,
11:20:33 25 is that the same thing as comorbidity?

11:20:36 1 A That's right.

11:20:37 2 Q All right. The next Exhibit 25, there is no objection
11:20:42 3 to.

11:20:43 4 MS. WYRZYKOWSKI: Yes.

11:20:44 5 Q Before I ask a question about this, can I get some
11:20:49 6 background first?

11:20:50 7 MS. WYRZYKOWSKI: Your Honor, I'm sorry,
11:20:53 8 Mr. Piccirilli.

11:20:54 9 Q So, Doctor, before you refer to this exhibit, again in
11:20:59 10 your field --

11:21:01 11 THE COURT: Sir, the number of conditions are
11:21:02 12 what you refer to as the comorbidity on Exhibit 24?

11:21:07 13 THE WITNESS: Yes, your Honor.

11:21:08 14 MR. PICCIRILLI: Your Honor, we switched
11:21:10 15 Exhibit 24, we removed it and replaced it. Is it
11:21:14 16 different?

11:21:14 17 THE CLERK: Its been scanned in, your Honor.
11:21:24 18 You're looking at the right one, your Honor.

11:21:26 19 THE COURT: Okay. So on Table 1, Page 9 of
11:21:29 20 Exhibit 24, which was the last one you were talking
11:21:34 21 about.

11:21:35 22 THE WITNESS: This one.

11:21:36 23 THE COURT: You talked about comorbidities on
11:21:39 24 Page 9.

11:21:40 25 THE WITNESS: Yes.

11:21:40 1 THE COURT: But it says, it says conditions.

11:21:44 2 THE WITNESS: I'm using the synopsis, chronic
11:21:47 3 condition.

11:21:48 4 THE COURT: Okay. Thank you. Chronic
11:21:50 5 condition. Thank you. Sorry, I just wanted to make
11:21:53 6 sure.

11:21:53 7 THE WITNESS: I apologize for not being clear.

11:21:56 8 THE COURT: And now you're on page?

11:21:58 9 MR. PICCIRILLI: Twenty-five.

11:21:59 10 Q So again, Doctor, before we get to the exhibit.

11:22:02 11 A I want to make sure, this is the one that's marked
11:22:06 12 Centers for Disease Control and Prevention on Masking?

11:22:08 13 Q Correct?

11:22:09 14 A Okay.

11:22:10 15 Q So, Doctor, again in your profession, in your training,
11:22:15 16 your skill, education, prior to March of 2020, are you
11:22:24 17 aware whether the Centers For Disease Control had a
11:22:27 18 position on whether or not masking worked to prevent
11:22:32 19 respiratory viruses?

11:22:33 20 A Oh, I wasn't aware of what their position was until they
11:22:40 21 issued this statement.

11:22:41 22 Q Okay. So you went back and tried to discover what the
11:22:45 23 CDC's position was pre March of 2020?

11:22:49 24 A Well, I remember this and sure, that triggered my
11:22:55 25 interest.

11:22:55 1 Q All right. Now, when you say, "this" you're referring to
11:22:58 2 Exhibit 25; correct?

11:22:59 3 A Yes.

11:23:00 4 Q And where did you find the information that's on
11:23:03 5 Exhibit 25?

11:23:04 6 A On Twitter.

11:23:06 7 Q And is it the official CDC website?

11:23:09 8 A Right.

11:23:09 9 Q So not only does the CDC put out old fashion paper
11:23:14 10 documents, not only do they put out articles on their
11:23:20 11 website, but apparently they also tweet?

11:23:23 12 A Yes.

11:23:23 13 Q Okay. And so you copied this tweet from the CDC's
11:23:29 14 official website?

11:23:30 15 A Yes.

11:23:30 16 Q Just like you've been copying documents, almost all the
11:23:35 17 CDC exhibits are from the website; right?

11:23:39 18 A Yeah.

11:23:39 19 MR. PICCIRILLI: I move this as a full exhibit.

11:23:41 20 MS. WYRZYKOWSKI: And the State objects, your
11:23:42 21 Honor. The State objects to this document because it's
11:23:45 22 based upon pre global pandemic, which is what we agreed
11:23:48 23 to discuss today. I understand the Court's ruling but I
11:23:51 24 just want to note it's from February 27, 2020, which is
11:23:54 25 marked on the document. The global pandemic wasn't

11:23:57 1 proved to be in the United States until October, excuse
11:23:58 2 me, March of 2013 (sic).

11:24:24 3 THE COURT: So pre pandemic but they know about
11:24:28 4 the Corona virus. It's February 2020, right?

11:24:29 5 MR. PICCIRILLI: The Corona virus is mentioned
11:24:32 6 right in the tweet.

11:24:33 7 MS. WYRZYKOWSKI: Correct, your Honor.

11:24:37 8 THE COURT: Exhibit 25 is full.

11:24:38 9 MR. PICCIRILLI: Thank you.

11:24:40 10 THE CLERK: Plaintiffs' 25 is full.

11:24:40 11 **(PLAINTIFFS' EXHIBIT 25 WAS MARKED AS FULL)**

11:24:44 12 Q Doctor, since that tweet in February of 2020, have there
11:24:50 13 been, to your knowledge in your field, have there been
11:24:53 14 any randomized controlled trials to determine the
11:24:58 15 effectiveness of masks in preventing the spread of Corona
11:25:04 16 virus?

11:25:04 17 A Yes.

11:25:05 18 Q There have been randomized controlled trials?

11:25:09 19 A Yes, of Corona virus, yes, and influenza published since
11:25:15 20 this, since this tweet, you know, was issued.

11:25:18 21 Q And what have those randomized controlled trials found?

11:25:25 22 A So --

11:25:27 23 MS. WYRZYKOWSKI: Objection, your Honor,
11:25:29 24 hearsay. We don't have a basis.

11:25:36 25 THE COURT: Can we just deal with the studies.

11:25:38 1 Sustained.

11:25:39 2 Q Let's do Exhibit 26 next. This is, I believe, without
11:25:53 3 objection?

11:25:54 4 MS. WYRZYKOWSKI: Correct.

11:25:56 5 THE COURT: You mean full without objection?

11:25:59 6 MS. WYRZYKOWSKI: Correct, your Honor.

11:26:00 7 THE COURT: 26 is full.

11:26:01 8 THE CLERK: Plaintiffs' 26 is full.

11:26:05 9 Q Let's back up for a minute, Doctor. What is this? What
11:26:09 10 does this document represent?

11:26:10 11 A Well, I hope it represents that we come to appreciate
11:26:19 12 randomized controlled trials as the highest standard of
11:26:22 13 evidence that we can produce given our own imperfection
11:26:26 14 to conduct studies because of the eight characteristics
11:26:29 15 that randomized controlled trials have when it comes to
11:26:33 16 weighing evidence and this goes back 60 years.

11:26:36 17 This goes back to monograph that was produced by
11:26:40 18 Campbell and Stanley, and it was very clear even in the
11:26:43 19 title, there are experimental designs and there are quasi
11:26:46 20 experimental designs for research.

11:26:48 21 And the only one that fits, a true experimental
11:26:51 22 design is a randomized control trial where you have
11:26:55 23 parallel groups and randomization. And they went through
11:26:58 24 describing why that is because there are intractable
11:27:02 25 biases, also known as confounders, that the only true

11:27:06 1 experimental design for randomized control trial gets rid
11:27:11 2 of to the best of our ability.

11:27:12 3 And these confounders, these biases, are just an
11:27:18 4 inherent part of all observational studies and non
11:27:22 5 randomized design without parallel control groups, and
11:27:26 6 that's why they call them stocking experimental. And we
11:27:30 7 can attempt to deal with these biases after the fact but
11:27:33 8 there's actually a very limited ability to do that.

11:27:39 9 Moreover, the process of randomization allows things
11:27:42 10 that we didn't even consider that may actually turn out
11:27:46 11 to be important, to be equally represented in the two
11:27:49 12 groups.

11:27:50 13 So let's say some risk factor that's actually
11:27:53 14 important, for example for Covid is discovered later on,
11:27:57 15 you can be sure by the basis of the randomization process
11:28:00 16 if the trial is properly designed and large enough that
11:28:04 17 those unknown factors were equally represented in the two
11:28:08 18 groups, and that is unique to a randomized controlled
11:28:11 19 trial.

11:28:12 20 And we don't have to just go back to Campbell and
11:28:15 21 Stanley 60 years ago. You know, in a more, in a more
11:28:20 22 mundane way, dealing more specifically with clinical
11:28:26 23 issues, Guyette published a paper in the British medical
11:28:33 24 journal in 2008.

11:28:34 25 MS. WYRZYKOWSKI: Objection, your Honor.

11:28:35 1 THE WITNESS: The basic idea --

11:28:37 2 THE COURT: If you would, please. What's the
11:28:39 3 objection?

11:28:39 4 MS. WYRZYKOWSKI: Your Honor, the document is
11:28:40 5 not in evidence. He's not referencing this document
11:28:43 6 here. Oh, I'm sorry. I apologize. You're right. I
11:28:45 7 apologize.

11:28:46 8 THE COURT: If you can go to another question
11:28:48 9 so we don't get any narratives.

11:28:49 10 Q Yes. So, Doctor, on the second bullet point of this
11:28:52 11 exhibit, you reference a study by someone named Guyette,
11:28:57 12 2008?

11:28:57 13 A Yes.

11:28:58 14 Q What does that study show?

11:29:01 15 A It's really just spilling out how you -- how you
11:29:06 16 determine what is the most important evidence when you're
11:29:10 17 dealing with any clinical situation. Again, it could be,
11:29:14 18 it could be treating Covid. It could be whether you're
11:29:17 19 going to use masks or not to prevent Covid.

11:29:20 20 And the point is it comes all the way back to what
11:29:24 21 Campbell and Stanley described in a more broad and
11:29:29 22 theoretical way, in a very practical way. And the
11:29:31 23 ultimate recommendations are that when you're looking at
11:29:34 24 evidence, from something as complicated for example as
11:29:40 25 vaccine administration, to something as seemingly simple

11:29:45 1 as math administration, you use the randomized control
11:29:49 2 trial, the graded the quality of evidence, as actually
11:29:54 3 having many, many high quality randomized trials before
11:29:58 4 you would launch into, and this is very important, before
11:30:01 5 you would launch into a recommendation, let alone a
11:30:05 6 mandate. That's very important and very germane to
11:30:09 7 what's going on.

11:30:10 8 Q Thank you. Showing you next Exhibit 27, which I believe
11:30:15 9 is also agreed to as full.

11:30:17 10 MS. WYRZYKOWSKI: Agreed. No objection.

11:30:21 11 **(PLAINTIFFS' EXHIBIT 27 WAS MARKED AS FULL)**

11:30:21 12 Q Doctor, previously we were talking about whether there
11:30:27 13 had been randomized controlled trials for masking?

11:30:30 14 A Right.

11:30:30 15 Q Did you prepare this document?

11:30:32 16 THE COURT: That doesn't say mandate, does it?

11:30:36 17 MR. PICCIRILLI: I'm sorry?

11:30:38 18 TH COURT: Going back to Exhibit 26, you say
11:30:41 19 you used a randomized control trial before you get to a
11:30:44 20 recommendation. It says that by the Guyette study.

11:30:44 21 THE WITNESS: Guyette, yes.

11:30:52 22 THE COURT: It says before you make a
11:30:54 23 recommendation, you rely on something very reliable such
11:31:00 24 as a randomized control study.

11:31:03 25 THE WITNESS: Yes.

11:31:03 1 THE COURT: It doesn't say that about
11:31:05 2 mandates.

11:31:07 3 MR. PICCIRILLI: Your Honor, I think the
11:31:07 4 witness testified that you would need even more strength
11:31:12 5 and evidence to go to a mandate as opposed to a
11:31:15 6 recommendation.

11:31:16 7 THE COURT: He doesn't get that from here.
11:31:20 8 That's not what Exhibit 26 says; right?

11:31:23 9 MR. PICCIRILLI: Judge --

11:31:23 10 THE COURT: I just want to make sure that
11:31:26 11 Guyette didn't say that was required for a mandate. It
11:31:29 12 was required for the strength of the recommendation.
11:31:33 13 Q Doctor, when you testified that you would need -- that
11:31:41 14 you would want to see these randomized controlled trials
11:31:46 15 to make a recommendation, let alone a mandate, why did
11:31:50 16 you say also "let alone a mandate"? Again, based upon
11:31:53 17 your experience, training, education, why would you add
11:32:01 18 the qualifier, let alone mandate?

11:32:02 19 A Because a mandate is involuntary and what I'm saying is
11:32:06 20 that just to get to the standard of something voluntary
11:32:10 21 that's being recommended, you have to have the standard
11:32:13 22 of evidence.

11:32:14 23 It should be at least as high if not higher for an
11:32:18 24 absolute mandate. That was my only point.

11:32:20 25 Q Again, going back to Exhibit 27, did you prepare this

11:32:27 1 document?

11:32:27 2 A Yes. This is what starts with 13 randomized.

11:32:32 3 Q Correct?

11:32:33 4 A Okay.

11:32:34 5 Q So, Doctor, what did you do to prepare this document?

11:32:38 6 What did you review?

11:32:41 7 A So, if we're going to use -- we're going to go back to
11:32:45 8 the tweet. I was trying to understand the tweet when it
11:32:49 9 came out, and not long, not that long after the tweet
11:32:53 10 came out there was actually what's called a medicine
11:32:58 11 analysis published. It's an available prepublication and
11:33:03 12 then it's finally published actually a couple months
11:33:07 13 after the tweet that was discussed earlier.

11:33:11 14 But that med analysis came out again after the
11:33:17 15 tweet, and I was actually quite shocked by it because it
11:33:22 16 it pooled evidence, even though it was the pre Corona
11:33:27 17 virus period. It pooled evidence from very similar -- it
11:33:30 18 certainly in terms of size, spread, et cetera, virus,
11:33:34 19 mostly flu studies and pooled evidence from ten
11:33:41 20 individual studies, that's all studies under C in the
11:33:45 21 figure.

11:33:46 22 And not only, the reason they pooled them was
11:33:49 23 because they were hoping to see that even though each of
11:33:52 24 the individual studies on its own was negative, these are
11:33:56 25 randomized control trials of primarily flu prevention.

11:34:00 1 They were hoping that maybe a trend in these studies that
11:34:04 2 they had missed, because they didn't have enough of what
11:34:07 3 we call statistical powers, was missed by pooling all the
11:34:11 4 data and then reevaluating them and saying now we have
11:34:15 5 enough data, we can pick up more sensitively a positive
11:34:15 6 trend.

11:34:20 7 And so even after pooling all the data together and
11:34:25 8 reanalyzing it in over 6,000 patients, there was still no
11:34:31 9 statistically significant benefit of masking. And again,
11:34:34 10 my curiosity was peaked because this was published after
11:34:39 11 the CDC recommendation. So, if anything, it would
11:34:43 12 validate the CDC recommendation that masking was not
11:34:48 13 going to be effective.

11:34:49 14 Q Okay. The next page, Doctor, what does that represent?
11:34:56 15 Are these just some of the studies that were included or
11:35:00 16 are these different?

11:35:00 17 A These are independent studies, and that's why I included
11:35:02 18 them. So chronologically we have the meta analysis that
11:35:07 19 pools together ten studies that are clearly from the
11:35:11 20 pre Covid era. These are flu primarily. And we see
11:35:17 21 absolutely no evidence in randomized control settings of
11:35:20 22 a benefit of masking.

11:35:24 23 An enormous study of Hodge programs came out
11:35:29 24 actually in October of 2020. So now we're well past all
11:35:32 25 the discussion and imposition of mask mandates, etc, yet

11:35:37 1 more evidence of the ineffectiveness of masking in over
11:35:43 2 6,000 Hodge pilgrims in one single study.

11:35:47 3 Moreover, this study actually had a suggestion that
11:35:52 4 those pilgrims that were randomized with masking actually
11:35:57 5 had more infections of influenza and rhinovirus, although
11:36:03 6 it didn't reach statistical significance, but there was a
11:36:06 7 suggestion. But certainly it was a very, what we would
11:36:09 8 say negative or null study again in October of 2020 when
11:36:14 9 this was published.

11:36:16 10 Now caveat, important caveat, this is -- this was
11:36:20 11 such an enormous study. It was actually conducted prior
11:36:24 12 to the Corona virus era but only analyzed and reported
11:36:30 13 well into it.

11:36:31 14 So that's an important caveat and it's still
11:36:35 15 focusing on influenza.

11:36:37 16 Q The next bullet point, Doctor, is another study.

11:36:40 17 A This is the most relevant study. This is a study
11:36:44 18 conducted by Danish investigators in the SARS era,
11:36:49 19 specifically to look at SARS in a randomized control
11:36:52 20 trial. And once again, in a very large study where close
11:36:55 21 to 5,000 persons completed it, they found that masking
11:36:59 22 did not reduce the COVID-19 infection rate to any
11:37:04 23 statistical significant extent or to a clinically
11:37:08 24 relevant extent.

11:37:09 25 And they, again, they piece through the data and

11:37:13 1 what's called the secondary analysis and they looked only
11:37:16 2 at participants who reported wearing the masks "exactly
11:37:21 3 as instructed". And if anything that narrowed the
11:37:25 4 difference between the two groups to something that was
11:37:29 5 truly meaningless and certainly statistically not
11:37:32 6 significant.

11:37:32 7 Q And lastly, Doctor, the last page you reference a
11:37:37 8 Bangladesh study?

11:37:39 9 A Yes. So this has been issued, it's the largest study by
11:37:46 10 far that I'm aware of. This is a study that I understand
11:37:51 11 if you look at the registry from clinical trials.gov,
11:37:58 12 which is the registry, registry through the National
11:38:02 13 Institute of Health.

11:38:03 14 There is another study in New Guinea that apparently
11:38:08 15 has been completed. But there's no reporting on it.
11:38:11 16 That's about 45,000.

11:38:13 17 This is even bigger. Its been reported and
11:38:15 18 published in endless preprints, like almost 100 page,
11:38:25 19 and this was a randomized control trial of community
11:38:29 20 masks, which looked at essentially three group, no
11:38:32 21 masking, cloth masking and masks like, maybe like wearing
11:38:37 22 a paper mask. And the cloth mask finding, relative to
11:38:43 23 the control group, is absolutely negative. There was no
11:38:47 24 benefit found whatsoever.

11:38:49 25 There was some odd contradictory findings that were

11:38:52 1 reported about surgical masks for some reason that makes
11:38:56 2 no biological sense. It was somehow selectively a
11:39:01 3 benefit limited to only those over 50 years of age and
11:39:07 4 absolutely no benefit in those less than 50 years of age.
11:39:10 5 So that sort of does not really sound terribly plausibly
11:39:16 6 biologically.

11:39:16 7 But the point is that the absolute reduction overall
11:39:21 8 in the paper mask group was .09 percent. So as a decimal
11:39:29 9 that's .0009. What that means, if that held up in any
11:39:35 10 meaningful way, would mean that that you would have to
11:39:39 11 mask 10,000 people to potentially prevent 9 mildly to
11:39:48 12 almost asymptomatic infection, if that indeed held up
11:39:54 13 with surgical masks.

11:39:56 14 So that is an infinitesimally small clinically
11:40:03 15 irrelevant benefit. And, again, it's very odd because
11:40:06 16 why would that only occur in people who are 50 years of
11:40:10 17 age and older.

11:40:11 18 So overall my take, as a political trial, as an
11:40:16 19 epidemiologist, this is a null study.

11:40:19 20 Q And again, Doctor, part of your expert opinion that
11:40:26 21 masking doesn't work to stop the spread of Corona virus
11:40:30 22 was based upon these 13 studies that you just testified
11:40:33 23 to; correct?

11:40:34 24 A I think this is the most definitive negative evidence by
11:40:38 25 far.

11:40:39 1 Q Next, Doctor, I'm going to show you Exhibit 28, which is
11:40:43 2 not agreed to. And before we talk about that I'm going
11:40:48 3 to ask you some questions.

11:40:51 4 So first, Doctor, before we refer to the exhibit.
11:40:56 5 In addition to determining the effectiveness of masks
11:41:02 6 have you also looked into whether wearing masks can be
11:41:06 7 potentially harmful?

11:41:07 8 A Yes.

11:41:07 9 Q And what did you do to analyze whether or not masks are
11:41:13 10 potentially harmful?

11:41:15 11 A Again, it's a question of reviewing the literature.

11:41:18 12 Q Okay. And have you come to a conclusion or an opinion,
11:41:24 13 based upon your review of the literature, as to whether
11:41:28 14 or not wearing masks can be potentially harmful?

11:41:30 15 A Yes, I think, I think there's -- I think there is --

11:41:33 16 MS. WYRZYKOWSKI: Objection, your Honor. It
11:41:34 17 was a yes or no question.

11:41:37 18 THE COURT: That's true.

11:41:38 19 A The first part, yes.

11:41:40 20 Q Doctor, what is your opinion?

11:41:41 21 A An important caveat. This is not comparable to the
11:41:50 22 previous evidence that I just discussed. In other words,
11:41:52 23 this is a weaker grade of evidence, but there's a
11:41:55 24 suggestion there that masks could be not only infective
11:42:00 25 but they could be doing harm.

11:42:03 1 MS. WYRZYKOWSKI: Objection, your Honor. Move
11:42:05 2 to strike. His field of expertise is in epidemiology not
11:42:11 3 the ability of alleged harm. And if you look at Exhibits
11:42:14 4 28, 29, which has not been entered yet but for
11:42:18 5 identification, he's going to be talking about the
11:42:21 6 psychological vision problems with children.

11:42:23 7 In addition, we don't know if he reviewed the
11:42:27 8 literature in order for him to come to his conclusions.
11:42:29 9 And, again, it's outside his skill of expertise.

11:42:32 10 THE COURT: So for where he is now,
11:42:35 11 epidemiologist, from what I believe he's been found to be
11:42:39 12 an expert in, do deal with risks. That's what they do.
11:42:45 13 That is their field of specialty.

11:42:48 14 My concern is that he says they may be more harmful
11:42:53 15 suggests that the mask may be more harmful, and an
11:42:57 16 expert's opinion must be given with a certainty. There
11:43:01 17 is no certainty in that. I'm not going to strike it.
11:43:09 18 I'll leave it for what it is. I'm not sure that that is
11:43:13 19 helpful to the factfinder.

11:43:15 20 MR. PICCIRILLI: Thank you, your Honor.

11:43:15 21 Q Doctor, let's go to Page 2 first of this document. Did
11:43:23 22 you review the studies that are listed here?

11:43:26 23 A Yes.

11:43:27 24 Q Okay. The first study that you reviewed, can you explain
11:43:36 25 what that was?

11:43:37 1 A Yes. So this is a report of ICU nurses. It's not a
11:43:44 2 random, it's not a randomized control trial, and this is
11:43:47 3 why I'm hesitant about the data.

11:43:50 4 So I have certain standards for data. I would
11:43:53 5 review these studies by and large with the possible
11:43:56 6 exemption of the one that was a randomized controlled
11:43:59 7 crossover study of the masking in children, N95 masking
11:44:02 8 in children, as being more hypothesis generated, but
11:44:06 9 that's what's out there. I only reviewed the literature
11:44:10 10 as it exists.

11:44:11 11 So to get back to the first study, this is a study
11:44:16 12 of ICU nurses suggesting that if they are wearing masks
11:44:22 13 during a shift, and that's an extended period of time.
11:44:25 14 There's not a very short, brief duration wearing of a
11:44:28 15 mask. The symptoms that they were reporting were
11:44:34 16 associated with small, small increases in their blood CO2
11:44:40 17 levels, which didn't reach what we call the hypercapnic
11:44:44 18 range, which can be quite serious, but did at least
11:44:47 19 orally with the symptoms that they're reporting and I
11:44:50 20 thought that was a signal.

11:44:51 21 Q The next bullet point, what was that study?

11:44:55 22 A This is, again, not high grade evidence but it's a
11:45:01 23 signal. It's based on a cross sectional, just a survey,
11:45:04 24 of the residents in Singapore that was just put out. The
11:45:10 25 thing that struck me was, again, they're talking more

11:45:12 1 about prolonged use of masking. And that, according to
11:45:15 2 these respondents, was associated when they wearing masks
11:45:21 3 for more than three hours, was associated with what's
11:45:24 4 called dyspnea, shortness of breath, particularly with
11:45:28 5 moderate or physical activity. And apparently even worse
11:45:31 6 with the use of an N95 mask.

11:45:34 7 Q And then the last --

11:45:37 8 MS. WYRZYKOWSKI: I'm sorry, so sorry. Your
11:45:38 9 Honor, I requested that Dr. McDonald be excused at 11:45
11:45:42 10 for his conference.

11:45:45 11 THE COURT: Sure. Could counsel approach for a
11:45:49 12 minute.

11:47:08 13 (Bench conference)

11:47:08 14 THE COURT: We're going to keep going for about
11:47:10 15 15 minutes or so.

11:47:12 16 Q BY MR. PICCIRILLI: So, Doctor, I think we're on the
11:47:14 17 third bullet point, regarding the children and N95 masks?

11:47:18 18 A Right. So this is the kind of evidence that I'm more
11:47:22 19 comfortable with. This is what's called a randomized
11:47:26 20 crossover study. So the subject is first intervened upon
11:47:34 21 in random order versus a controlled variant, so it's a
11:47:40 22 stronger design, in my opinion.

11:47:42 23 And, again, simply what -- there's been discussion
11:47:46 24 of the possibility of using, utilizing N95 masks in kids,
11:47:54 25 and I thought that this was an interesting study, pre

11:47:57 1 Covid era, to suggest that that might not be a great
11:48:01 2 idea. Because within five minutes, a very short period
11:48:06 3 of time during the mask period, there was a significant
11:48:09 4 increase in their blood CO2 concentrations versus the
11:48:13 5 control when they were unmasked. So that was a signal to
11:48:17 6 me that this might not be a great idea.

11:48:19 7 Q And then on the bottom of the last bullet point, what
11:48:24 8 does that study show?

11:48:25 9 A So there had been some lay press reports about masks
11:48:31 10 analyzed for contaminants after long use, and it was
11:48:40 11 difficult to make any sense of them. So I was, I was
11:48:45 12 curious when I did some research and found that in fact
11:48:49 13 an appropriate clinical study, again, not, not controlled
11:48:55 14 to the standard of a randomized control trial, but a
11:49:00 15 study that at least looked at this practical clinical
11:49:04 16 setting, and this was a study of a surgeon who had their
11:49:07 17 masks cultured within, again, it's more the function of
11:49:11 18 time, the prolong period of usage. In this case two
11:49:16 19 hours in the operating room and the masks were examined
11:49:20 20 and cultured. I think they were prepared to a control
11:49:26 21 mask, a mask that had not been opened, a mask that was
11:49:30 22 not utilized, right out of the box and then examined.

11:49:34 23 And there was evidence that there were multiple
11:49:37 24 pathogens that were in the culture. In fact, the
11:49:40 25 investigators made a recommendation that perhaps there

11:49:43 1 should be more of a policy change such that masks were
11:49:48 2 changed more frequently. Certainly if the procedure, it
11:49:51 3 can be very long procedures in the OR, but if the
11:49:55 4 procedure was going beyond two hours, maybe there should
11:49:58 5 be a change in masks.

11:50:00 6 Q Thank you, Doctor. Now, to go back to Page 1. But
11:50:04 7 before we do that you've qualified your answer a few
11:50:07 8 times about your concerns that these studies are not
11:50:11 9 randomized controlled studies, or to the level that you
11:50:14 10 would like to see but are more observational, was that
11:50:18 11 your testimony?

11:50:18 12 A Yes, yes.

11:50:19 13 Q So just to be clear, Doctor, you were here during the
11:50:22 14 testimony of Dr. McDonald; correct?

11:50:24 15 A Yes.

11:50:24 16 Q Dr. McDonald referenced a number of studies in his
11:50:29 17 testimony, did he not?

11:50:30 18 A Yes. A number of reports from Morbidity and Mortality
11:50:34 19 Weekly Report. The ones that were put out.

11:50:37 20 Q Were any of those studies randomized control studies?

11:50:41 21 A Not at all.

11:50:42 22 Q They were all observational?

11:50:43 23 A They were all observational. One even qualified, and I
11:50:46 24 would agree with him, as an ecologic study.

11:50:50 25 Q So although the studies you reference in this document

11:50:55 1 maybe don't rise to the level of your comfort because
11:50:58 2 they're not randomized control. Certainly nothing that
11:51:02 3 the State has introduced would rise to that level either
11:51:04 4 to show whether or not masks are effective or whether or
11:51:07 5 not masks are harmful; correct?

11:51:07 6 A Absolutely not.

11:51:09 7 MS. WYRZYKOWSKI: Objection, your Honor.

11:51:10 8 THE COURT: What's the objection.

11:51:12 9 MS. WYRZYKOWSKI: The question asked was if it
11:51:15 10 held to his standard. His standard as an epidemiologist?
11:51:19 11 His standard -- there was no foundation laid for that
11:51:21 12 question.

11:51:21 13 MR. PICCIRILLI: Well, I think he's already
11:51:23 14 testified quite clearly that he thinks the gold standard
11:51:26 15 of testing is randomized control.

11:51:27 16 THE COURT: Well, let's not give him the
11:51:28 17 answers. If you could rephrase the question and he
11:51:30 18 answers.

11:51:30 19 Q BY MR. PICCIRILI: Okay, Doctor, lets just go over it
11:51:34 20 again. You testified about randomized control testing;
11:51:39 21 correct?

11:51:39 22 A Yes.

11:51:40 23 Q And the difference between a RCT and some other kind of
11:51:45 24 test or study; correct?

11:51:46 25 A Yes.

11:51:47 1 Q What's the other kind of study?

11:51:49 2 A So they're basically observational studies. They don't
11:51:54 3 have a parallel control group. They don't have a
11:51:57 4 randomized design.

11:51:58 5 Q And you testified that it concerns, as an epidemiologist
11:52:02 6 that observational studies are not as good as RCT
11:52:06 7 studies; correct?

11:52:07 8 A Well, I think we were establishing evidence of
11:52:10 9 therapeutics, again, something as simple as masks,
11:52:13 10 something more complicated like a vaccine or a drug.

11:52:16 11 Q And I asked you, Doctor, if you had reviewed the evidence
11:52:21 12 that the State has produced of studies with regard to
11:52:26 13 masks.

11:52:26 14 A Yes.

11:52:27 15 Q And your testimony, they were all observational, none of
11:52:29 16 them were randomized control trials?

11:52:31 17 A All observational, zero randomized control trials.
11:52:35 18 That's what was presented.

11:52:36 19 Q In your opinion as an epidemiologist, does that raise a
11:52:40 20 concern for you?

11:52:41 21 A Yes. They're using much lower standards of evidence upon
11:52:45 22 which they base their recommendation.

11:52:47 23 Q So now when you did your Exhibit 28, you had to rely upon
11:52:53 24 none RCT studies, correct, for the most part?

11:52:56 25 A Yes, again, with the sort of exception of this randomized

11:53:01 1 crossover design. But remember I caveat that too.

11:53:05 2 That's not parallel group, that's the same person in a
11:53:10 3 random order. That doesn't have the same strength. It's
11:53:14 4 better but it doesn't have the same strength as a true
11:53:17 5 randomized control design.

11:53:19 6 Q Now, Doctor, I'll ask you this, are you aware of whether
11:53:26 7 or not there has ever been a study in the United States,
11:53:31 8 randomized control trial of either the affect of -- let's
11:53:36 9 start with this. The effectiveness of masks, with regard
11:53:39 10 to Corona virus?

11:53:41 11 A No. The ones that I mentioned, one was conducted in
11:53:46 12 Denmark and the other -- and these are adults, let alone
11:53:50 13 children. It's actually a separate issue. The
11:53:54 14 randomized controlled trials that I mentioned specific to
11:53:58 15 Corona virus were the DANMASK trial in Denmark, and the
11:54:02 16 enormous mask study. So those are the only two.

11:54:06 17 And, again, if you go to the Papua.gov website there
11:54:12 18 is a large study in New Quinea Papua that apparently has
11:54:16 19 been completed but not recorded.

11:54:16 20 Q So, Doctor, you also qualified that by saying these were
11:54:21 21 not tests of children in school; is that correct?

11:54:24 22 A Oh, none of them. The closest you could even infer
11:54:29 23 getting down to the youngest age reached was 18
11:54:33 24 specifically on a college campus. But, no, nothing
11:54:37 25 nothing in school, nothing below the age of 18, no

11:54:42 1 randomized studies.

11:54:43 2 Q So, Doctor, let me see if I understand this. We're about
11:54:47 3 18 months into this pandemic; correct?

11:54:50 4 A Yes.

11:54:50 5 Q Okay. And are you aware, just to be clear, are you aware
11:54:57 6 of any randomized controlled studies that has been
11:55:02 7 conducted since March of 2020 through today to determine
11:55:08 8 whether or not masking children in schools is effective?

11:55:12 9 A Zero. None.

11:55:15 10 Q Are you aware of any randomized controlled studies from
11:55:19 11 March of 2020 to today to determine whether or not
11:55:24 12 children wearing masks in schools might be potentially
11:55:27 13 harmful?

11:55:28 14 A No. And that by design should actually be apart of the
11:55:34 15 efficacy trial.

11:55:34 16 Q So both the effectiveness and the potential risk?

11:55:38 17 A Right. And in fact if you wanted to truly gauge harm, if
11:55:43 18 you assumed that maybe the harms were rare for argument
11:55:48 19 sake, you would have to make the trial even larger.

11:55:50 20 Q So now, Doctor, going back to Page 1, do you find that as
11:55:58 21 in your expert opinion as an epidemiologist, what is your
11:56:01 22 opinion about the fact that no one in this country has
11:56:04 23 done a study to determine either the effectiveness or the
11:56:08 24 potential harm of wearing masks in school for children?

11:56:11 25 A Um, in Yiddish you can say it's a shun.

11:56:16 1 Q Well, you have to say it in English, Doctor?

11:56:17 2 A It's a shame.

11:56:18 3 Q It's a shame?

11:56:19 4 A It's a shame. It's an outlandish shame.

11:56:22 5 Q Doctor, do you know who Dr. Marty Makary is?

11:56:26 6 A Yes, I do. He was a transplant surgeon that does

11:56:35 7 pancreatic transplants, tissue transplants for people

11:56:36 8 that have destruction of their cells that are used to

11:56:41 9 metabolize insulin, that produce insulin, and can create

11:56:45 10 a form of diabetes.

11:56:46 11 So he does surgeries, transplant surgeries to
11:56:49 12 restore the function of the pancreas and helps people who
11:56:53 13 probably have diabetes as a result of that.

11:56:55 14 He's also a very respected MPH epidemiologist that
11:57:02 15 deals with a lot of health economic issues and he's based
11:57:06 16 his training and is based at Johns Hopkins University.

11:57:10 17 Q Okay. Pretty prestigious university Johns Hopkins?

11:57:14 18 A Yes.

11:57:14 19 Q In your review of the literature in this area, are you
11:57:21 20 aware of whether Dr. Marty Makary has an opinion about
11:57:28 21 the fact that there have been no randomized control
11:57:32 22 trials for the effectiveness of masks for children in
11:57:35 23 schools?

11:57:36 24 A Yes, he voiced that --

11:57:37 25 MS. WYRZYKOWSKI: Objection, your Honor.

11:57:38 1 That's a yes or no question.

11:57:42 2 THE COURT: The answer was yes, Dr. Makary does
11:57:46 3 have an opinion. What was your objection?

11:57:48 4 MS. WYRZYKOWSKI: It was a yes or no question,
11:57:49 5 your Honor.

11:57:50 6 THE COURT: Okay.

11:57:51 7 Q And, again, Doctor you testified earlier about your
11:57:54 8 opinion about it's a shame that none of these studies
11:58:00 9 have been done. Have you relied upon the opinions of
11:58:03 10 other epidemiologists in this country to inform that
11:58:06 11 opinion, your opinion as well?

11:58:08 12 A Yes.

11:58:10 13 Q So, Doctor --

11:58:11 14 A Yes.

11:58:12 15 Q Is one of these doctors, Dr. Makary?

11:58:15 16 A Yes. And there are two others.

11:58:17 17 Q Okay. Well, start with Dr. Makary. What was his opinion
11:58:21 18 that helped you form your opinion?

11:58:22 19 A His opinion -- actually, he pointed to the fact that
11:58:26 20 there were no randomized control trials conducted as
11:58:30 21 being one of his objections.

11:58:31 22 MS. WYRZYKOWSKI: Objection, your Honor.

11:58:31 23 THE COURT: I had problems with the question
11:58:35 24 but you seemed to wait until you heard the answer. Are
11:58:38 25 you objecting to the question?

11:58:39 1 MS. WYRZYKOWSKI: I'm objecting to the question
11:58:40 2 and the answer but I think I might have missed the first
11:58:43 3 part.

11:58:48 4 THE COURT: Isn't it hearsay to have him
11:58:50 5 solicit someone else's opinion?

11:58:53 6 MR. PICCIRILLI: Judge, again, he's testifying
11:58:55 7 as an expert and he can rely upon the opinions of others
11:58:59 8 in his field in coming to his expert opinion. That's a
11:59:03 9 common practice for expert witnesses. I was just trying
11:59:09 10 to do some research about it last night, Judge. There's
11:59:09 11 a case --

11:59:12 12 THE COURT: So he's depending on hearsay. So I
11:59:15 13 can discount the fact points. I'm going to discount the
11:59:18 14 strength of that conclusion; correct?

11:59:21 15 MR. PICCIRILLI: I think you can give it the
11:59:23 16 weight that you find is relevant, and I'm not going to be
11:59:28 17 able to get Dr. Marty Makary in, obviously. I can't
11:59:31 18 subpoena him to come here.

11:59:33 19 THE COURT: No, but Dr. Bostom has used
11:59:36 20 quotations from others and citations from other articles,
11:59:39 21 and even though they're only a part, the State hasn't
11:59:43 22 even objected to those, as long as they're properly cited
11:59:47 23 and you can find -- you can relate it to the article
11:59:52 24 but...

11:59:54 25 MR. PICCIRILLI: Can I show the witness

11:59:54 1

Exhibit 29.

11:59:56 2

THE COURT: Okay.

11:59:58 3

MR. PICCIRILLI: This is not agreed to, your

11:59:59 4

Honor.

12:00:06 5

Q Doctor, what is that exhibit? Just describe what it is.

12:00:09 6

A Yes. It's called "The Case Against Masks for Children."

12:00:12 7

It was a Wall Street Journal op-ed published August 8th,

12:00:16 8

and Dr. Makary was one of the co-authors. He was the

12:00:22 9

first author.

12:00:23 10

Q Doctor, in forming your opinion, do you rely upon not

12:00:29 11

just studies but professional op-ed pieces that doctors

12:00:33 12

and other professionals might publish in the newspaper?

12:00:36 13

A Yes.

12:00:37 14

MS. WYRZYKOWSKI: Objection, your Honor.

12:00:38 15

THE WITNESS: Yes. The document that they're

12:00:41 16

referencing right now is opinion piece -- an opinion

12:00:44 17

piece published in the New York Times.

12:00:44 18

MR. PICCIRILLI: The Wall Street Journal.

12:00:50 19

MS. WYRZYKOWSKI: It has no relevance to what's

12:00:52 20

before this Court today. It's an opinion by another

12:00:55 21

doctor, offered outside of this court, and is clear

12:00:59 22

hearsay testimony. And, again, it's just an opinion.

12:01:01 23

The Doctor is here as an epidemiologist, and that's his

12:01:05 24

expert field and has been certified by this Court, not an

12:01:08 25

opinion for him to give in this Court. That's the

12:01:13 1 State's objection.

12:01:24 2 THE COURT: Op-ed, as I understand it, stands
12:01:26 3 for opinion and editorials, so it's an opinion in the
12:01:30 4 newspaper, not necessarily a medical opinion, but an
12:01:36 5 opinion in which the newspaper publishes. You're going
12:01:44 6 to use that as the basis for his answer?

12:01:49 7 MR. PICCIRILLI: I asked the witness whether it
12:01:52 8 helped him form his opinion of the lack of studies with
12:01:58 9 regard to masking, not the effectiveness of masks, not of
12:02:02 10 the studies, not what studies may or may not have found.
12:02:07 11 But merely for the fact that there have been no
12:02:10 12 randomized control trial studies in this country in the
12:02:16 13 last year and a half, and that -- again, maybe your Honor
12:02:21 14 we don't need expert opinion. It does seem, even to a
12:02:24 15 lay person, to be outrageous that that hasn't happened.

12:02:28 16 But he's testifying as an expert in this field of
12:02:31 17 epidemiology that for 18 months, through this pandemic,
12:02:34 18 and that's what Dr. Marty Makary says in his article, for
12:02:38 19 18 months there hasn't been one commissioned randomized
12:02:42 20 control trial. Why not? That's certainly an opening
12:02:47 21 question. But it does prove that there have been no
12:02:50 22 tests, no trials, and that is not -- that does not seem
12:02:57 23 to be an appropriate way to conduct public health policy
12:03:00 24 in this country.

12:03:02 25 THE COURT: The State's objection is noted.

12:03:03 1 He's going to rely on an opinion piece in a newspaper, so
12:03:08 2 be it. The Court will consider that for it's weight.

12:03:11 3 But maybe it will help speed things along to let you
12:03:15 4 know that the Court is impressed that there is no
12:03:17 5 randomized control study. There is no gold standard
12:03:22 6 study of masks, their benefits or their harm at all. He
12:03:27 7 already testified to that.

12:03:28 8 MR. PICCIRILLI: Thank you, your Honor.

12:03:29 9 Q So, again, just very briefly, Doctor, in that article
12:03:36 10 Dr. Makary gives an opinion as to whether or not there
12:03:40 11 have been these trials, these randomized controlled
12:03:44 12 trials for children in schools wearing masks. You can
12:03:48 13 answer.

12:03:49 14 A Okay. What is added, to my understanding it doesn't live
12:03:59 15 up. There's hyperlinks in there that you can click on,
12:04:03 16 if you were reading this online, but it refers -- it
12:04:07 17 confirms, well, it's obvious when you read the literature
12:04:11 18 that nothing has been published. In other words,
12:04:13 19 nothing, no trial has been conducted, completed and
12:04:18 20 published that's a randomized control trial of the
12:04:21 21 effectiveness or lack thereof of masking in the United
12:04:26 22 States in adult populations or pediatric populations.

12:04:30 23 This gave me an insight because he made a comment,
12:04:34 24 everyone has it in front of them now?

12:04:36 25 Q Yes, we do.

12:04:37 1 A It says a new research by one of them, Dr. Makary and his
12:04:42 2 Johns Hopkins colleagues found that of the 42 billion The
12:04:45 3 National Institute of Health spent on research last year,
12:04:48 4 less than 2 percent went to Covid clinical research, and
12:04:52 5 this part stood out: Not a single grant was dedicated to
12:04:56 6 study masks in children.

12:04:57 7 So to me what that says, not only confirmed what I
12:05:01 8 could see in reviewing the literature, nothing has been
12:05:03 9 published, that there's nothing potentially even in the
12:05:06 10 hyper.

12:05:07 11 Q Thank you, Doctor. Lastly, I'm going to show you
12:05:14 12 Exhibit 31.

12:05:21 13 MR. PICIRILLI: And I believe this is agreed to
12:05:23 14 as full?

12:05:24 15 MS. WYRZYKOWSKI: Correct. No objection by the
12:05:27 16 State.

12:05:28 17 THE COURT: 31 is full.

12:05:30 18 THE CLERK: Plaintiffs' 31 is full.

12:05:33 19 **(PLAINTIFFS' EXHIBIT 31 WAS MARKED FULL)**

12:05:33 20 Q Doctor, before we get into the exhibit, you were here
12:05:36 21 again for the testimony of Dr. McDonald where he
12:05:39 22 mentioned a number of MMWR articles; correct?

12:05:43 23 A Yes.

12:05:44 24 Q Now, Dr. McDonald claimed in his testimony that MMWR
12:05:50 25 articles are peer reviewed; correct?

12:05:55 1 A That's what I heard.

12:05:56 2 Q Okay. And, again, what does MMWR stand for?

12:06:00 3 A Morbidity Mortality Weekly Report.

12:06:03 4 Q And who publishes that?

12:06:04 5 A The CDC.

12:06:06 6 Q And do you have an opinion as to whether or not

12:06:10 7 Dr. McDonald was correct when he said these MMWR reports

12:06:14 8 are in fact peer-reviewed?

12:06:17 9 A That is incorrect.

12:06:18 10 Q So you do have an opinion, yes or no?

12:06:20 11 A He's incorrect.

12:06:21 12 Q Do you have an opinion, yes or no?

12:06:24 13 A Yes.

12:06:25 14 Q What is your opinion?

12:06:26 15 A Incorrect.

12:06:27 16 Q Okay. Why is he incorrect?

12:06:29 17 A It comes from this supplement and it says specifically --

12:06:35 18 Q And can you give us the page?

12:06:37 19 A On Page 5 it's the -- well, I guess it's the first

12:06:42 20 paragraph. It starts with the word "several." They're

12:06:46 21 pointing out why MMWR is different.

12:06:49 22 Q I'm sorry, Doctor. Page?

12:06:50 23 A Page 5.

12:06:51 24 Q And what paragraph?

12:06:54 25 A So it would be the first indentation on the page. It

12:06:58 1 starts with the word several. And what they're doing is
12:07:01 2 comparing and contrasting MMWR to true peer-reviewed
12:07:04 3 literature, and it says: Unlike medical journals, the
12:07:08 4 contents published in MMWR constitutes the official voice
12:07:12 5 of it's parent.

12:07:12 6 So that's one huge difference. That's a very
12:07:15 7 important difference.

12:07:16 8 Q So this document is just a house order from the CDC?

12:07:20 9 A It's a house order from the CDC and it can't deviate from
12:07:24 10 CDC policy, and this becomes quite germane to the MMWR
12:07:32 11 reports that were, you know, the litany of them that were
12:07:35 12 presented during Dr. McDonald's testimony.

12:07:41 13 In other words they can't, it's clear that the CDC
12:07:45 14 is a proponent of masking. So they're not going to
12:07:49 15 publish any raw data, any studies that are going to
12:07:53 16 oppose the policy of masking. They're entitled to do
12:07:57 17 that but that is completely different when it's
12:08:02 18 functioning properly.

12:08:04 19 Objective peer review, well, you can have an
12:08:06 20 editorial board that they send you the pieces, the
12:08:10 21 research articles out to independent, independent of the
12:08:17 22 editorial boards, independent peer reviewers, precisely
12:08:20 23 so that they don't have to, you know, march in lock step
12:08:23 24 to whatever might be the editorial board's policy of the
12:08:27 25 given journal. That's very, very different. And so,

12:08:32 1 yes, they do get some sort of internal review, if you
12:08:35 2 read the rest of the paragraph, and it may be good in
12:08:37 3 terms of statistics, et cetera, but the bottom line is
12:08:41 4 that that's not traditional peer review where it goes
12:08:44 5 outside the organization for independent reviewers to
12:08:50 6 render their criticism.

12:08:52 7 Q So again, Doctor, you stopped reading but continued
12:08:58 8 reading from one side of this, the absence and the MMWR?

12:09:01 9 A And then it says: Although most articles appear in MMWR,
12:09:05 10 it says very specifically: Are not peer-reviewed. I
12:09:08 11 mean, that sort of brings home what I'm saying. And why,
12:09:12 12 I'm not saying there's not a value to MMWR, because
12:09:16 13 there's a tremendous value to MMWR, but to call it peer
12:09:20 14 reviewed is really making, you know, too elastic the
12:09:25 15 definition of what a peer review journal is. It's not
12:09:28 16 really acceptable, in my opinion.

12:09:30 17 MR. PICCIRILLI: I have nothing further of the
12:09:32 18 Doctor at this time, Judge. We can take a break.

12:09:43 19 THE COURT: You read a portion of that
12:09:46 20 sentence, sir. Would you read the entire sentence.

12:09:47 21 THE WITNESS: I'm sorry, where do you want me
12:09:59 22 to start, your Honor?

12:10:00 23 THE COURT: Page 5 of exhibit --

12:10:02 24 THE WITNESS: Starting with several?

12:10:04 25 MR. PICCIRILLI: No after "although most

12:10:05 1

articles."

12:10:06 2

THE COURT: About six lines down from several.

12:10:09 3

THE WITNESS: "Although most articles that

12:10:10 4

appear in MMWR are not peer reviewed in the way that

12:10:14 5

submissions to medical journals are to ensure that the

12:10:18 6

contents of MMWR comport with CDC policy, every

12:10:23 7

submission to MMWR undergoes a rigorous, multi-level

12:10:28 8

clearance process before publication." That's not,

12:10:34 9

that's not peer reviewed. That's not peer reviewed. I'm

12:10:37 10

sorry. THE COURT: Okay.

12:10:40 11

MR. PICCIRILLI: Your Honor, maybe just one

12:10:42 12

last question about that.

12:10:44 13

THE COURT: If you like.

12:10:45 14 Q

If the articles are submitted to ensure that they comport

12:10:55 15

with the CDC policy, isn't that the exact opposite of

12:11:00 16

peer review? Isn't that preventing contrary opinions to

12:11:05 17

be even considered in the publication?

12:11:08 18

MS. WYRZYKOWSKI: Objection. Calls for

12:11:10 19

speculation.

12:11:11 20

MR. PICCIRILLI: I'll withdraw the question,

12:11:12 21

your Honor. Nothing further.

12:11:13 22

THE COURT: Thank you. Before we break now

12:11:16 23

until 1:30.

12:11:19 24

MS. WYRZYKOWSKI: I would really like the

12:11:20 25

Doctor to eat, so 1:30 possibly? I'm sorry.

12:11:23 1 THE COURT: He'll be done by 1:30?

12:11:26 2 MS. WYRZYKOWSKI: He'll be done at around one
12:11:26 3 o'clock.

12:11:28 4 THE COURT: Sure. So why don't we pick up
12:11:30 5 again at 1:30.

12:11:31 6 MS. WYRZYKOWSKI: Thank you, Judge.

12:11:31 7 THE SHERIFF: Court is in recess.

12:11:31 8 **(Lunch recess)**

14:11:16 9 THE COURT: The State is ready to proceed?

14:11:19 10 MS. WYRZYKOWSKI: The State is ready to
14:11:19 11 continue Dr. McDonald's direct, your Honor.

14:11:22 12 THE COURT: Dr. McDonald, if you can come up.

14:11:26 13 THE CLERK: Please raise your right hand.

14:11:26 14 **DR. JAMES MCDONALD, (SWORN)**

14:11:56 15 THE CLERK: Please state your full name and
14:11:58 16 spell your last name for the record.

14:11:59 17 THE WITNESS: My name is Dr. James McDonald,
14:11:59 18 M-c-D-o-n-a-l-d.

14:12:06 19 THE CLERK: Thank you.

14:12:10 20 THE COURT: Ms. Wyrzykowski.

14:12:13 21 **CONTINUED DIRECT EXAMINATION BY MS. WYRZYKOWSKI**

14:12:13 22 Q Good afternoon, Dr. McDonald.

14:12:17 23 A Good afternoon.

14:12:18 24 Q I want to direct your attention to randomized control
14:12:27 25 studies and observational studies. You were present for

14:12:29 1 Dr. Boston's testimony on these studies?

14:12:31 2 A Yes, I was.

14:12:32 3 Q Can you please explain what a randomized study is?

14:12:37 4 A So randomized controlled study, which are often double
14:12:42 5 blinded, means that you have one group, that's the group
14:12:47 6 you want to experiment with another group is called a
14:12:50 7 control group. So whatever you do with the groups, you
14:12:54 8 do something to one group and you simply don't do it to
14:12:56 9 the other group. That's a simple way of explaining a
14:13:00 10 randomized controlled style study.

14:13:02 11 When you're talking about blinding, a lot of times
14:13:05 12 people don't know which group they're in. When we do
14:13:08 13 vaccine trials, for example, people don't know that they
14:13:12 14 got the vaccine or if they got a placebo. So that's an
14:13:15 15 example of blinding to the patients. Often their double
14:13:18 16 blinded so the person who is giving you that particular
14:13:21 17 intervention doesn't know either you got the vaccine.
14:13:25 18 That's called double blinding. So the double blinding
14:13:29 19 randomized control trial is indeed the best kind of
14:13:32 20 study.

14:13:33 21 Q Can you please explain what an observational study is?

14:13:38 22 A Yes. So most of public health is observational studies
14:13:42 23 where you look at what happened. You try to control for
14:13:45 24 as many variables as occurred and try to determine what
14:13:49 25 happened.

14:13:49 1 But often it's called prospective studies where you
14:13:53 2 design a study, and design intervention, look what's
14:13:57 3 going to happen in the future. Many studies are what's
14:14:00 4 called retrospective studies where you look at what
14:14:03 5 happened in the past. You try to decide what happened.

14:14:05 6 Sometimes it's what we call case control studies,
14:14:08 7 where you separate one group into a case and then find a
14:14:12 8 control group.

14:14:12 9 So observational studies are often what's done in
14:14:15 10 public health.

14:14:16 11 Q Why do you say observational studies is what's often done
14:14:20 12 in public health?

14:14:20 13 A Well, there's a number of reasons but not the least of
14:14:23 14 which is you have to look at what's ethical when it comes
14:14:26 15 to experimenting with people and with human subjects in
14:14:30 16 particular. In other words, if you're going to do a
14:14:33 17 study, you have to have it approved by an institutional
14:14:37 18 review board, often referred to as an IRB. The purpose
14:14:41 19 of an IRB is to protect the humans who are being studied
14:14:45 20 with. So whatever intervention you're going to propose
14:14:48 21 you have to ensure that the people who are being
14:14:51 22 experimented on aren't harmed in the experiment, or if
14:14:56 23 there is harm that they know about that ahead of time and
14:14:59 24 consent is obtained.

14:15:00 25 In other words, people really shouldn't be put into

14:15:02 1 studies without their own consent and that's typically
14:15:06 2 what happens in randomized controlled trials.

14:15:08 3 Q Can you explain the difference between a randomized
14:15:13 4 control study and an observational study?

14:15:16 5 A Yes. So in a randomized control study you set a study
14:15:20 6 ahead of time. You have a control group and then you
14:15:24 7 have your intervention group. It really doesn't matter
14:15:27 8 what you're studying, whatever the intervention would be.

14:15:30 9 I made the example of giving a vaccine to one group
14:15:34 10 of people, that being the intervention group, and not
14:15:37 11 giving a vaccine to another group, that would be the
14:15:40 12 control group. Then you follow it up over time and look
14:15:44 13 for outcomes.

14:15:45 14 In the case of vaccine studies, who got the disease,
14:15:50 15 who didn't. You can say, well, gee, the group who got
14:15:53 16 the vaccine, much less of them got the disease. The
14:15:58 17 people who didn't get the vaccine much more of them got
14:16:01 18 the disease. Through statistics you see what happens.
14:16:04 19 That's the example of randomized control trials, quite
14:16:04 20 simply.

14:16:07 21 If you're doing an observation study, or
14:16:10 22 retrospective study that goes back in time, which is
14:16:14 23 often what's done in public health. You look at
14:16:17 24 something that happened, a case for example. Like one of
14:16:22 25 the studies I talked about earlier was in Marin County

14:16:26 1 California where a teacher was in a classroom. She was
14:16:31 2 symptomatic with Covid but attributed to allergies. The
14:16:35 3 kids were sitting in the classroom, the kids were
14:16:38 4 masked. The teacher took her mask off from time to time
14:16:41 5 to teach the kids.

14:16:43 6 When you look at that study, it's a historical event
14:16:47 7 that occurred, when you look back at all the kids that
14:16:49 8 were exposed. There's no control group. But you see who
14:16:53 9 in that classroom got the disease and who didn't. You
14:16:56 10 look at what was different in that study and if the
14:17:01 11 teacher would be one, symptomatic, and two, not wearing a
14:17:04 12 mask that puts the kids at risk.

14:17:07 13 Then it shows that study, 50 percent of the kids in
14:17:10 14 the classroom ended up getting Covid, and it was Delta
14:17:13 15 the variant that they got. So that's another thing they
14:17:16 16 did in that study. So that's one example of an
14:17:20 17 observational study.

14:17:21 18 MSWYRZYKOWSKI: Your Honor, may I approach the
14:17:22 19 clerk, please?

14:17:23 20 THE COURT: Yes.

14:17:23 21 MS. WYRZYKOWSKI: Can I see Defendants' B,
14:17:52 22 please. Your Honor. May I approach the witness, please?

14:17:54 23 THE COURT: Yes.

14:17:56 24 Q Dr. McDonald, what is before you is marked as Defendants'
14:18:06 25 Exhibit B for identification.

14:18:08 1 MR. PICCIRILLI: I'm sorry, B or D?

14:18:10 2 MS. WYRZYKOWSKI: B as in boy, I apologize.

14:18:12 3 Q And the title, can you please read the title of that
14:18:16 4 document, Doctor?

14:18:16 5 A It's entitled Science Brief.

14:18:18 6 Q That's the wrong one, Doctor, apologize. You were
14:18:21 7 talking about the Marin study; correct?

14:18:24 8 A Marin County, yes. That's in MMWR.

14:18:39 9 MS. WYRZYKOWSKI: Exhibit G, please, Melissa.

14:19:04 10 Q Doctor, before you is Defendants' Exhibit G. Is that the
14:19:07 11 study that you were just referencing?

14:19:09 12 A Yes.

14:19:09 13 Q And that document has already been marked in full.
14:19:12 14 Doctor, that's an observational study?

14:19:15 15 A Yes.

14:19:15 16 Q Okay. And just to clarify, it's an observational study
14:19:22 17 because it was intended to be a study and you're looking
14:19:26 18 back at it in time, that's why it's not randomized
14:19:29 19 control?

14:19:29 20 A Observational studies are different, you know, they can
14:19:33 21 be prospective. In other words, set up ahead of time and
14:19:36 22 look for things in the future and, you know, you can set
14:19:38 23 up a study like that.

14:19:39 24 This happened to be a retrospective study, it
14:19:42 25 already occurred. In other words, a lot of public health

14:19:45 1 studies are retrospective. You look at something that
14:19:47 2 occurred, look at what you know in public health science
14:19:50 3 and try best to explain and understand what happened.

14:19:53 4 Q And that was that study before you?

14:19:55 5 A Yes, this is an observational study.

14:19:58 6 Q Doctor, are you aware as to whether or not there had been
14:20:02 7 any COVID-19 randomized controlled studies in adults?

14:20:06 8 A Yes, there have been.

14:20:10 9 Q Doctor, are you aware if there are COVID-19 randomized
14:20:18 10 control studies with children?

14:20:21 11 A I'm not aware of any.

14:20:22 12 Q Doctor, based upon your training, education and
14:20:25 13 experience, can you offer an opinion to a degree of
14:20:28 14 medical certainty as to why there have been no randomized
14:20:31 15 controlled COVID-19 studies with the pediatric
14:20:34 16 population?

14:20:34 17 A Well, are you referring to just the masks in particular,
14:20:38 18 or in general for the whole pandemic?

14:20:40 19 Q You can start with the masks.

14:20:42 20 A So, and I think it's important to make a distinction
14:20:45 21 because if you're talking about the masks, that's a
14:20:47 22 little different than talking about a vaccine, for
14:20:51 23 example. Because, you know, there is obviously vaccine
14:20:54 24 studies going on in children, and so there are randomized
14:20:57 25 controlled studies, so that's an example of a randomized

14:21:00 1 control study, where vaccines are given to some kids and
14:21:04 2 not to others.

14:21:04 3 When it comes to masks though, what's a little
14:21:07 4 different about setting up that experiment is you have to
14:21:11 5 get approved by an institutional review board until your
14:21:14 6 protecting in the subject.

14:21:16 7 Since there's a fair amount of evidence that say
14:21:18 8 masks are protective in adults, you know, to prevent the
14:21:22 9 spread of disease. You have to explain to the
14:21:25 10 institution review board why you're subjecting children
14:21:28 11 to this brand new disease, putting them at greater risk,
14:21:32 12 but we're not even sure what's going to happen, so we're
14:21:35 13 gonna let the kids be exposed.

14:21:37 14 So that's not ethical in my mind, and I don't think
14:21:42 15 an IRB would approve a study on kids for not wearing
14:21:45 16 masks in one group and wearing in another.

14:21:47 17 MR. PICCIRILLI: Objection. Move to strike the
14:21:51 18 last part of his answer. It's completely speculative
14:21:55 19 what an IRB would do. He's not testifying as anybody
14:21:59 20 would be opposed to do that. He's also injected --

14:22:02 21 THE COURT: Everything from the word "I think"
14:22:04 22 are stricken.

14:22:05 23 MR. PICCIRILLI: Thank you.

14:22:06 24 Q Doctor, based upon your training, education and
14:22:11 25 experience, do you hold an opinion to a degree of medical

14:22:16 1 certainty as to why there was no randomized control study
14:22:23 2 of pediatric patients and masking?

14:22:25 3 MR. PICCIRILLI: Objection. Again, calls for
14:22:28 4 speculation.

14:22:29 5 MS. WYRZYKOWSKI: It calls for medical opinion,
14:22:32 6 based upon his training, education and experience, a
14:22:35 7 master's degree in public health, holding a position on
14:22:39 8 the Covid council that advises the Governor and has been
14:22:41 9 working in the public health field for almost a decade.

14:22:44 10 MR. PICCIRILLI: The question is why have there
14:22:46 11 not been any studies. There's no foundation --

14:22:49 12 THE COURT: I got the question, hang on. It's
14:23:17 13 asking to speculate, but he is an expert so it's asking
14:23:22 14 him his opinion.

14:23:34 15 First off, Dr. McDonald, to cut to the quick, do you
14:23:37 16 know why there are no studies with certainty?

14:23:40 17 THE WITNESS: Yes, I do.

14:23:42 18 THE COURT: You know with certainty?

14:23:43 19 THE WITNESS: Yes, I do.

14:23:44 20 THE COURT: Then the question was speculative
14:23:45 21 and need not be asked in a speculative nature. He
14:23:49 22 appears to know the answer.

14:23:50 23 Q Doctor, could you please provide an opinion to a
14:23:52 24 reasonable degree of medical certainty as to why there
14:23:56 25 have not been randomized controlled studies with masking

14:23:59 1 in a pediatric setting?

14:24:02 2 MR. PICCIRILLI: I'm going to object. There's
14:24:03 3 no foundation as to how he could have got this knowledge.

14:24:06 4 MS. WYRZYKOWSKI: Your Honor, the foundation
14:24:07 5 was laid two days ago when we sat and went over the
14:24:11 6 doctor's resume.

14:24:12 7 THE COURT: Thank you. What's the basis for
14:24:12 8 your conclusion?

14:24:14 9 THE WITNESS: My training, education and
14:24:15 10 experience but also my understanding of bioethics, and
14:24:18 11 I'm also a member of the Rhode Island Department of
14:24:22 12 Health Institutional Review Board, so I have expertise in
14:24:22 13 that regard as well.

14:24:24 14 THE COURT: Thank you. The objection is
14:24:26 15 overruled. You may answer.

14:24:28 16 THE WITNESS: Yes, it's unethical.

14:24:30 17 Q Doctor, why is it, based upon your training, education
14:24:32 18 and experience, why is it unethical to conduct a
14:24:36 19 randomized controlled study in the pediatric setting
14:24:39 20 concerning masking?

14:24:40 21 A Because you're exposing one population of children for
14:24:45 22 risk factors where they're not protected, and then you're
14:24:49 23 protecting another group of kids with a mask.

14:24:52 24 And since there's a fair amount of evidence, and
14:24:54 25 there's, you know, statements from the Center for Disease

14:24:57 1 Control and American Academy of Pediatrics that masks are
14:25:00 2 recommended for kids, an IRB would have not approved that
14:25:03 3 study, which are putting children at risk to a new
14:25:06 4 disease, we're not sure it could happen. If some
14:25:08 5 children do end up in the hospital or pass away or have
14:25:11 6 serious consequences like MIS-C, so that's why it's
14:25:15 7 unethical.

14:25:16 8 Q Thank you, Doctor.

14:25:20 9 MS. WYRZYKOWSKI: Melissa, can I please have
14:25:22 10 Plaintiffs' Exhibit 31 full?

14:25:24 11 THE CLERK: Sure.

14:26:00 12 MS. WYRZYKOWSKI: Sorry, Plaintiffs' Exhibit 31
14:26:02 13 in full.

14:26:26 14 THE COURT: This is the NNWR study, correct,
14:26:29 15 part of it?

14:26:30 16 MS. WYRZYKOWSKI: Yes, your Honor.

14:26:50 17 Q Doctor, you have before you what has been marked as
14:26:54 18 Plaintiffs' Exhibit 31 as the exhibit that's in full.
14:26:56 19 Could you please go to Page 5 of that exhibit?

14:26:58 20 A Yes, I have Page 5.

14:26:59 21 Q Doctor, I direct your attention to the first indent
14:27:02 22 beginning with the word several. Do you see that, sir?

14:27:04 23 A I do.

14:27:05 24 Q Okay. Doctor, I don't think you were here for the
14:27:08 25 testimony of Dr. Bostom in this regard, but a portion of

14:27:11 1 this paragraph was read into evidence. Starting with the
14:27:16 2 word A, which is the first -- second sentence in. Do you
14:27:20 3 see that, Doctor?

14:27:22 4 A Are you talking about the word although?

14:27:25 5 Q "Several other differences exist. A major one"?

14:27:29 6 A Yes, I see that.

14:27:30 7 Q Doctor, can you please read that portion allowed. I will
14:27:33 8 stop you at the word publication, which is several
14:27:36 9 sentences down.

14:27:37 10 THE COURT: And although I think you've been
14:27:39 11 good, when people read they talk fast. So she's trying
14:27:39 12 to --

14:27:43 13 THE WITNESS: Understood.

14:27:44 14 THE COURT: Thank you.

14:27:45 15 A "A major one is that unlike several medical journals,
14:27:50 16 with a few exceptions, in other words certain supplements
14:27:54 17 such as this one, the contents published in MMWR
14:27:58 18 constitutes the official voice of its parent, CDC.

14:28:03 19 One sign of this is the absence in MMWR of any
14:28:07 20 official disclaimers. Although most articles that appear
14:28:11 21 in MMWR are not peer reviewed in the way that submissions
14:28:15 22 to medical journals are to ensure that the contents of
14:28:20 23 MMWR comports with CDC policy, every submission of MMWR
14:28:25 24 undergoes a rigorous multi level clearance process before
14:28:30 25 publication."

14:28:31 1 Q Please stop, Doctor. Thank you. That portion was read
14:28:33 2 into evidence earlier today. You were not here for that.
14:28:37 3 You had testified -- please hold onto that document. You
14:28:40 4 had testified two days ago that the articles that you
14:28:43 5 cited from the MMWR were peer-reviewed. Do you remember
14:28:46 6 that testimony?

14:28:46 7 A I do.

14:28:47 8 Q The phrase that you just read into evidence, Doctor, was
14:28:51 9 used to assert that the MMWR studies were not actually
14:28:55 10 peer-reviewed. Could you please provide clarity on that?

14:29:00 11 MR. PICCIRILLI: Objection, your Honor. If he
14:29:03 12 wants to retract his previous testimony, that's one thing
14:29:07 13 but...

14:29:08 14 THE COURT: I think he was asked to clarify his
14:29:11 15 previous testimony. The question is overruled.

14:29:14 16 THE WITNESS: Well, actually the sentence right
14:29:15 17 after that to me provided all the clarity that one needs.
14:29:19 18 It goes on to say, and I think it's important, the word
14:29:23 19 peer reviewed has been used a lot in this courtroom, but
14:29:26 20 it hasn't been defined. And I think it's important to
14:29:30 21 understand that what peer reviewed means is other people,
14:29:34 22 or people with greater credentials, have reviewed your
14:29:37 23 science, reviewed your study, and decided if it's worthy
14:29:40 24 of publication.

14:29:41 25 I've peer-reviewed articles. I've offered people

14:29:44 1 constructive criticism. Sometimes I've told them you got
14:29:47 2 a lot more work to do to make this credible.

14:29:50 3 So peer reviewed, you know, is what it is and I
14:29:52 4 stand by my assertion, but the statement says this
14:29:56 5 includes review by the CDC director. Top scientific
14:30:01 6 directors have all CDC organizational levels in an
14:30:05 7 exacting review by MMWR editors.

14:30:08 8 Articles submitted to MMWR from non CDC authors
14:30:13 9 undergo the same kind of review by a set of experts
14:30:17 10 within the Center for Disease Control. By the time a
14:30:19 11 report appears in the MMWR, it reflects or is consistent
14:30:21 12 with CDC policies.

14:30:23 13 So it's a much higher standard than you would get in
14:30:26 14 traditional medical journals, even like the New England
14:30:29 15 Journal of Medicine.

14:30:30 16 Q Thank you, Doctor. Doctor, when you were on the stand a
14:30:38 17 few days ago, we discussed how Covid spreads. Can you
14:30:44 18 please briefly state how COVID-19 spreads?

14:30:47 19 A Yes. Covid spreads, COVID-19 the virus like SARS-CoV-2
14:30:53 20 that causes the disease for COVID-19. The virus spreads
14:30:58 21 largely by respiratory droplets, to a lesser extent it's
14:31:02 22 airborne, meaning the particles can go farther, and to a
14:31:06 23 lesser extent it's spread by touch. In other words, an
14:31:09 24 object or from, you know, people touching each other,
14:31:11 25 shaking hands to a lesser extent. But that's the main

14:31:15 1 way it's spread is through respiratory droplets.

14:31:17 2 Q Doctor, could you please explain whether or not COVID-19
14:31:28 3 is spread in the same manner, regardless of age?

14:31:32 4 A Yes, it's spread the same manner, regardless of age.
14:31:36 5 It's really about humans.

14:31:37 6 Q I'm sorry, it's about what?

14:31:39 7 A It's about humans, human beings. In other words, we all
14:31:43 8 exhale, and that's how the disease is spread generally
14:31:46 9 through exhalation, that's the main way. I mean since
14:31:49 10 people exhale, no matter how old they are that really
14:31:53 11 doesn't change.

14:32:10 12 Q Doctor, based upon your training, education and
14:32:12 13 experience and your role in the public Health Department,
14:32:16 14 and as a Covid task force member advising the Governor,
14:32:21 15 can you provide an opinion to a reasonable degree of
14:32:23 16 medical certainty as to why there was a mask mandate for
14:32:26 17 children and adults in the K-12 settings but not a
14:32:31 18 universal masking mandate at this time?

14:32:33 19 A So the mandate --

14:32:34 20 Q Yes or no, Doctor? Can you provide an opinion to a
14:32:37 21 reasonable degree of medical certainty on that question?

14:32:39 22 A Yes.

14:32:40 23 Q Doctor, what is that opinion?

14:32:42 24 A Because children are in a classroom, they're in a fixed
14:32:47 25 location for a prolonged duration of time, and because

14:32:51 1 they're in a fixed location for a long duration of time,
14:32:54 2 and people are possibly spreading disease. Keep in mind
14:32:59 3 one of the things about this disease is people can
14:33:03 4 spread the disease and not have symptoms. It's called
14:33:06 5 asymptomatic spread.

14:33:08 6 So because there are people in the classroom who may
14:33:10 7 have disease and might be spreading respiratory droplets,
14:33:13 8 they're exposing everyone in the classroom. So because
14:33:16 9 we put kids in a fixed location for a prolonged duration,
14:33:20 10 kids are at higher risk as well as the teachers and the
14:33:23 11 staff that are mixed among them. So we know it's a high
14:33:27 12 risk setting.

14:33:28 13 We also knew that Delta, the variant of Covid we're
14:33:31 14 dealing with now is more contagious than the original
14:33:34 15 strain, and so because of those factors we knew that kids
14:33:39 16 were higher risk. We also got last year with DC
14:33:44 17 transmission in classrooms about 5 percent spread, so we
14:33:49 18 knew that even last year with the mitigation strategies
14:33:52 19 in place there was spread. We knew it this year. We
14:33:55 20 wanted to prioritize kids going back to school so we gave
14:33:59 21 up on the six-foot distance and settled for three feet,
14:34:03 22 so every kid could be in school and so every kid could be
14:34:07 23 on the school bus. So we actually have a more contagious
14:34:10 24 virus. We have kids in this setting, so it makes sense
14:34:14 25 to me and to my team to recommend and mandate rather, for

14:34:19 1 kids to wear masks in school as well as the staff and
14:34:22 2 teachers.

14:34:23 3 Q So, Doctor, you just talked a lot about a fixed duration.
14:34:26 4 The kids are in a fixed setting for a long period of
14:34:29 5 time. How does that correlate, or does it correlate, as
14:34:33 6 to whether or not there should be a masking mandate for
14:34:37 7 adult?

14:34:37 8 A So a lot of adults are free to roam about and do what
14:34:43 9 they want, they're not sitting in a fixed location for a
14:34:47 10 day.

14:34:47 11 For example, in the courtroom we're all sitting here
14:34:47 12 --

14:34:50 13 MR. PICCIRILLI: I'm going to object and move
14:34:51 14 to strike. That is highly speculative as to what adults
14:34:55 15 do, I mean.

14:34:56 16 THE COURT: Then again, it's ripe for
14:34:58 17 cross-examination.

14:34:59 18 MR. PICCIRILLI: Thank you, your Honor.

14:35:00 19 THE COURT: Overruled.

14:35:01 20 THE WITNESS: So, you know, in a setting like
14:35:05 21 this there's a little bit more risk, but adults move
14:35:09 22 about throughout the day. Kids are in this fixed
14:35:12 23 location. They can't decide whether they want to come
14:35:15 24 and go, and we know transmission occurs, that's why it's
14:35:18 25 required for kids.

14:35:18 1 For adults, the Governor came out with a
14:35:21 2 recommendation, not a requirement. One of the things
14:35:24 3 that's important about the adults is adults can be
14:35:27 4 vaccinated. Kids can't be vaccinated. So you have
14:35:31 5 different risk groups here. With adults being vaccinated
14:35:35 6 there's a little bit of risk as well.

14:35:38 7 The only thing about adults is if adults get
14:35:41 8 infected with the SARS-Cov-2, they can be treated with
14:35:46 9 monoclonal antibodies. Kids under 12 cannot be treated.

14:35:48 10 So you have kids being unable to be vaccinated,
14:35:54 11 unable to be treated, and in fixed long duration
14:35:57 12 exposures to me that equals mandate, makes sense, and
14:36:01 13 that's why it was considered and done.

14:36:03 14 Q Doctor, you also just said that there is a greater risk
14:36:07 15 for spread here in this setting. Could you please
14:36:11 16 explain that?

14:36:11 17 A Yes, because we're in a fixed location. We're all here
14:36:15 18 in the same time. Some people are within six feet of
14:36:18 19 each other. You're at greater risk. So it's just
14:36:21 20 greater risk. We're wearing masks. We do what we can to
14:36:25 21 mitigate the spread. Hope these rooms are appropriately
14:36:29 22 ventilated. We're doing what we can.

14:36:30 23 Q Doctor, are you familiar with the CDC?

14:36:32 24 A I'm very familiar with the Center for Disease Control and
14:36:36 25 Prevention.

14:36:36 1 Q Are you familiar with how the CDC defines a Covid death?

14:36:40 2 A I am

14:36:41 3 Q Could you please tell us how the CDC defines a Covid
14:36:46 4 death?

14:36:46 5 A It's a death with someone having a positive Covid test.

14:36:50 6 Q Do you know whether or not the Rhode Island Department of
14:36:53 7 Health follows the CDC definition of a Covid death?

14:36:57 8 A Yes, we do.

14:36:58 9 Q And as you stand here today, Doctor, do you know how many
14:37:02 10 pediatric patients in Rhode Island have met the CDC
14:37:05 11 definition of a Covid death?

14:37:07 12 A I'm only aware of three.

14:37:14 13 MS. WYRZYKOWSKI: Can you give me one moment,
14:37:15 14 your Honor.

14:37:16 15 THE COURT: Yes. I'm sorry, that was only
14:37:24 16 three pediatric; is that right?

14:37:26 17 THE WITNESS: That's all I'm familiar with,
14:37:26 18 Judge is three.

14:37:28 19 THE COURT: Three pediatric?

14:37:31 20 TH WITNESS: That's right, sir.

14:37:32 21 THE COURT: I just didn't hear the question.

14:37:40 22 Q Doctor, with respect to the CDC standard that is used by
14:37:44 23 the Rhode Island Department of Health to define Covid
14:37:46 24 positive deaths, can you clarify as to whether or not
14:37:51 25 there can be multiple causes of death?

14:37:54 1 A Yes.

14:37:54 2 Q Doctor, you previously testified two days ago about the
14:38:05 3 increased cases of COVID-19 over the summer. Do you
14:38:08 4 recall that testimony?

14:38:09 5 A I do.

14:38:10 6 Q I want to direct your attention to that now. At what
14:38:15 7 point in time, Doctor, did you in your role at the Rhode
14:38:18 8 Island Department of Health, as a member of the public
14:38:20 9 Health Department, notice an increase in Covid related
14:38:24 10 cases during the summer?

14:38:25 11 A The 4th of July.

14:38:30 12 Q And, Doctor, do you recall what type of increases you saw
14:38:35 13 at the 4th of July in 2021?

14:38:37 14 MR. PICCIRILLI: Objection, your Honor. This
14:38:38 15 has been asked and answered previously. There's even an
14:38:42 16 Exhibit A that sort of goes over this.

14:38:43 17 THE COURT: It has been but she's just bringing
14:38:47 18 us back to a new point. So overruled.

14:38:50 19 Q Doctor, you discussed already Exhibit A, which lists the
14:38:54 20 Covid data trends?

14:38:55 21 A Yes.

14:38:56 22 Q And now I want to direct your attention to a new exhibit,
14:38:59 23 which has not been marked.

14:39:14 24 THE CLERK: Defendants' Exhibit M for
14:39:17 25 identification.

14:39:21 1 MS. WYRZYKOWSKI: Melissa, this is for the
14:39:23 2 Judge.

14:39:23 3 THE CLERK: Thank you.

14:39:36 4 MR. PICCIRILLI: Which one is this marked?

14:39:38 5 MS. WYRZYKOWSKI: Defendants' M.

14:39:38 6 **(DEFENDANTS' EXHIBIT M WAS MARKED FOR**
14:39:43 7 **IDENTIFICATION)**

14:39:43 8 Q Doctor, do you recognize Exhibit M that is before you?

14:39:54 9 A Yes, I do.

14:39:55 10 Q What is that, Doctor?

14:39:56 11 A It's a report from data set. It has the number of
14:40:00 12 children who are hospitalized associated with Covid based
14:40:03 13 on age from the beginning of the pandemic until September
14:40:07 14 of 2021.

14:40:08 15 Q Doctor, is that document kept in the ordinary course of
14:40:12 16 business at the Rhode Island Department of Health?

14:40:13 17 A Yes.

14:40:14 18 MS. WYRZYKOWSKI: Your Honor, I ask that this
14:40:15 19 exhibit be moved in full.

14:40:19 20 MR. PICCIRILLI: Your Honor, we already
14:40:22 21 introduced an exhibit, it's our Exhibit 8. It actually
14:40:27 22 has the data.

14:40:29 23 MS. WYRZYKOWSKI: Defendants' Exhibit M, your
14:40:31 24 Honor, is clear with the numbers as opposed to charts
14:40:33 25 that make it a little difficult to read.

14:40:36 1 MR. PICCIRILLI: Yes, but these are monthly.

14:40:38 2 THE COURT: I've seen identical exhibits
14:40:41 3 introduced by plaintiff and defendant. It's easier to
14:40:43 4 just admit both then to argue about it.

14:40:48 5 MR. PICCIRILLI: Okay. Thank you, your Honor.

14:40:48 6 THE COURT: M is full.

14:40:50 7 MS. WYRZYKOWSKI: Thank yo, your Honor.

14:40:51 8 **(DEFENDANTS' EXHIBIT M WAS MARKED FULL)**

14:40:51 9 Q Your Honor, excuse me, not your Honor --

14:40:56 10 THE COURT: That's okay, she called me doctor
14:40:59 11 before.

14:40:59 12 Q Dr. McDonald, you have before you two exhibits. Exhibit
14:41:03 13 A, which is in full. That is the exhibit that we have
14:41:05 14 already talked about. We talked about that two days ago.
14:41:07 15 But I want to direct your attention to Exhibit M.

14:41:14 16 Doctor, can you please explain to the Court what
14:41:18 17 Exhibit M shows to you in your position in public health
14:41:22 18 with respect to COVID-19 cases in pediatrics?

14:41:28 19 A Yes. So it talks about number of hospitalizations, and
14:41:32 20 its broken down from July to September, and then July 4th
14:41:37 21 to present. And, you know, what we're trying to do is
14:41:41 22 get an idea of what Delta was doing to hospitalizations
14:41:44 23 for children. And so when you look at this report, for
14:41:49 24 example, if you look at the months with the most
14:41:51 25 admissions in the hospital, 5 to 8 year olds, which is

14:41:54 1 December of 2020, you'll see that there's 23 children
14:42:00 2 with Covid associated admissions in December of 2020.

14:42:03 3 When you look at September of 2021 there's 15, but
14:42:08 4 if you compare September 2020 to September 21 you see its
14:42:13 5 8 in 2020 and 15 in 2021. It's just one month. But it's
14:42:20 6 an interesting little trend that there is more cases in
14:42:22 7 September with Delta this year than last year.

14:42:25 8 This is the data I have to go with, when it was
14:42:28 9 October of 2020 I saw five in children 5 to 8 years old,
14:42:34 10 and, you know, I don't know what's going to happen this
14:42:36 11 month. But it may be more, we just don't know. We have
14:42:39 12 to wait and see.

14:42:40 13 But it's a trend. And what you're trying to see is
14:42:43 14 are kids still being admitted to the hospital? And it
14:42:46 15 seems like they are, and it seems like it's still quite a
14:42:50 16 bit of a problem. Fifteen admissions to me seems like a
14:42:50 17 lot.

14:42:55 18 MR. PICCIRILLI: Your Honor, I'm going to move
14:42:56 19 to strike all of that speculation at the end of his
14:42:59 20 answer. It seems like a trend. It's not a trend. And
14:43:02 21 speculating on what's going to happen. It's all
14:43:05 22 speculative and certainly not supported by this document.

14:43:08 23 There's no trends here, if anything the trend is
14:43:12 24 down. Plus the document is inherently misleading. It
14:43:18 25 goes by months instead of days. So we have no idea what

14:43:22 1 part of the month these hospitalizations were, whether
14:43:25 2 they were the same two people on the same day. It
14:43:27 3 doesn't -- this document doesn't really provide any
14:43:30 4 probative value to what the doctor is trying to testify
14:43:34 5 to.

14:43:35 6 MS. WYRZYKOWSKI: Your Honor, if you take
14:43:37 7 Exhibit M and compare it with Exhibit A, which does have
14:43:41 8 data trends, and you look at Exhibit M, it does show an
14:43:44 9 increase.

14:43:45 10 The Doctor has been qualified as an expert. He is
14:43:48 11 in the field of public health. This is the information
14:43:50 12 that the Rhode Island Department of Health and someone
14:43:53 13 with Dr. McDonald's expertise looked at to help determine
14:43:56 14 the next step.

14:43:57 15 MR. PICCIRILLI: But, your Honor, Exhibit A is
14:44:00 16 all hospitalizations. It's not broken up by pediatric
14:44:04 17 hospitalization. She's comparing apples to oranges, and
14:44:08 18 that makes it even more confusing now.

14:44:10 19 Exhibit A is total hospitalizations by day.
14:44:13 20 Exhibit M is pediatric hospitalizations by month. How is
14:44:18 21 this probative to getting to -- its inherently confusing.

14:44:23 22 MS. WYRZYKOWSKI: It's probative, your Honor,
14:44:24 23 because it goes to the material that Dr. McDonald has
14:44:27 24 before him to help make decisions that help guide the
14:44:31 25 Governor of this State. He's testified that he's on the

14:44:32 1 Covid Task Force. He is inundated with information.
14:44:33 2 This is some of the information that he uses to help
14:44:36 3 guide the Governor's decision.

14:44:38 4 Okay. Hospitalizations are increasing. I'm not
14:44:41 5 comparing March of 2020 to September of '21 and saying
14:44:46 6 oh, it's different days and different times. I'm just
14:44:48 7 looking at a month analysis here. That's all we're
14:44:51 8 trying to do here just to show that cases were,
14:44:53 9 hospitalization cases were increasing in pediatric
14:44:56 10 patients. And that information, the Doctor will explain,
14:44:59 11 is used by the Govenor.

14:45:00 12 MR. PICCIRILLI: The hospitalizations are done.
14:45:02 13 In August it was 20, in September it's 17. So how can
14:45:07 14 you testify that that's a trend that's going up?

14:45:09 15 MS. WYRZYKOWSKI: Because it goes up through
14:45:11 16 June and July.

14:45:12 17 THE COURT: And that's what he testified to.
14:45:14 18 He was testifying about earlier in the year. Obviously,
14:45:17 19 he didn't have the number for September of '21 when they
14:45:23 20 were making a decision about masking. But it's probative
14:45:27 21 not only to whether or not it's reasonable to invoke the
14:45:39 22 masking regulation and what the numbers are now, but it's
14:45:43 23 also probative to what the policy makers were looking at
14:45:46 24 at the time they established the policy.

14:45:48 25 Dr. McDonald already testified that he was on the --

14:45:51 1 there was another name for it, the policy making team,
14:45:56 2 the Corona virus task force, which advised the Governor,
14:46:00 3 which set the policy in motion of which this case is all
14:46:04 4 about.

14:46:06 5 However, he hasn't testified that he was looking at
14:46:14 6 M, specifically at those meetings or that the meeting was
14:46:18 7 looking at M but either way, and I don't see how he could
14:46:26 8 have been looking at M because it says the September 21
14:46:30 9 numbers.

14:46:30 10 MS. WYRZYKOWSKI: Yes, your Honor. It goes
14:46:33 11 until --

14:46:33 12 THE COURT: So perhaps you can clarify with the
14:46:35 13 witness.

14:46:35 14 Q Doctor, do you know what date this exhibit goes to? It
14:46:38 15 says September of 2021 but do you know the actual date?

14:46:42 16 A It goes to September 30 of 2021.

14:46:45 17 Q It is September 30. Okay. And, Doctor, do you get this
14:46:50 18 document, excluding month of September, in the ordinary
14:46:55 19 course of your business on a monthly basis to show
14:47:00 20 pediatric hospitalizations?

14:47:01 21 A I don't think it's monthly. I don't know how often I get
14:47:05 22 this.

14:47:05 23 Q Do you know how often or you don't --

14:47:07 24 A I don't know how often I get it. I get a lot of
14:47:09 25 documents every day. I don't keep track of how often

14:47:12 1 they come in.

14:47:13 2 Q Prior to taking the stand today, have you seen this
14:47:17 3 document?

14:47:17 4 A I did.

14:47:17 5 Q Have you used this document in helping to formulate your
14:47:22 6 own public policy decisions?

14:47:24 7 A Yes.

14:47:25 8 Q Why have you used this document to help formulate your
14:47:30 9 own public policy decision?

14:47:32 10 A I'm trying to decide if children are having a problem
14:47:35 11 with this disease, and if children are in the hospital
14:47:37 12 that's indicative of a significant problem.

14:47:39 13 Q How does this document show that children are having a
14:47:42 14 problem with this disease?

14:47:43 15 A Because children are still ending up in the hospital.

14:47:46 16 Q And is this document solely related to COVID-19
14:47:49 17 hospitalizations?

14:47:50 18 A Yes.

14:47:51 19 Q Doctor, based upon your training, education and
14:47:57 20 experience, and as a public health professional, what
14:48:02 21 does -- can you provide an opinion to a reasonable degree
14:48:05 22 of medical certainty as to what it means when you see an
14:48:09 23 increase in hospitalizations among pediatric patients?

14:48:12 24 A What it means is --

14:48:13 25 Q Just yes or no?

14:48:14 1 A Yes.

14:48:15 2 Q What is that opinion?

14:48:17 3 A It means there's a problem.

14:48:18 4 Q What do you mean, "there's a problem?"

14:48:20 5 A It means that children are going to get infected with
14:48:24 6 Delta --

14:48:25 7 MR. PICCIRILLI: Objection, your Honor. Move
14:48:26 8 to strike. The question was, I don't think it was
14:48:28 9 specifically Covid hospitalizations. I thought it was
14:48:31 10 all pediatric hospitalizations. Did I hear the question
14:48:31 11 wrong?

14:48:36 12 MS. WYRZYKOWSKI: I was focussing solely on
14:48:38 13 COVID-19 hospitalizations. That's what this document is.

14:48:41 14 MR. PICCIRILLI: So on the basis of less than
14:48:44 15 one hospitalization a day of Covid hospitalizations, this
14:48:50 16 is a public health crisis?

14:48:50 17 MS. WYRZYKOWSKI: Objection, your Honor.

14:48:51 18 MR. PICCIRILLI: I'm just trying to figure out
14:48:53 19 what the question is. Are you questioning that it's
14:48:56 20 causing pediatric hospitalizations that are --

14:49:03 21 THE COURT: Are you objecting to the question?

14:49:05 22 MR. PICCIRILLI: I guess I misheard the
14:49:06 23 question. I thought the question was all pediatric
14:49:09 24 hospitalizations.

14:49:10 25 THE COURT: Let's hear the question again

14:49:11 1 because we got to let the stenographer go back about two
14:49:16 2 questions and we'll get the full.

14:49:16 3 (Record read)

14:50:18 4 MR. PICCIRILLI: That was all hospitalizations
14:50:19 5 not only hospitalizations.

14:50:23 6 THE COURT: Sustained.

14:50:25 7 Q Doctor, based upon your training, education and
14:50:30 8 experience, can you provide an opinion to a reasonable
14:50:33 9 degree of medical certainty, as to why there was an
14:50:38 10 increase in COVID-19 cases in a hospital setting in the
14:50:45 11 summer of 2021?

14:50:48 12 MR. PICCIRILLI: Objection. Now she's asking
14:50:50 13 what the reason was? What would be the basis for the
14:50:52 14 reason?

14:50:54 15 MS. WYRZYKOWSKI: Opinion.

14:50:55 16 THE COURT: Do you have an opinion as to why?
14:50:57 17 That's appropriate. That's an expert opinion. And the
14:51:00 18 question calls for a yes or no. Do you have an opinion?

14:51:02 19 THE WITNESS: Yes.

14:51:02 20 Q Doctor, what is that opinion?

14:51:05 21 MR. PICCIRILLI: Again, I object. What's the
14:51:07 22 basis of reason?

14:51:09 23 MS. WYRZYKOWSKI: He's a medical expert --

14:51:10 24 THE COURT: Don't give him the answer. He held
14:51:13 25 the basis for his opinion.

14:51:15 1 Q Doctor, what is the basis for your opinion?

14:51:17 2 A A public health physician. I work with the Rhode Island
14:51:21 3 Department of Health. I'm the Medical Director of the
14:51:23 4 Covid Unit. I live and breath Covid every single day.
14:51:26 5 I've been trained in this profession and so I have access
14:51:29 6 to a lot of data that other people don't have access to,
14:51:31 7 so based on that I formed an opinion.

14:51:35 8 Q Doctor, can you tell us what that opinion is?

14:51:38 9 MR. PICCIRILLI: So he based it on data that
14:51:41 10 nobody else has?

14:51:42 11 THE COURT: The question for his basis is you
14:51:45 12 can ask him on cross-examination.

14:51:48 13 MR. PICCIRILLI: I will. Thank you.

14:51:51 14 Q What is that opinion, Doctor?

14:51:53 15 A That there's more cases of Covid in Rhode Island and
14:51:57 16 because there's more cases of Covid in Rhode Island
14:51:59 17 there's more children getting Covid in Rhode Island, and
14:52:02 18 because the rates are going up in children some of them
14:52:04 19 are ending in the hospital.

14:52:06 20 Q Thank you, Doctor. Doctor, based upon your training,
14:52:15 21 education and experience, saying there an increase in
14:52:18 22 Covid, 19 pediatrics hospitalizations].

14:52:21 23 Do you have an opinion to a reasonable degree of
14:52:24 24 medical certainty as to what action, if any, should be
14:52:29 25 taken as a result of an increase in pediatric

14:52:33 1 hospitalizations?

14:52:33 2 A Yes.

14:52:34 3 Q Doctor, what is that opinion?

14:52:36 4 A So we need to reduce the amount of people in total who
14:52:40 5 have Covid in the state, that could be done through multi
14:52:43 6 means. One is vaccinating as many people as possible
14:52:47 7 that can be vaccinated. Isolating anyone who is sick
14:52:50 8 with Covid. Quarantining people who are exposed to
14:52:54 9 Covid, and then having people wear masks in various
14:52:58 10 settings. Improving ventilation in other settings is
14:53:01 11 another strategy that works, as well as using hand
14:53:06 12 sanitizer and washing your hands.

14:53:07 13 MS. WYRZYKOWSKI: Thank you, Doctor. Your
14:53:07 14 Honor, may I approach the clerk, please?

14:53:07 15 THE COURT: Yes.

14:53:09 16 MS. WYRZYKOWSKI: Doctor, can I have those two
14:53:12 17 exhibits in front of you or three. I don't know how many
14:53:18 18 you have.

14:54:17 19 Q Doctor, you have before you what has been marked as
14:54:21 20 Plaintiffs' Exhibit 4 and Plaintiffs' Exhibit 5, with
14:54:25 21 respect to Executive Orders 2187 and 2186; is that
14:54:30 22 accurate?

14:54:30 23 A Yes.

14:54:31 24 Q Both of these exhibits have been marked in full. Doctor,
14:54:37 25 with respect to Exhibits 4 and 5, do you recognize these

14:54:43 1 exhibits?

14:54:43 2 A I do.

14:54:44 3 Q Let's do Exhibit 4 first, please, Doctor. What is this
14:54:47 4 exhibit?

14:54:48 5 A It's a declaration of a disaster emergency for new
14:54:52 6 COVID-19 variants.

14:54:53 7 Q And, Doctor, Exhibit 5, please?

14:54:56 8 A It's titled Requiring Masks in Schools.

14:54:59 9 Q Doctor, you previously testified that you were part of
14:55:02 10 the Covid Leadership Team that helps advise the Governor;
14:55:06 11 is that accurate?

14:55:07 12 A Yes.

14:55:07 13 Q Doctor, with respect to Executive Orders 2186 and 2187,
14:55:13 14 Plaintiffs' Exhibits 4 and 5, did you help to advise on
14:55:16 15 those policies before you?

14:55:18 16 A Yes.

14:55:19 17 Q Doctor, we're going to focus right now just on
14:55:24 18 Plaintiffs' Exhibit 4, which is Executive Order 2186. Do
14:55:28 19 you have that, Doctor?

14:55:29 20 A I do.

14:55:29 21 Q Doctor, could you please go to Page 3 of that executive
14:55:34 22 order. Doctor, I direct your attention to the first
14:55:48 23 paragraph on Page 3. Could you please read allowed from
14:55:52 24 that first whereas clause?

14:55:54 25 A 'Whereas Rhode Island is seeing increasing cases of

14:55:58 1 COVID-19 in children and expects to see more childhood
14:56:02 2 cases increase."

14:56:04 3 Q And you previously testified, correct me if I'm wrong,
14:56:11 4 that there was an increase in Covid cases in pediatric
14:56:15 5 populations at approximately July 4 of 2021; is that
14:56:24 6 accurate?

14:56:24 7 A The cases have been increasing since then.

14:56:26 8 Q We talked about hospitalization numbers, Exhibit A. We
14:56:32 9 also talked pediatric hospitalization numbers. In
14:56:41 10 addition to Exhibit A and Exhibit G, was there additional
14:56:44 11 information that you used to help guide the Governor in
14:56:50 12 the statement of seeing an increase in COVID-19 cases in
14:56:54 13 children and expect to see more childhood cases?

14:56:57 14 A Yes.

14:56:57 15 Q Do you recall what those exhibits were? What those
14:57:02 16 documents were?

14:57:02 17 A One of them is the Covid data dashboard.

14:57:06 18 MS. WYRZYKOWSKI: Your Honor, Melissa has the
14:57:10 19 exhibits marked. Plaintiffs' counsel and I have not been
14:57:14 20 able to agree with respect to these exhibits. Your Honor
14:57:19 21 you already have a copy. It's a really long one. So
14:57:26 22 they're all marked Exhibit L. Melissa, can I have those
14:57:30 23 to give to....

14:57:31 24 THE CLERK: Would you like all 12?

14:57:33 25 MS. WYRZYKOWSKI: I don't know. They're just

14:57:38 1 I.D. at this point. If you can just give it to me.

14:57:44 2 Thank you.

14:57:44 3 Q Doctor, we talked at length about the information that
14:57:47 4 you have before you in helping to advise the Governor
14:57:52 5 with respect to Executive Order 2186 for
14:57:52 6 hospitalizations.

14:57:53 7 We talked about increased case numbers and you also
14:57:56 8 just indicated that you referred to the response data
14:58:01 9 dashboard. Is that accurate?

14:58:03 10 A Yes. This is called the Covid Data Dashboard. I get a
14:58:08 11 e-mail copy of this twice a week.

14:58:10 12 Q Doctor, could you please tell us what the Covid data
14:58:13 13 dashboard is?

14:58:14 14 A Yes. It's a summary of a lot of critical data that we
14:58:19 15 look at twice a week that really helps us understand what
14:58:23 16 the pandemic has been doing, and what is it doing now,
14:58:27 17 and then it might give us a hint of what it's going to do
14:58:30 18 in the future.

14:58:31 19 It covers everything from how many people got a
14:58:34 20 vaccine that day. How they filed the cases, and then it
14:58:38 21 goes into things like how are we doing with testing? We
14:58:41 22 get all kinds of data about how our emergency departments
14:58:46 23 are doing, whether they're overcrowded or not. I believe
14:58:49 24 we get data about how our lab turnaround times are doing.
14:58:52 25 It's just an awful lot of data we look at almost every

14:58:56 1

day.

14:58:57 2

Q And I believe you testified that the COVID-19 data dashboard was used in helping you to provide guidance to the Governor with respect to the Executive Order 2187; correct?

14:59:01 3

14:59:05 4

14:59:09 5

14:59:09 6

A Yes. This is some of the data we use.

14:59:12 7

14:59:19 8

Q Can we please look at Exhibit L1. There's a lot of them there so I apologize. There's a June 30, 2021 data?

14:59:22 9

A I have it.

14:59:23 10

14:59:28 11

14:59:34 12

14:59:38 13

Q Doctor, can you please look at the first page of Exhibit L1 and explain what portion of this first page is used to help advise the Governor as part of the Covid Leadership Team?

14:59:38 14

14:59:43 15

14:59:46 16

14:59:50 17

14:59:54 18

14:59:57 19

14:59:59 20

A Well, all of it is relevant. In other words, it starts at the upper left-hand corner saying how many pods of cases were there? What's our cumulative cases? What's test positivity rate? Were there any fatalities? How many we had total. Then it goes on on the other chart talking about what's the estimated prevalence of infection.

15:00:00 21

Q I'm sorry, Doctor, where are you, Doctor?

15:00:02 22

15:00:06 23

15:00:08 24

15:00:12 25

A In the chart, right at the chart below, it says right below on June 29. In other words, there's an inset box and it talks about the estimated prevalence of infection.

It was recognized that not everybody actually gets

15:00:16 1 tested. So our statisticians come up with a modeling
15:00:20 2 number, but we have some idea of what community
15:00:23 3 transmission is.

15:00:24 4 And part of it too is just how many cases of people
15:00:27 5 that actually are infected at the time recognize that
15:00:30 6 people are generally ill for ten days, so it's important
15:00:34 7 to know how many people that are there.

15:00:35 8 We have a little box about vaccinations that day.
15:00:38 9 Then we have a little thing about projected community
15:00:41 10 immunity. How many people that we think are immune,
15:00:44 11 based on the vaccination or previous infection.

15:00:47 12 And then this gives me a big enough idea on the
15:00:49 13 bottom about how good the case investigation is and how
15:00:53 14 good the contact tracing is, and then every page has got
15:00:57 15 useful data on it. It's a very data rich dashboard that
15:01:02 16 we look at -- well, I look at this twice a week.

15:01:04 17 Q Your Honor, we have Exhibit L1 L16, which covers the
15:01:12 18 period of June 30, 2021, up to and including
15:01:23 19 October 4, 2021. They're all marked L1 and go all the
15:01:26 20 way through L14. The State asks that these exhibits be
15:01:30 21 marked in full.

15:01:34 22 MR. PICCIRILLI: Where do I start, Judge?

15:01:36 23 THE COURT: Well, lets start with L1 so we can
15:01:39 24 all focus.

15:01:41 25 MR. PICCIRILLI: All right. So first of all,

15:01:42 1 there's a lot of data in the back of this, well,
15:01:48 2 evictions, assistance programs, consumer spending, state
15:02:01 3 comparison. I don't -- long term care assisted
15:02:04 4 facilities. What possible relevance to this case does
15:02:04 5 this have?

15:02:08 6 MS. WYRZYKOWSKI: Your Honor, the State didn't
15:02:09 7 want to be in a position where it was choosing not to
15:02:12 8 file the full information that was provided to the
15:02:14 9 Doctor. So that's what we produced, what he's completely
15:02:16 10 provided with as part of the data dashboard.

15:02:19 11 The Court wants to remove evictions, the State has
15:02:21 12 no objection to that but we didn't want to choose to not
15:02:24 13 provide the full exhibit.

15:02:28 14 MR. PICCIRILLI: I'm not sure that the Doctor
15:02:30 15 had testified as to what specifically in this data
15:02:33 16 dashboard he relied upon to recommend the mask mandate.

15:02:36 17 THE COURT: He did. He said he relied on the
15:02:38 18 whole thing.

15:02:40 19 MR. PICCIRILLI: He relied on the entire thing
15:02:43 20 for the mask mandate, okay.

15:02:45 21 THE COURT: I'm sorry, for the masking, no. I
15:02:48 22 don't want to put -- we're not putting words in his
15:02:49 23 mouth.

15:02:50 24 MR. PICCIRILLI: I didn't understand.

15:02:51 25 THE COURT: But he said he relies upon this,

15:02:55 1 the updates twice a week, and he relies upon it to make
15:02:57 2 his health care decisions.

15:02:59 3 MR. PICCIRILLI: Correct. It's not relevant to
15:03:00 4 the executive order. I don't see how --

15:03:02 5 MS. WYRZYKOWSKI: But it is because we were
15:03:04 6 just talking about how he helped to form policy for the
15:03:07 7 Executive Order 2186, and this is one of these documents
15:03:09 8 that they use to help guide the Governor, which he
15:03:12 9 testified to.

15:03:13 10 MR. PICCIRILLI: Again, I think there's a lot
15:03:16 11 in here that's irrelevant but I'll leave that for now.

15:03:20 12 THE COURT: There is but in many of the
15:03:22 13 documents that I have it's irrelevant, including the
15:03:25 14 study that your doctor read from, it was like 20 pages.

15:03:30 15 MR. PICCIRILLI: So the problem is, Judge,
15:03:33 16 these documents are not internally consistent. So, for
15:03:36 17 example, in June on the first page he has an estimated
15:03:39 18 prevalence of infection. It shows it all going down.
15:03:42 19 I'm assuming that on August 16th he's going to testify
15:03:46 20 until eight that there was going to be a spike.
15:03:49 21 September 16, the day before.

15:03:51 22 THE COURT: All good reasons for cross.

15:03:54 23 MR. PICCIRILLI: Your Honor, the data isn't
15:03:55 24 there. They omitted the data for September 16, the day
15:03:59 25 before they extended the executive order. Are they

15:04:02 1 hiding that data? You can't have one document, this is
15:04:05 2 all going to be one packet. Some of the data is there
15:04:08 3 and then all of a sudden they stop producing the data.

15:04:11 4 MS. WYRZYKOWSKI: Your Honor --

15:04:13 5 MR. PICCIRILLI: Moreover, where does this
15:04:15 6 estimated prevalence come from, some computer model? Is
15:04:19 7 there some separate report that purports that? There's
15:04:23 8 no...

15:04:24 9 THE COURT: That one is a fair question. The
15:04:26 10 others are all questions about how much weight is given
15:04:29 11 and that's where the numbers came from, where it all came
15:04:31 12 from.

15:04:32 13 MR. PICCIRILLI: There's no indication where
15:04:33 14 they come from, your Honor.

15:04:34 15 THE COURT: Do you know where these numbers
15:04:36 16 come from, Doctor?

15:04:37 17 THE WITNESS: I do.

15:04:38 18 THE COURT: Where?

15:04:38 19 THE WITNESS: So the epidemiologist, who works
15:04:40 20 with the Rhode Island Department of Health, makes a
15:04:44 21 calculation based on the number of positive tests and
15:04:45 22 they make assumptions. Assumptions that some of them
15:04:49 23 stick, they stick for ten days, because that's generally
15:04:52 24 how long people are sick for, then there's a calculation
15:04:55 25 based -- based upon how many people are positive and how

15:04:58 1 many people are likely to get tested, what the estimated
15:05:01 2 prevalence is. That's what the estimation is made out
15:05:05 3 of.

15:05:07 4 MR. PICCIRILLI: So there's assumptions made
15:05:09 5 and we don't even -- its just those three things and
15:05:13 6 that's where the data comes from.

15:05:13 7 THE WITNESS: Well, its --

15:05:15 8 THE COURT: There must be assumptions.

15:05:16 9 THE WITNESS: There has to be assumptions. But
15:05:18 10 if you look at the model, if you look at the data in
15:05:21 11 front of us, you see it says CDC transmissions 9.9.

15:05:24 12 So what was special about this day? It was the only
15:05:28 13 day during the summer where we actually met the
15:05:33 14 definition of low transmission. It's kind of a fun day
15:05:35 15 for us because we really thought we were heading in the
15:05:38 16 right direction.

15:05:39 17 MR. PICCIRILLI: I'm going to ask that all of
15:05:41 18 that be stricken. I'm still trying to figure out how
15:05:44 19 this document can be admitted when now we're saying it's
15:05:47 20 computer models.

15:05:47 21 THE COURT: So when we look at admissions, we
15:05:49 22 look at two things, whether or not it is authenticated
15:05:55 23 and he just authenticated it indicating that he had it, a
15:05:59 24 true copy of what he had and it came from the Department
15:06:01 25 of Health, as well as what I assume from another place.

15:06:04 1 MR. PICCIRILLI: No objection on the
15:06:05 2 authenticity.

15:06:07 3 THE COURT: The probative value, whether it's
15:06:09 4 going to help the decision maker to help to decide the
15:06:12 5 case. This is what he had in his hand while he was
15:06:15 6 making the decision or making a recommendation to the
15:06:19 7 group that made a recommendation to the other.

15:06:23 8 The Court tends to find it probative. Do you object
15:06:26 9 to that? Even if it's wrong.

15:06:30 10 MR. PICCIRILLI: Even if it's wrong.

15:06:32 11 THE COURT: So we can move forward.

15:06:33 12 MR. PICCIRILLI: Thank you, your Honor. I'll
15:06:34 13 take that. Again, other than the irrelevance of much of
15:06:39 14 it, but I guess it's too late to try and separate it so.

15:06:43 15 THE COURT: We can separate it but the rules
15:06:46 16 favor a complete document. So L1 is full.

15:06:51 17 **(DEFENDANTS' EXHIBIT L1 WAS MARKED FULL)**

15:06:51 18 MS. WYRZYKOWSKI: Thank you, your Honor.

15:06:55 19 Q Doctor, you had indicated that there were a series of
15:06:58 20 assumptions, with respect to the front page of L1. I
15:07:02 21 don't know if you said series or assumptions. Where is
15:07:04 22 the assumption utilized on the first page of L1?

15:07:07 23 A So you have to make assumptions right after you get to
15:07:10 24 the date of where you are for modeling to work.

15:07:13 25 So the epidemiologists and statisticians make

15:07:16 1 modeling predictions about where they think the pandemic
15:07:19 2 was going to hit. So you look at July 2021, it says 854
15:07:24 3 but they were projecting by September '21 with only 133
15:07:28 4 cases, leaving October only 49.

15:07:30 5 So that was their estimated weekly prevalence. So
15:07:33 6 that's some of the examples of assumptions, but that's
15:07:36 7 what modeling is. You have to make assumptions in order
15:07:38 8 to make a model.

15:07:39 9 Q I'm sorry, Doctor, why do you have to make assumptions in
15:07:42 10 order to make a model?

15:07:43 11 A Because you're trying to predict the future.

15:07:46 12 Q Doctor, we've already covered the front page of L1, it
15:07:52 13 covers vaccinations. Can you please explain as to why
15:07:57 14 the vaccination rate is relevant with respect to
15:08:01 15 Executive Order 2186?

15:08:04 16 A Because when you look at the vaccination rate you're
15:08:09 17 trying to get an understanding of are we at heard
15:08:12 18 immunity or not, and when you look at that number
15:08:15 19 65 percent for the first dose and 59 percent of fully
15:08:20 20 vaccinated, I know that's not herd immunity.

15:08:22 21 Q Doctor, what is heard immunity?

15:08:25 22 A Herd immunity means you immunize enough people so you
15:08:29 23 don't see spread of the disease anymore.

15:08:32 24 MR. PICCIRILLI: Objection. That's not the
15:08:34 25 definition of heard immunity.

15:08:35 1 THE COURT: Then you can ask him that.

15:08:37 2 MR. PICCIRILLI: But, your Honor, he's trying
15:08:38 3 to testify that natural immunity doesn't exist? It's not
15:08:41 4 part of heard immunity?

15:08:43 5 THE COURT: If he testified that white is
15:08:44 6 black, that's grounds for you to question him on.

15:08:48 7 MR. PICCIRILLI: Okay. Thank you, your Honor.

15:08:49 8 MS. WYRZYKOWSKI: Your Honor, opposing counsel
15:08:52 9 just brought up a point, he raised the issue of natural
15:08:54 10 immunity.

15:08:54 11 Q Is natural immunity incorporated into this document?

15:08:57 12 A Yes, it is.

15:08:57 13 Q Where is natural immunity incorporated into this
15:09:00 14 document?

15:09:00 15 A In the chart right below it, it says: Projected community
15:09:04 16 immunity.

15:09:04 17 Q So there actually is a separation between vaccination and
15:09:04 18 herd immunity and herd immunity; correct?

15:09:04 19 A Yes.

15:09:14 20 Q So on L1, Doctor, there's actually a separation between
15:09:18 21 vaccination heard immunity and then immunity provided
15:09:22 22 through projected community immunity?

15:09:25 23 MR. PICCIRILLI: Your Honor, that's not
15:09:27 24 accurate. He testified that vaccinations is what
15:09:30 25 determines immunity and projected community immunity only

15:09:35 1 reflects vaccinations. There's nothing on here that
15:09:38 2 includes natural immunity, so that question is
15:09:41 3 inappropriate. That's not what this chart says. Where
15:09:44 4 does it say under projected community immunity, includes
15:09:48 5 natural immunity.

15:09:50 6 MS. WYRZYKOWSKI: Your Honor --

15:09:53 7 Q Dr. McDonald, is natural immunity included in this chart?

15:09:55 8 A It is.

15:09:56 9 Q Could you please explain, first, what is natural
15:10:00 10 immunity?

15:10:00 11 A That's people who have been infected with Covid and it
15:10:04 12 had a consolidated body response, so they have some
15:10:08 13 measure of protection for a period of time from
15:10:10 14 reinfection.

15:10:11 15 Q Do you know, based upon your training, education and
15:10:14 16 experience, how long a person who had COVID-19 maintains
15:10:19 17 their immunity?

15:10:20 18 A It's not known by anybody.

15:10:22 19 Q So not --

15:10:24 20 A I don't know.

15:10:24 21 Q To go back. This chart covers vaccinations, in addition
15:10:36 22 to covering vaccination rates it also covers immunity
15:10:42 23 that would have been obtained from someone who received
15:10:45 24 COVID-19?

15:10:46 25 MR. PICCIRILLI: Objection. That's nowhere on

15:10:47 1 this chart from the three does it say that.

15:10:51 2 THE COURT: That was the question, correct?

15:10:53 3 THE WITNESS: It actually does say that. Can I
15:10:55 4 just point it out?

15:10:56 5 Q Please, Doctor.

15:10:58 6 THE COURT: Overruled.

15:10:58 7 A So if you look at the number here, where it says 59
15:11:02 8 percent fully vaccinated in Rhode Island.

15:11:04 9 Q Yes.

15:11:05 10 A So if you go down here where it says July 2021, the
15:11:08 11 little bar going down shows where we are today. The
15:11:12 12 projected immunity is 66 and 67 percent, so that includes
15:11:17 13 people who had natural infection.

15:11:20 14 Q Doctor ---

15:11:22 15 MR. PICCIRILLI: Judge, that -- objection, your
15:11:24 16 Honor. That's absolutely not what this chart says.
15:11:28 17 There's nowhere on this chart -- and, again, he's now
15:11:31 18 saying we have to do a calculation to subtract that
15:11:34 19 percentage, that 66 percent can comport with the first
15:11:38 20 dose.

15:11:38 21 THE COURT: And what's the legal ground to your
15:11:40 22 objection to the question?

15:11:41 23 MR. PICCIRILLI: The chart is inherently -- it
15:11:44 24 is vague. It is not clear. I don't see how it is
15:11:47 25 probative to this issue of natural immunity. It doesn't

15:11:50 1 say anything about that on here. We just have to --

15:11:53 2 THE COURT: L1 is already full.

15:11:57 3 MR. PICCIRILLI: I'm sorry, Judge. I'll
15:11:58 4 withdraw my objection.

15:11:59 5 THE COURT: And on top of that, L1 from what I
15:12:02 6 can tell from my notes, is the document that your Doctor
15:12:05 7 relied on in coming to his conclusion.

15:12:09 8 MR. PICCIRILLI: Not with regard to projected
15:12:13 9 immunity.

15:12:13 10 THE COURT: He testified, Mr. Piccirilli. The
15:12:17 11 Covid dashboard, the DOH dashboard.

15:12:20 12 MR. PICCIRILLI: Yes, your Honor, and I didn't
15:12:22 13 object to the authenticity of the document. I'm not
15:12:25 14 objecting. I'm talking about its relevance and its
15:12:28 15 probative value. If it doesn't --

15:12:30 16 THE COURT: So there's no foundation for what
15:12:36 17 your expert testified on?

15:12:41 18 MR. PICCIRILLI: I'm not objecting to its
15:12:43 19 authenticity, your Honor. I'm talking about the way --

15:12:45 20 THE COURT: It goes to its probative value.

15:12:49 21 MR. PICCIRILLI: I withdraw my objection. I'll ask
15:12:52 22 it on cross.

15:12:57 23 THE COURT: Both the stenographer and I are
15:12:59 24 going to need a break, but there's one case that's coming
15:13:02 25 in. So I'm going to recess this case for about 15

15:13:04 1 minutes and we'll come back. Thank you for putting up
15:13:07 2 with us.

15:13:07 3 (Break taken)

15:32:33 4 **(The witness returns to the stand)**

15:33:22 5 THE CLERK: I would just like to remind the
15:33:27 6 witness that having been previously sworn in you are
15:33:29 7 still under oath. Please state your name for the record.

15:33:31 8 THE WITNESS: I'm Dr. James McDonald.

15:33:33 9 THE CLERK: Thank you. Handing to the witness
15:33:38 10 L7, L8 and L12 for identification.

15:34:04 11 **CONTINUED DIRECT EXAMINATION BY MS. WYRZYKOWSKI**

15:34:28 12 Q Thank you, your Honor. Your Honor, I'm going to attempt
15:34:30 13 to fast forward and I'm going to direct the Court's
15:34:35 14 attention and opposing counsel's attention and
15:34:38 15 Dr. McDonald's attention to Exhibit L8.

15:34:41 16 First, let's start with L7, Exhibit L7. Doctor, do
15:34:46 17 you have Exhibit L7 in front of you?

15:34:48 18 A I do.

15:34:51 19 Q Doctor, could you please tell us the date of Exhibit L7?

15:34:58 20 A Its August 9, 2021.

15:35:03 21 Q Doctor, the document before you, the packet as a whole,
15:35:07 22 is this information provided to you in the ordinary
15:35:10 23 course of business in the Rhode Island Department of
15:35:12 24 Health?

15:35:12 25 A Yes.

15:35:13 1 Q We were previously discussing Executive Order 2186, which
15:35:19 2 was implemented on August 19, 2021. The document L7 that
15:35:25 3 you have before you was document L7 used by you in your
15:35:32 4 Covid leadership team in helping to advise the Governor
15:35:37 5 with respect to Executive Order 2186?

15:35:40 6 A Yes.

15:35:41 7 Q Doctor, I would like to direct your attention to page, I
15:35:49 8 think it's 7 of Exhibit L7. And just for ease, to make
15:36:02 9 sure everyone is on the same page, I'm on the page with a
15:36:07 10 graph and multiple charts. There's no numbers,
15:36:13 11 unfortunately. The top left-hand corner, it lists cases
15:36:16 12 by age group.

15:36:34 13 Doctor, I'm directing your attention to Page 7 of
15:36:37 14 L7, which is currently before you. On the left-hand
15:36:44 15 corner they've identified cases by age group, followed by
15:36:49 16 cases for 100k for by age group by date. Did I read that
15:36:54 17 correctly?

15:36:54 18 A Yes.

15:36:54 19 Q Doctor, focussing solely on the top portion of this
15:36:58 20 document, can you please describe what this document is
15:37:04 21 showing -- what this document is attempting to display
15:37:08 22 with respect to cases by age group, only on the first top
15:37:12 23 portion of the page?

15:37:13 24 A Yes. So this shows the number of cases of COVID-19 by
15:37:19 25 various age bands, children who are 0 to 4, 5 to 9, 10 to

15:37:25 1 14, all in different brackets up to 80 plus, and it's
15:37:30 2 rated. It's cases per 100,00 population per week. We
15:37:35 3 use that number because the CDC and other health
15:37:40 4 departments use the same number.

15:37:41 5 So what this shows is the case rates in all age
15:37:45 6 groups are really declining quite impressively and really
15:37:50 7 saw later, right around July 4th. What you see after
15:37:54 8 July 4th is slowly the case rates in every age group
15:37:59 9 increasing. Definitive that it's increasing.

15:38:04 10 If you look at the box it says the top five weekly
15:38:07 11 case rates by age group, July 25 to July 31, for example.
15:38:13 12 It just shows you the rates for the 5 to 9 years old that
15:38:17 13 week was 107 per 100,000 per week, which corresponds
15:38:24 14 we've already established is high prevalence, according
15:38:26 15 to the Rhode Island Department of Health and Center for
15:38:26 16 Disease Control.

15:38:30 17 So what you saw is around July 4th, we were actually
15:38:34 18 doing quite well as a state. We had just gotten from low
15:38:39 19 prevalence up to the next level, which was moderate. We
15:38:42 20 moved into substantial and then quickly moved into high
15:38:46 21 prevalence in the state, that's because of Delta Covid.

15:38:51 22 Q So, Doctor, based upon your training, education and
15:38:53 23 experience and your work in the field of public health,
15:38:57 24 can you opine to a reasonable degree of medical certainty
15:39:00 25 as to why case numbers were increasing from July 4 to

15:39:04 1 July 11 up to July 25 of 2021 by looking at the document
15:39:09 2 before you?

15:39:09 3 A Yes.

15:39:10 4 Q What is that medical opinion, Doctor?

15:39:13 5 A The variant of Delta Covid became the dominant viral
15:39:18 6 strain in the State, and because it's more contagious,
15:39:22 7 more people got infected.

15:39:26 8 Q Doctor, I now want to move you -- we're going to get back
15:39:32 9 to L7 in one moment. I now want to move you to L8. I
15:39:43 10 believe it's also on Page 7. I'm looking for the same
15:39:46 11 graph that you just described on L7.

15:40:05 12 Q Doctor, you have before you L8 and the page that
15:40:09 13 references cases by age group and the chart?

15:40:12 14 A Yes.

15:40:14 15 THE COURT: Actually, he's not supposed to be
15:40:16 16 reading from a chart unless it's a full exhibit. Only L1
15:40:20 17 came in.

15:40:21 18 MS. WYRZYKOWSKI: Your Honor, I ask that the
15:40:23 19 exhibit be full at this time.

15:40:24 20 THE COURT: Which ones? All of the Ls?

15:40:26 21 MS. WYRZYKOWSKI: At this moment just L7 and
15:40:29 22 L8.

15:40:29 23 THE COURT: Incorporating the same objections
15:40:32 24 as before?

15:40:32 25 MR. PICCIRILLI: Yes, your Honor. These were

15:40:35 1 actually just dumped on me. I haven't had a chance to
15:40:38 2 review them with my expert. If I could just reserve some
15:40:42 3 objections -- we're not going to finish today. That way
15:40:45 4 I won't waste the Court's time any more about objecting.
15:40:49 5 For the purpose of this hearing, I'll let the witness
15:40:52 6 read from it. I have no objection.

15:40:53 7 THE COURT: Very well, we'll do that.

15:40:55 8 Q Looking at Exhibit L8, the page before you, cases by age
15:41:00 9 group.

15:41:01 10 THE COURT: The Court reserves on whether
15:41:02 11 they're full, but please remind me to come back. I'll
15:41:06 12 try to remember as well. I don't mean to hang that out
15:41:09 13 there. We'll determine at the end of this thing whether
15:41:11 14 this is full or not.

15:41:12 15 MS. WYRZYKOWSKI: Yes, your Honor.

15:41:13 16 THE COURT: Thank you.

15:41:13 17 Q I'm looking at the chart from July 25 to August 1st, can
15:41:21 18 you please explain what that chart is showing with
15:41:25 19 respect to Exhibit L8?

15:41:28 20 A What you see in the chart is every age group is
15:41:32 21 increasing its rate per 100,000 per week, so you see at
15:41:37 22 every age group there's more cases and that means the
15:41:41 23 pandemic is getting worse in the State.

15:41:47 24 Q Doctor, looking at L8, I want to direct your attention to
15:41:53 25 another page in L8. Please give me a moment to find it.

15:42:06 1 I'm still at L8, Page 6.

15:42:22 2 Just for clarity, I'm looking at a chart or graph,
15:42:26 3 excuse me. I don't know what it is. It's entitled
15:42:29 4 Hospital Beds PPE. Are you with me?

15:42:33 5 MR. PICCIRILLI: Is this L8? I'm sorry, L8?

15:42:36 6 MS. WYRZYKOWSKI: I'm currently on L8, and I
15:42:39 7 believe I'm on Page 6. And the top right-hand corner
15:42:44 8 says, hospital data updated July 26, 2021. Greg, you all
15:43:02 9 set?

15:43:02 10 (Pause taken)

15:43:03 11 THE COURT: All set.

15:43:03 12 Q Doctor, through both Exhibits L7 and L8, you testified
15:43:10 13 that there's an increase in Covid positive cases in the
15:43:14 14 age groups; is that accurate?

15:43:15 15 A Yes.

15:43:15 16 Q And that increase began on or about July 4th and
15:43:20 17 continued until, according to L8, the first week of
15:43:28 18 August; is that accurate?

15:43:30 19 A Yes.

15:43:30 20 Q And now I'm directing your attention to Page 6, that is
15:43:35 21 before you in Exhibit L8. We've talked about increase
15:43:42 22 COVID-19 cases. Can you explain how the exhibit before
15:43:47 23 you on Page 6 regarding hospital beds and PPE relate, or
15:43:52 24 if they do relate to the increase in COVID-19 positive
15:43:55 25 cases?

15:43:56 1 A Yes, I can explain that.

15:43:59 2 Q Please explain that, Doctor.

15:44:00 3 A So in the upper left-hand corner it talks about the
15:44:05 4 national emergency department overcrowding scale, also
15:44:10 5 abbreviation as NEDC. It's a score. And it's an
15:44:15 6 estimate of the severity of overcrowding in emergency
15:44:18 7 departments.

15:44:18 8 This is a report that I rely on to help understand
15:44:22 9 what's going on in the emergency department in the acute
15:44:26 10 care hospitals in our state. The name of the hospitals
15:44:29 11 are in the left-hand column under facility. Then it
15:44:34 12 lists total hospital beds.

15:44:35 13 Most importantly, though, there's a score and
15:44:39 14 there's color bands attributed to it called 7 day
15:44:44 15 average, NEDC score. And they have a color scale from
15:44:47 16 green to red. Green meaning not busy and then it
15:44:52 17 accelerates to busy or extremely busy but not
15:44:56 18 overcrowded. Then it goes to overcrowded. Then it leads
15:45:00 19 to severely overcrowded, and the red says dangerously
15:45:05 20 overcrowded.

15:45:07 21 When I look at this and I see all these hospitals in
15:45:11 22 red, that they're dangerously overcrowded that makes me,
15:45:17 23 as the medical director of the Rhode Island Department of
15:45:19 24 Health, very concerned. Because I see four hospitals
15:45:23 25 that are dangerously overcrowded, another four are

15:45:28 1 severely overcrowded.

15:45:30 2 So this concerns me deeply because this means not
15:45:34 3 only are there patients with Covid not getting the care
15:45:38 4 they need, but everybody might not get the care they
15:45:40 5 need. It's the word dangerous that gathers my attention.

15:45:43 6 Q First off, could you please explain where this
15:45:48 7 information in this chart comes from?

15:45:49 8 A It's a score, and it's reported from the hospital to us.
15:45:54 9 So twice a day the hospital gives us data, the Rhode
15:45:59 10 Island Department of Health, and it's calculated for each
15:46:03 11 hospital on one number, the emergency department beds,
15:46:07 12 the number of hospital beds, total patients in the
15:46:11 13 emergency department, and then the number of cases on
15:46:14 14 ventilators in the emergency department, number of admits
15:46:17 15 in the emergency department, waiting time of the longest
15:46:21 16 patient and the waiting time for the longest waiting room
15:46:26 17 admission, and then they send us this score at least
15:46:29 18 twice per day and they can resubmit it as they need to.

15:46:34 19 Q Doctor, why does it matter as an opinion, as a public
15:46:38 20 health official and Director of the Rhode Island
15:46:41 21 Department of Health, that a local hospital on or about
15:46:45 22 August 16, 2021 is listed as dangerously overcrowded?

15:46:50 23 A Yes, so what that means is when they're dangerously
15:46:54 24 overcrowded, the hospital is more likely to go on
15:46:57 25 diversion. What diversion means is if you're in an

15:47:01 1 ambulance, and you want to go to the hospital, the
15:47:05 2 hospital will tell you no, we can't accept you.

15:47:08 3 So you can't necessarily go to the nearest hospital.
15:47:12 4 You go to the next hospital that is accepting patients.
15:47:15 5 We see hospitals go into the dangerously overcrowded,
15:47:17 6 they often want diversion. So you have patients going
15:47:21 7 all over the state for their emergency care but not
15:47:25 8 everybody goes to the hospital through an ambulance, some
15:47:28 9 people drive there or walk there. But when they get
15:47:31 10 there, if a hospital or emergency department is
15:47:34 11 dangerously overcrowded, that means people who are
15:47:37 12 waiting to just simply be triaged, in other words,
15:47:41 13 waiting in the line to come to the parking lot just to
15:47:44 14 even see the medical screening exam, have to wait for a
15:47:49 15 long period of time just to simply get a medical
15:47:50 16 screening exam. That's what dangerously overcrowded
15:47:53 17 looks like.

15:47:54 18 What that means is people aren't getting the health
15:47:57 19 care they need and they might have adverse outcomes
15:48:00 20 because emergency departments are dangerously overcrowded
15:48:03 21 and this worries me.

15:48:05 22 Q Why does it worry you if a member of the public who had
15:48:08 23 an adverse outcome because a hospital is dangerously
15:48:11 24 overcrowded in the month of August 2021, excuse me, from
15:48:16 25 the date of August 16, 2021?

15:48:18 1 A Yes, so as the Department of Health we want to have a
15:48:21 2 health care delivery system that works for everybody, and
15:48:25 3 I want a health care delivery system that allows
15:48:29 4 everybody importantly access to care and access to
15:48:32 5 emergency care when they need it.

15:48:34 6 If a hospital is dangerously overcrowded people are
15:48:38 7 waiting, and while they're waiting they might pass away.
15:48:41 8 They might have an adverse outcome. They might be
15:48:42 9 admitted to the hospital and they didn't need to be.
15:48:44 10 They might be suffering in pain longer than they needed
15:48:47 11 to be. It's preventible though, and the way it's
15:48:50 12 preventible is trying to do public health interventions
15:48:53 13 that prevents the spread of communicable diseases that I
15:48:56 14 can prevent. I can't prevent every car accident in the
15:49:00 15 state, but I really do think I can prevent most cases of
15:49:03 16 Covid in the state, whether people listen to me or not is
15:49:07 17 up to them.

15:49:08 18 MR. PICCIRILLI: Objection. Move to strike.
15:49:10 19 He can't prevent car accidents? You can ban cars,
15:49:12 20 according to his policy --

15:49:13 21 MS. WYRZYKOWSKI: Objection, your Honor.

15:49:15 22 MR. PICCIRILLI: -- just ban everything. So
15:49:16 23 that's totally speculative, inappropriate, argumentative
15:49:20 24 not based on any evidence in the record.

15:49:22 25 MS. WYRZYKOWSKI: Your Honor, he was --

15:49:23 1 THE COURT: Overruled.

15:49:25 2 Q Your Honor, can you please explain very simply --
15:49:36 3 Dr. McDonald, can you please explain very simply, why
15:49:40 4 looking at the data of a dangerously overcrowded hospital
15:49:46 5 relates to the COVID-19 increase in cases? I'm missing
15:49:53 6 -- can you explain the correlation between the two and
15:49:55 7 how that helps formulate your opinion to the Governor?

15:49:58 8 A So when there's increased cases of Covid, there's more
15:50:02 9 people seeking healthcare, from either their own doctor
15:50:05 10 or for the people who don't have doctors, emergency
15:50:09 11 departments, or for people who have doctors but need
15:50:11 12 emergency care going to the emergency department.

15:50:14 13 Keep in mind there's people going to the emergency
15:50:16 14 department for other reasons. People are going to
15:50:19 15 hospitals for all other reasons. Our hospital system
15:50:22 16 isn't designed to handle a pandemic nor is it designed to
15:50:26 17 handle a surge in cases.

15:50:28 18 What you see is with the exhibits we showed earlier
15:50:32 19 was we were doing great until July 4th, but there was a
15:50:35 20 surge in cases. There was a surge in cases because the
15:50:39 21 variants of Covid that was circulating then, the Alpha
15:50:43 22 variant was reserved by the Delta variant, and the Delta
15:50:47 23 variant is more contagious and that's why we have much
15:50:50 24 more cases.

15:50:51 25 Q Can you opine, based on your training, education and

15:50:57 1 experience, in your role as the director of the Rhode
15:51:01 2 Island Department of Health, as to why local Rhode Island
15:51:07 3 hospitals isn't designed to handle a pandemic?

15:51:09 4 A So --

15:51:11 5 Q Can you make that opinion?

15:51:13 6 A Yes.

15:51:13 7 Q What is that opinion, Doctor?

15:51:15 8 A So hospitals are designed to handle a certain predictable
15:51:20 9 volume of patients, based on the historical records of
15:51:23 10 what the patient's volumes will look like. Hospitals
15:51:27 11 also are designed for a certain amount of staff; doctors,
15:51:30 12 nurses, lab technicians and staff for the hospital.

15:51:35 13 There's only so many health care staff in the state,
15:51:37 14 since they have to be highly trained, subsequently
15:51:40 15 licensed, you can't just create health care
15:51:44 16 professionals. We have to rely on the ones we have. You
15:51:47 17 just can't find new ones because since it's a pandemic
15:51:50 18 that's effecting not just this country but the whole
15:51:54 19 planet, healthcare workers have been in short supply
15:51:57 20 throughout the entire pandemic and still are to this day.

15:52:04 21 MS. WYRZYKOWSKI: Your Honor, at this point in
15:52:06 22 time I ask that you move L7 and L8 in full. These
15:52:14 23 documents were used by the doctor to help formulate his
15:52:19 24 opinion and medical guidance that was provided to the
15:52:23 25 Governor, with respect to Executive Order 2186. They go

15:52:26 1 to his mental state, I'm sorry his state of mind and his
15:52:30 2 mental impression in helping to formulate those opinions.
15:52:33 3 And the data used in these documents, it's my
15:52:35 4 understanding is also relied upon by Dr. Bostom as well.

15:52:39 5 THE COURT: L7 and L8 are returned.

15:52:48 6 Q Doctor, we're still focussing on August -- I'm sorry, on
15:52:59 7 2021, and we talked about the hospitalization numbers
15:53:02 8 that are in Exhibit 6. Excuse me, that are on Page 6 of
15:53:09 9 Exhibit L8.

15:53:12 10 In addition to looking at the data that's provided
15:53:15 11 on this page, did you receive any additional information
15:53:19 12 from the hospital?

15:53:19 13 A Well, I looked at all the data on this page, not all of
15:53:26 14 it. I don't really need to worry about the personal
15:53:28 15 protective equipment on the bottom because we solved that
15:53:31 16 problem.

15:53:32 17 We do look at the hospital bed capacity, and we show
15:53:36 18 right there how we're doing in the hospital bed capacity.

15:53:38 19 Q Doctor, in your role as the Director of the Department of
15:53:41 20 Health, did there come a point in time where you had
15:53:43 21 telephone conversations with executives at local
15:53:48 22 hospitals?

15:53:48 23 A Yes.

15:53:49 24 Q Doctor, when did the conversation take place?

15:53:54 25 A So I was on a call with the chief executive officers and

15:53:58 1 the chief medical officers of all the hospitals in Rhode
15:54:01 2 Island on August 12, 2021.

15:54:04 3 Q Doctor, on that call on August 12th of 2021, did you
15:54:11 4 discuss the dangerously overcrowded state of hospitals in
15:54:15 5 the State of Rhode Island?

15:54:16 6 A Yes.

15:54:17 7 Q Doctor, what was said during that phone call?

15:54:21 8 MR. PICCIRILLI: Objection.

15:54:22 9 MS. WYRZYKOWSKI: State of mind, mental
15:54:23 10 impression, how the doctor formulated his opinion.

15:54:27 11 MR. PICCIRILLI: It's being introduced for what
15:54:28 12 the CEO's allegedly told the Doctor.

15:54:31 13 THE COURT: The Court is not going to use it as
15:54:33 14 that. She's only offering it as the state of mind, and
15:54:37 15 that's all it would be used for, so to that extent it's
15:54:41 16 allowed. Overruled.

15:54:43 17 THE WITNESS: The hospitals were overwhelmed.
15:54:46 18 The hospitals needed relief. Many topics were discussed.
15:54:50 19 Shortage of staff, the vaccine mandate was discussed.
15:54:55 20 But the overcrowding, one of the big issues that I kept
15:55:00 21 hearing though is we have a nursing shortage. We can't
15:55:03 22 seem to hire nurses.

15:55:04 23 These were the types of things that I was hearing
15:55:06 24 from chief executive officers and chief medical officers.
15:55:11 25 No hospital said to me we're in good shape, no worries.

15:55:16 1 Every hospital is saying we're overwhelmed.

15:55:19 2 Q And I believe you said that that phone call was on
15:55:23 3 August 12th; correct?

15:55:23 4 A Yes.

15:55:24 5 Q Doctor, you testified two days ago that you knew, I
15:55:36 6 believe I'm quoting your language, that the current
15:55:39 7 school year 2021 to 2022 "would be different." Do you
15:55:45 8 recall that testimony?

15:55:45 9 A Yes.

15:55:47 10 Q Can you please explain why you knew that the 2021-2020
15:55:54 11 school year would be different?

15:55:56 12 MR. PICCIRILLI: Objection. Is there a time
15:55:58 13 frame? Did he know that on August 19th or June 29th?
15:56:04 14 I'm sorry, what time frame?

15:56:06 15 MS. WYRZYKOWSKI: I'm sorry.

15:56:07 16 THE COURT: Are you saying his prior testimony
15:56:09 17 he said that?

15:56:10 18 MS. WYRZYKOWSKI: Yes.

15:56:11 19 THE COURT: Or are you saying he said that
15:56:13 20 publically before?

15:56:14 21 MS. WYRZYKOWSKI: He said that he knew the
15:56:17 22 2021-2022 school year would be different.

15:56:20 23 THE COURT: He said that in prior testimony the
15:56:23 24 other day?

15:56:23 25 MS. WYRZYKOWSKI: Yes, the other day.

15:56:23 1 THE COURT: Okay. That's what you're asking
15:56:25 2 him about.

15:56:26 3 MS. WYRZYKOWSKI: Correct. I forgot my
15:56:27 4 question.

15:56:29 5 THE WITNESS: You asked me why I thought it
15:56:32 6 would be different.

15:56:32 7 Q Thank you, Doctor.

15:56:33 8 A And the reason I thought it would be different is we knew
15:56:37 9 we wanted the kids to be in school in person, full-time.
15:56:42 10 Yet we saw after July 4th the case rates increasing, so
15:56:49 11 we knew also that the dominant strain of Covid was Delta,
15:56:53 12 which we knew to be more contagious.

15:56:55 13 So we also knew that if you want kids in school
15:56:59 14 full-time, kids aren't going to be 6 feet apart. They're
15:57:02 15 going to be less than 6 feet apart. We knew we had
15:57:05 16 improved ventilation in all the schools that wanted it,
15:57:08 17 but we were concerned, I was concerned deeply, about kids
15:57:12 18 being within 6 feet of each other, knowing that at least
15:57:15 19 3 feet apart, with the case rate increasing and the kids
15:57:20 20 being in school for long periods of time and not being
15:57:23 21 able to get up and move about, we knew there would be an
15:57:26 22 increased exposure because the virus has spread
15:57:29 23 asymptotically, and because Delta is more contagious,
15:57:34 24 we knew that it was going to be higher risk.

15:57:35 25 So in other words, we knew that it was going to be

15:57:38 1 higher risk in 2021 than the previous years. So it did
15:57:42 2 not make sense to me to let them not wear masks, when we
15:57:49 3 did it the year before and we knew we had success with
15:57:52 4 that.

15:57:53 5 Q Doctor, focussing on Executive Order 2186, which is
15:58:00 6 Plaintiff's Exhibit 4, you just stated that you knew that
15:58:05 7 there would be a higher risk in schools, based upon
15:58:09 8 factors you just listed. Was that a factor in helping
15:58:13 9 you to advise the Governor, with respect to Executive
15:58:16 10 Order 2186 for the first paragraph on Page 3?

15:58:21 11 A I don't have the exhibit in front of me.

15:58:24 12 Q I apologize.

15:58:24 13 A Is this the one entitled requiring masks?

15:58:29 14 MS. WYRZYKOWSKI: Can I have the exhibit,
15:58:30 15 please.

15:58:31 16 THE CLERK: I'm sorry, Counsel, which exhibit
15:58:32 17 please?

15:58:33 18 MS. WYRZYKOWSKI: Exhibit 4.

15:58:49 19 A Yes, I have the Executive Order in front of me now.

15:58:52 20 Q Thank you. Doctor, can you please go to Page 3 of that
15:58:56 21 Executive Order, the first paragraph that we have been
15:58:58 22 focusing.

15:59:00 23 A Yes.

15:59:01 24 Q So I'm asking as a whole of the Executive Order, you just
15:59:06 25 testified that there would be a higher risk going into

15:59:10 1 the 2021 school year. You knew that Delta cases were
15:59:13 2 increasing, and you knew that hospitalizations, the
15:59:16 3 hospitals were overwhelmed based upon the charts and
15:59:19 4 conversations that you had. That information, was that a
15:59:23 5 factor in advising the Governor with respect to the
15:59:26 6 Executive Order 2186?

15:59:29 7 A Yes.

15:59:30 8 Q Why were those factors important in advising the Governor
15:59:35 9 with respect to Executive Order 2186?

15:59:39 10 A Because when you really look at what happened over the
15:59:41 11 summer, the pandemic got a whole lot better. We were
15:59:45 12 heading in the right direction. We knew it wasn't over,
15:59:48 13 but it looked like it was going well.

15:59:50 14 It was after July 4th when we saw Delta dominant
15:59:54 15 case rates were increasing that we just saw things were
15:59:58 16 getting worse. What we realized was there was
16:00:00 17 justification for a new state of emergency. Because the
16:00:04 18 mutated form of Covid, the Delta variant, had literally
16:00:08 19 changed the face of the pandemic in Rhode Island. It
16:00:10 20 turned it upside down. What we saw was we weren't
16:00:14 21 getting better. We weren't going to stay better, no
16:00:17 22 matter how successful we were with the vaccinations we
16:00:21 23 knew we were heading in the wrong direction, and what we
16:00:23 24 saw was increase in cases.

16:00:25 25 Therefore, we had to say to the Governor, we have a

16:00:28 1 new situation on our hands, Delta Covid is dominating the
16:00:32 2 State. Delta Covid is increasing cases. It's increasing
16:00:36 3 hospitalizations. This is a public health emergency.

16:00:39 4 Because we want to protect the public, because one
16:00:43 5 of the common goals of any government is to protect its
16:00:46 6 people from a common threat. It was justified to tell
16:00:50 7 the Governor, we have a State of Emergency. Therefore,
16:00:54 8 he listened to us and agreed with us.

16:00:56 9 Q Thank you, Doctor.

16:00:57 10 THE COURT: I think we're almost done. I don't
16:01:00 11 want to interrupt you in the middle of something.

16:01:02 12 MS. WYRZYKOWSKI: We're done with that section,
16:01:04 13 your Honor. Now is a great time to break.

16:01:06 14 THE COURT: Okay. We will break. So tomorrow
16:01:17 15 afternoon we're not going forward with the hearing. I'm
16:01:20 16 available Friday afternoon at 1:30.

16:01:24 17 MS. WYRZYKOWSKI: Dr. Macdonald is not
16:01:26 18 available on Fridays. He has clinic, your Honor.

16:01:28 19 THE COURT: Why don't I meet with counsel to
16:01:31 20 figure out where we're going from here.

16:01:33 21 MS. WYRZYKOWSKI: Thank you, your Honor.

16:01:33 22 THE COURT: We're at recess.

16:01:34 23 THE SHERIFF: All rise.

16:01:34 24 **A-D-J-O-U-R-N-E-D**

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