IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JANICE LORRAH, individually and as parent of G.L., a minor child,	)	
Plaintiff,	)	
v.	)	C.A. No. 2022-0134-PAF
GOVERNOR JOHN C. CARNEY, individually and in his official capacity as the Governor of Delaware,	)	
Defendant.	)	

DEFENDANT'S ANSWERING BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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INTRODUCTION

This is a case about statutory interpretation. On March 12, 2020, the Governor John C. Carney (the "Governor"), pursuant to Title 20, Chapter 31 of the Delaware Code, declared a State of Emergency in response to the global COVID-19 pandemic. On August 26, 2020, while still under a State of Emergency, the Governor instituted a mask mandate for all schools in the State of Delaware. On July 12, 2021, the Governor ended the State of Emergency, which also ended any mask mandate for schools.

On August 13, 2021, the Delaware Department of Education ("DOE") and Department of Health and Human Services ("DHSS"), under the Delaware Administrative Procedures Act ("APA"), codified under Title 29, Chapter 101 of the Delaware Code, issued emergency orders reinstituting masks for all schools in Delaware. Under the APA, the maximum time those orders could remain in effect is 180 days. Hence, the orders would expire on February 8, 2022.

On January 3, 2022, the Governor declared another State of Emergency due to the new "Delta" and "Omicron" variants of the COVID-19 pandemic. Thereafter, on January 10, 2022, the Governor issued a mask mandate for individuals above the age of 2 when in indoor public areas. Subsequently, on January 31, 2022, the Governor extended the State of Emergency for another 30 days, until March 2, 2022.

On February 7, 2022, the Governor issued his Fourth Revision to the State of Emergency ("Fourth Revision"), which is the crux of the instant case. In the Fourth Revision, the Governor lifted the universal mask mandate for most individuals. The Governor also rescinded the DOE and DHSS orders implementing the school mask mandate. The Governor then, under the authority granted in Title 20, Chapter 31, issued a mask mandate for all schools in Delaware. The Fourth Revision provided that the mask mandate would be effective until March 31, 2022. Plaintiff Janice Lorrah ("Lorrah") claims, under Count I, that the March 31, 2022 end date for the mask mandate is unlawful, and, therefore, that the entire mask mandate is unlawful, because, currently, the State of Emergency will expire by operation of law on March 2, 2022 (the "Date Claim"). Lorrah also claims, under Count II that the mask mandate in the Fourth Revision violates the APA because it constituted an invalid extension of emergency regulations beyond the APA's 180-day limit (the "Extension Claim"). Lorrah asks the court to preliminarily enjoin any enforcement of the mask mandate.

Lorrah cannot meet the standard to obtain a preliminary injunction. Initially, she cannot show a likelihood of success on the merits on either of her claims. Lorrah's Extension Claim fails because the Fourth Revision did not, in fact, extend an emergency regulation. To the contrary, the Fourth Revision rescinded the DOE and DHSS orders. In the Fourth Revision, the Governor issued a mask mandate

under the emergency powers available to the Executive under Title 20, Chapter 31. Alternatively, if the Court should determine that the Fourth Revision acted as an extension of the emergency regulations, Plaintiff's request for a preliminary injunction must be denied because Title 20, Chapter 31 of the Delaware Code resolves conflicts of law in the Governor's favor.

Lorrah also cannot show a likelihood of success on the merits of the Date Claim. In fact, Lorrah does not have standing to pursue the Date Claim at this time because the claim is not ripe. That claim could only become ripe, if at all, after March 2, 2022. Notably, Lorrah does not dispute the validity of the current State of Emergency. Rather, Lorrah claims that the mask mandate may not extend beyond the expiration of the State of Emergency, which may occur on March 2, 2022. However, because the mask mandate is currently lawful, Lorrah's claim is premature. If the Governor exercises his statutory authority to extent the State of Emergency before it expires, Lorrah's Date Claim will never ripen.

Lorrah's request for a preliminary injunction must also be denied because she cannot satisfy the remaining elements of the legal standard. Lorrah has not demonstrated that she or her minor child is suffering any harm, much less irreparable harm, as a result of the mask mandate. There is no evidence that either is adversely affect by the use of masks in schools. Indeed, Lorrah fails to provide any documentation that she or her minor child is harmed from the mask requirements.

Finally, the balance of equities requires the court to deny Lorrah's request for a preliminary injunction. Lorrah's allegations of potential harm to herself or her minor child are strongly outweighed by the harm that would result from enjoining the mask mandate. The evidence submitted on behalf of the Governor establishes that enjoining the mask mandate would lead to a significantly increased infection rate. As a result, the Court should deny Lorrah's Motion for Preliminary Injunction.

STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

On February 9, 2022, Lorrah filed a verified complaint against the Governor, challenging the Governor's mask mandate for schools. (D.I. 1). Lorrah also filed a Motion for Preliminary Injunction ("Motion") and sought expedited proceedings for the Motion. (D.I. 10). The parties agreed to expedite proceedings and submitted a briefing schedule for the Court's approval. (D.I. 20). On February 11, 2022, the Court approved the briefing schedule. (D.I. 21). On February 15, 2022, Lorrah filed her Opening Brief in Support of her Motion. (D.I. 23). This is the Governor's Answering Brief in Opposition to Lorrah's Motion.

STATEMENT OF FACTS

A. Government mandates involving masks in school settings

The facts in this case revolve around the global pandemic caused by the SARS COV-2 virus, more commonly known as COVID-19. Because of this pandemic, on March 12, 2020, the Governor declared a State of Emergency in accordance with the powers granted by Title 20, Chapter 31 of the Delaware Code.[1] As part of the rationale for this emergency declaration, the Governor stated that his office and the agencies under his control will take all necessary actions "to protect the health and safety of the public."[2]

On August 26, 2020, the Governor modified his March 12, 2020 State of Emergency declaration by mandating masks to be worn in all schools, including private and religious schools, in the State of Delaware.[3] This mandate, as well as others, remained in effect until July 12, 2021, when the Governor issued an order terminating the State of Emergency.[4]

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[1] Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat, March 12, 2020, attached as Exhibit A.
[2] Ex. A at 2, ¶3.
[3] Twenty-Fifth Modification of Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat, August 26, 2020, attached as Exhibit B, at 8.
[4] Termination of the State of Emergency for the State of Delaware Due to a Public Health Threat, July 12, 2021, attached as Exhibit C.

As the 2021-22 academic year approached, on August 13, 2021, an emergency regulation was issued by DOE requiring that all individuals, including K-12 students, wear a mask indoors at a public school while students are present.[5] On August 13, 2021, DHSS issued an order implementing the mask mandate for private and religious schools through an emergency regulation.[6]

Both emergency regulations issued by DOE and DHSS were authorized under the Delaware Administrative Procedures Act (the "APA"). Under the APA, an agency may issue such emergency regulations "if an agency determines that an imminent peril to the public health, safety, or welfare" exists and demands that the agency act.[7] The APA limits the effectiveness of such an emergency regulation to 120 days with a renewal period of 60 days for a total of 180 days.[8] The emergency measures implemented by both agencies were scheduled to expire, in accordance with the 120-day limit, on December 14, 2021, but both DOE and DHSS extended the emergency regulations for another 60 days in accordance with the APA. As a result, DOE's and DHSS's orders were expected to expire on February 8, 2022.

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[5] Department of Education Emergency Order, August 13, 2021, attached as Exhibit D.

[6] Delaware Department of Health and Social Services, Emergency Secretary's Order, August 13, 2021, attached as Exhibit E.

[7] 29 *Del. C.* §10119.

[8] *Id.*

As 2021 rolled into 2022, variants of COVID-19 known as "Delta" and "Omicron" caused a significant increase in the number of COVID-19 cases and hospitalizations in Delaware, prompting the Governor to declare a new State of Emergency, on January 3, 2022.[9] On January 8, 2022, hospitals in Delaware began operating under the Crisis Standards of Care due to the dramatic rise in COVID-19 hospitalizations.[10] On January 10, 2022, the Governor issued his first revision to the State of Emergency, requiring that all individuals aged two (2) and older wear masks when in public spaces such as gyms, grocery stores, and restaurants.[11] On January 31, 2022, the Governor extended the State of Emergency. Barring any additional action by the Governor, the State of Emergency would expire on March 2, 2022.[12]

On February 7, 2022, one day prior to the expiration of the aforementioned emergency regulations, the Governor issued his Fourth Revision.[13] In the Fourth Revision, the Governor rescinded the DOE and DHSS orders, pursuant to the authority granted in Chapter 31 of Title 20, effective February 8, 2022. The

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[9] Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat, January 3, 2022, attached as Exhibit F.
[10] Doug Rainey, *State's hospitals now operating in crisis care mode*, January 8, 2022, https://delawarebusinessnow.com/2022/01/states-hospitals-now-operating-under-crisis-standards-of-care/.
[11] First Revision to the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat, January 10, 2022, attached as Exhibit G.
[12] First Extension of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat, January 31, 2022, attached as Exhibit H.
[13] Fourth Revision to the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat, February 7, 2022, attached as Exhibit I.

Governor also put in place a mask mandate that mirrored DOE's and DHSS's emergency regulations requiring masks to be worn in public, private, and religious schools under his powers pursuant to Title 20, Chapter 31 of the Delaware Code.[14] The Fourth Revision advised that the Governor intended the mask mandate to be effective until March 31, 2022.[15] However, the Governor acknowledges that the Fourth Revision has no legal effect after March 2, 2022 unless he takes further action. Thus, there is no controversy between the parties on Lorrah's Date Claim.

B. Masking Prevents the Spread of COVID-19.

The COVID-19 virus is transmitted via "respiratory droplets produced when an infected person, coughs, sneezes, talks, sings, or breathes."[16] The COVID-19 virus "spreads easily from person to person"; in fact as of January 3, 2022, Delaware had a total of 190,916 positive COVID-19 cases.[17] By February 21, 2022, the total number of positive cases had increased to 255,210 cases; an increase of 64,294 cases.[18] The Center for Disease Control and Prevention ("CDC") recommends the use of masks to prevent the spread of COVID-19.[19] The American Academy of

[14] Ex. I at 3.
[15] Ex. I at 3.
[16] Declaration of Dr. Karyl Thomas Rattay, February 22, 2022, attached as Exhibit J, at ¶8.
[17] Ex. J at ¶33.
[18] Ex. J at ¶34.
[19] Ex. J at ¶9-12.

Pediatrics also strongly recommends the use of masks for individuals over the age of 2, regardless of vaccination status, while in public.[20]

The CDC recommends that schools put in place indoor masking requirements for students and staff for kindergarten through grade 12 to lessen and stop the spread of COVID-19.[21] One study revealed that masking in schools can cut the COVID-19 infection rate by over 50%.[22] Other studies have also shown that utilizing masks in schools can significantly decrease the rate of COVID-19 infections.[23] Further, "there is no scientific consensus within the medical and public health communities as to any negative effect of mask-wearing on children."[24]

The Food and Drug Administration ("FDA") has only recently approved COVID-19 vaccines for young children.[25] While vaccines have been approved for children ages 16 and older since December of 2020, a vaccine was not available for children ages 12 to 15 until August 23, 2021, and a vaccine for children ages 5 to 11 was not available until October 29, 2021.[26]

C. Lorrah's Complaint

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[20] Ex. J at ¶13.
[21] Ex. J at ¶14.
[22] Ex. J at ¶15.
[23] Ex. J at ¶16-17.
[24] Ex. J at ¶18-19.
[25] Ex. J at ¶20-23.
[26] Ex. J at ¶20-23.

Lorrah asserts two claims alleging that the mask mandate in the Fourth Revision is unlawful. Under Count I of her Complaint, the Date Claim, Lorrah claims the Fourth Revision is unlawful because the March 31, 2022 end date for the mask mandate extends beyond the date upon which current State of Emergency will expire absent further action by the Governor. As to Count II, the Extension Claim, Lorrah alleges that the Fourth Revision unlawfully extended the DOE and DDHS orders beyond the APA's 180-day limit.[27] Notably, Lorrah concedes that she is not arguing about the efficacy of the use of masks in schools; rather Lorrah's claims are procedural in nature.[28]

[27] Complaint at 8-9, Opening Brief ("Op. Br.") at 15-23.
[28] Op. Br. at 14, fn. 6; Yusra Asif, *Gov. John Carney sued over extending school mask mandate through March*, Delaware News Journal, Feb. 17, 2022, attached as Exhibit K, at 2.

QUESTION PRESENTED

Whether Lorrah is entitled to a preliminary injunction when there is not a likelihood of success on the merits for either of her claims, Lorrah failed to demonstrate irreparable harm, and the balance of equities tips in favor of the Governor.

ARGUMENT

I. LORRAH FAILS TO MEET THE BURDEN REQUIRED TO IMPOSE THE EXTRAORDINARY REMEDY OF PRELIMINARY INJUNCTIVE RELIEF.

A. Legal Standard

Lorrah fails to satisfy the standard to obtain preliminary injunctive relief. Under Delaware law, a plaintiff seeking a preliminary injunction "must demonstrate: (1) a reasonable probability of success on the merits; (2) that they will suffer irreparable injury without an injunction; and (3) that their harm without an injunction outweighs the harm to the defendants that will result from the injunction."[29] Preliminary injunctive relief is an "extraordinary" remedy because it requires the Court "to make a 'preliminary' determination of the merits of a cause before there can be a final adjudication of petitioner's claims."[30] The movant's burden is "not a light one" and a preliminary injunction "will never be granted unless earned."[31]

B. Lorrah Cannot Show a Reasonable Likelihood of Success on Count I of her Complaint Because Lorrah Lacks Standing, the Matter is Not Ripe, and the Governor's Acknowledgement Renders the Claim Moot.

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[29] *Protech Solutions v. Del. Dep't of Health and Human Servs.*, 2017 WL 5903357, at *1 (Del. Ch. Nov. 30, 2017).
[30] *Id.* (quoting *In re New Maurice J. Moyer Acad., Inc.*, 108 A.3d 294, 311 (Del. Ch. 2015)) (alterations omitted).
[31] *Wayne Cnty. Emps.' Ret. Sys. v. Corti*, 954 A.2d 319, 329 (Del. Ch. 2008) (quoting *Lenahan v. Nat'l Computer Analysts Corp.*, 310 A.2d 661, 664 (Del. Ch. 1973)).

Under Count I of her Complaint, Lorrah argues that the Fourth Revision is invalid because the mask mandate, which the Governor advised he intended to keep in place until March 31, 2022, extends beyond the current State of Emergency, which will expire on March 2, 2022 absent further action by the Governor.[32] At the outset, it is acknowledged, and there is no dispute of fact or law, that the Fourth Revision will not be enforceable after March 2, 2022 without further action from the Governor. Today, however, and before March 2, 2022, the order is valid and enforceable; Lorrah does not contend otherwise. Accordingly, there is no current controversy between the parties on this point and the Date Claim is not ripe. Moreover, no claim is likely to become ripe because by March 2, 2022, the Governor's State of Emergency will have expired by operation of law, or the Governor will have taken additional steps to extend it. In either case, there will not likely be any need for action by this court. Even if Lorrah could potentially establish that her Date Claim was ripe on the date she filed the complaint, the claim is clearly moot now, as the Governor has acknowledged a central aspect of Lorrah's argument: The mask mandate established in the Fourth Revision will expire unless the Governor acts to extend the State of Emergency on or before March 2, 2022.

1. Lorrah Cannot Establish Standing to Assert Count I Because She Has Alleged No Injury-in-Fact.

[32] Op. Br. at 15, 19.

"Standing is a . . . question that must be answered by a court affirmatively to ensure that the litigation before the tribunal is a 'case or controversy' that is appropriate for the exercise of the court's judicial powers."[33] Standing, therefore, "is a threshold jurisdictional requirement,"[34] as to which a plaintiff bears the burden of proof on each element.[35] "In order to achieve standing, the plaintiff's interest in the controversy must be distinguishable from the interest shared by other members of a class or the public in general."[36] A plaintiff "must demonstrate: (1) that he or she suffered an injury-in-fact (*i.e.*, an invasion of a legally protected interest), (2) that is caused by the complained of conduct of the defendant, and (3) that could be redressed by a favorable decision by the Court."[37]

Lorrah lacks standing because she cannot identify an injury-in-fact, which is the "quintessence of standing."[38] To establish an injury-in-fact, Lorrah must demonstrate an "invasion of a legally protected interest which is (a) concrete and

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[33] *Pontone v. Milson Industries Corp.,* 100 A.3d 1023, 1036 (Del. Ch. 2014) (quotation omitted).
[34] *Hall v. Coupe,* 2016 WL 3094406, at *3 (Del. Ch. May 25, 2016) (citing *Dover Historical Soc. v. City of Dover Planning Comm'n,* 838 A.2d 1103, 1110 (Del. 2003)).
[35] *Burkhart v. Genworth Financial Inc.,* 2020 WL 507938, at *6 n. 56 (Del. Ch. Jan. 31, 2020) (quoting *Dover Historical Soc.,* 838 A.2d at 1110).
[36] *Stuart Kingston, Inc. v. Robinson,* 596 A.2d 1378, 1382 (Del. 1991) (citation omitted).
[37] *Pontone,* 100 A.3d at 1036.
[38] *Ritchie CT Opps, LLC v. Huizenga,* 2019 WL 2319284, at *9 (Del. Ch. May 30, 2019).

particularized and (b) actual or imminent, not conjectural or hypothetical."[39] "Plaintiffs must always allege an actual, concrete injury."[40] Here, Lorrah has not suffered any injury-in-fact because there is no particularized invasion of a legally protected interest. Lorrah claims that the mask mandate cannot exceed the current state of emergency set to expire on March 2, 2022. The Governor agrees. Any injury-in-fact cannot manifest until after March 2, 2022. Currently, there can be no injury because the mask mandate is lawful, and the matter should be dismissed. As a result, Lorrah cannot demonstrate a likelihood of success on the merits.

Lorrah also cannot demonstrate an injury-in-fact because there is no evidence that Lorrah or her minor child is injured by the mask mandate. There is no evidence that Lorrah's health is being affected by the school mask mandate. Further, any evidence Lorrah provides in the abstract about negative effects of masks for school children are irrelevant because Lorrah specifically concedes that her claims are not based upon the efficacy of masks.[41] Therefore, this cannot be a basis for her Motion. Lorrah's references to various news media sources purporting to express "anti-mask" views while simultaneously conceding that these subjects are actually irrelevant to her argument exposes the underlying basis and purpose of her litigation: she simply disagrees with the Governor's policy choices. But the Court of Chancery

[39] *Id.*
[40] *Buckhart,* 2020 WL 507938, at *7.
[41] Op. Br. at 14, fn. 6

is not the appropriate venue to express disagreements about executive branch policy in the absence of legal authority invalidating those policy choices. Lorrah fails to sustain her arguments at fact, law, and equity.

2. Count I is Not Ripe Because it is Based on Uncertain, Future Events.

Delaware courts are statutorily authorized to entertain an action for a declaratory judgment, provided that an "actual controversy" exists between the parties.[42] For an "actual controversy" to exist, the following four prerequisites must be satisfied:

> (1) It must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between parties whose interests are real and adverse; (4) the issue involved in the controversy *must be ripe for judicial determination*.[43]

Delaware courts decline to exercise jurisdiction over a case unless the underlying controversy is ripe, *i.e.,* has "matured to a point where judicial action is appropriate."[44] That principle is sometimes expressed in terms of the adage that Delaware courts do not render advisory or hypothetical opinions. The underlying purpose of that principle is to conserve limited judicial resources and to avoid

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[42] *XI Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208, 1216-17 (Del. 2014).
[43] *Id.* at 1217 (emphasis added).
[44] *Id.*

rendering a legally binding decision that could result in premature and possibly unsound lawmaking.[45]

Generally, a dispute will be deemed ripe if "litigation sooner or later appears to be unavoidable and where the material facts are static."[46] Conversely, a dispute will be deemed not ripe where the claim is based on "*uncertain and contingent events*" that may not occur, or where "*future events may obviate the need*" for judicial intervention.[47]

Here, Lorrah's claim is not ripe because it is based on uncertain events and because future events may obviate the need for judicial intervention. As discussed above, the Fourth Revision's mask mandate is lawfully in place until March 2, 2022. Therefore, Lorrah's claims could only become ripe if the Governor takes no action after March 2, 2022 and the State also seeks to enforce the mask mandate. The Governor could lift the mask mandate at any time before or on March 2, 2022, obviating the need for any litigation. The Governor could also extend the State of Emergency for an additional 30 days on or before March 2, 2022. Ultimately, Lorrah's claim cannot become ripe until after March 2, 2022, and it is contingent upon the future actions of the Governor. If anything has been constant about the COVID-19 pandemic, it is uncertainty. The Governor has navigated that uncertainty

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[45] *Id.*
[46] *Id.*
[47] *Id.* at 1217-18 (emphasis added).

using the legal tools available based on everchanging facts and data.[48] Despite that uncertainty, Lorrah asks this Court to prejudge the course of the pandemic and cut off the flexibility that Delaware law gives to the Executive to address emergencies and adapt effectively to changing circumstances.

In essence, Lorrah seeks an advisory opinion from this Court that the mask mandate *might* become unlawful in the future *if* the Governor seeks to enforce it after March 2, 2022 (despite expressly acknowledging herein that it expires on March 2, 2022 without further action from the Governor). Such a remedy is beyond the Court of Chancery's jurisdictional authority and an inefficient use of judicial resources. Because Lorrah's claim is not ripe and is unlikely to ever become so, Lorrah cannot show a likelihood of success on the merits, and her Motion should be denied.

3. Even if Plaintiff Could Establish A Reasonable Probability of Success on the Merits, the Court Should Sever the Objectionable Language Rather Than Grant the Extraordinary Relief of a Preliminary Injunction.

"When an ordinance or statute faces constitutional or statutory challenges, a Court may preserve its valid portions if the offending language can lawfully be severed."[49] "The standard for severability has been articulated in the following two part test: i) is the unobjectionable part, standing alone, capable of enforcement; and

[48] Ex. J at ¶14-24, 29-34, 36.
[49] *Farmers for Fairness v. Kent Cty.*, 940 A.2d 947, 962 (Del. Ch. 2008) (citation omitted).

ii) did the legislature intend the [un]objectionable part to stand alone in case the other part should fall?"[50]

In the instant case, even if the Court finds that Lorrah had standing, a ripe claim, and the claim was not mooted by the Governor's acknowledgement, the Court should still find the unobjectionable portions of the Fourth Revision enforceable. The only language of the Fourth Revision that Lorrah claims is objectionable is the March 31, 2022 end date. That portion may be severed, and the remainder of the Fourth Revision may be maintained because it passes the two-part test of severability. The unobjectionable portion of the Fourth Revision passes the first portion of the test because it is enforceable absent the March 31, 2022 end date. If the language is stricken, the Fourth Revision is still enforceable because the school mask mandate would only continue to the extent there is a continuing State of Emergency and to the extent that the Governor acts to extend the school mask component of effective State of Emergency rules. The second part of the test is also satisfied because the Delaware Code expressly provides for severability under 1 *Del. C.* § 308, titled Severability of Provisions, which provides:

> If any provision of this Code or amendments hereto, or the application thereof to any person, thing or circumstances is held invalid, such invalidity shall not affect the provisions or application of this Code or such amendments that can be given effect without the invalid provisions or

[50] *Id.* (citation and internal quotations omitted) (alteration in original).

> application, and to this end the provisions of this Code and such amendments are declared to be severable.

While § 308 does not specifically address executive orders such as the State of Emergency order, the Governor submits that its principles would apply. Because both prongs of the severability test have been met, to the extent the Court finds that the March 31, 2022 portion of the Fourth Revision is objectionable, that provision may be struck and the remainder of the Fourth Revision is enforceable.

C. Lorrah Cannot Show a Reasonable Probability of Success on the Merits on Count II of her Complaint because the mask mandate did not violate the APA.

Lorrah erroneously argues that the mask mandate violates the APA because the Fourth Revision improperly extended the DOE and DHSS orders beyond 180 days, in violation of 29 *Del. C.* § 10119.[51] This argument fails because it misapprehends the organic legal authority for the Governor's actions on February 7, 2022.

The APA is codified at Title 29, Chapter 101 of the Delaware Code. Section 10119 of Title 29, which governs emergency regulations for Delaware agencies, provides:

> If an agency determines that an imminent peril to the public health, safety or welfare requires the adoption, amendment or repeal of a regulation with less than the notice required by § 10115, the following rules shall apply:

[51] Op. Br. at 22-23.

> (1) The agency may proceed to act without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable;
>
> (2) The order adopting, amending or repealing a regulation shall state, in writing, the reasons for the agency's determination that such emergency action is necessary;
>
> (3) The order effecting such action may be effective for a period of not longer than 120 days and may be renewed once for a period not exceeding 60 days;
>
> (4) When such an order is issued without any of the public procedures otherwise required or authorized by this chapter, the agency shall state as part of the order that it will receive, consider and respond to petitions by any interested person for the reconsideration or revision thereof; and
>
> (5) The agency shall submit a copy of the emergency order to the Registrar for publication in the next issue of the Register of Regulations.

Thus, 29 *Del. C.* § 10119(3) does provide that an *agency's regulations* cannot exceed 180 days. However, the Governor did not enact the mask mandate pursuant to 29 *Del. C.* § 10119(3); rather, he enacted the mandate pursuant to his emergency power under Title 20, Chapter 31 of the Delaware Code.[52] Indeed, the Governor specifically rescinded DOE's and DHSS's orders.[53] Even if he had not done so, these emergency

[52] Ex. I at 3.
[53] Ex. I at 3.

regulations would have expired as a matter of law the very next day, on February 8, 2022.

Under 20 *Del. C.* § 3116(a)(10), the Governor has the power to "[e]mploy such measures and make such recommendations to state or local health agencies, authorities or boards as may be reasonably necessary for the purpose of securing compliance with this chapter or with the findings or recommendations of such health entities by reason of conditions arising from emergencies or disasters." Furthermore, under 20 *Del. C.* § 3116(b)(13), during an emergency, the Governor is empowered to "[t]ake such other actions as the Governor reasonably believes necessary to help maintain life, health, property or public peace." Finally, under 20 *Del. C.* § 3115(c), the Governor may declare a State of Emergency for up to 30 days, and the State of Emergency may be renewed every 30 days. Unlike 29 *Del. C.* § 10119(3), the Code does not state a maximum duration for a State of Emergency.

In short, the Governor did not take any action under the APA; he took a valid action pursuant to his emergency powers. The interests served by the time restriction for agency action under the APA are not implicated in the context of the Governor's action to keep citizens safe during a State of Emergency. The mask mandate put in place by the Governor in the Fourth Revision does not violate the APA's 180-day

limit because the Governor did not extend the DOE and DHSS orders.[54] Indeed, the Fourth Revision specifically rescinded those orders, and put in place a mask mandate under Title 20, Chapter 31 of the Delaware Code, which specifically empowers the Governor to take such measures. Because the Governor acted pursuant to Title 20, Chapter 31 of the Delaware Code (and not the APA), the APA and its 180-day limit does not apply to the instant case. As a result, the Governor's mask mandate does not rely upon and cannot violate the APA, and Lorrah's argument fails. Given that Lorrah fails to demonstrate a likelihood of success on the merits for this claim, the Motion should be denied.

Even if the Court were to find that the Governor effectively extended the DOE and DHSS orders, Lorrah's argument would still fail because it ignores Title 20's legal conflict resolution provisions. Delaware law expressly resolves such conflicts of law in favor of the Governor. Title 20, Section 3127(b) states "[d]uring a state of emergency, whenever the restrictions imposed pursuant to this chapter are inconsistent and in conflict with those required by any other statute, local ordinance or regulation, the provisions of the emergency order imposed pursuant to this chapter shall govern." Therefore, if a restriction or mandate implemented under Title 20, Chapter 31 conflicts with any other portion of the Delaware Code, those issued under

[54] As outlined below, even if the Governor had done so, 20 *Del C.* 3116 (a)(2) and 3217 would have authorized such conduct.

Title 20, Chapter 31 control. As a result, even if the Court found that the Governor did extend the DOE and DHSS orders, the Governor did so under a State of Emergency pursuant Title 20, Chapter 31, and therefore is not bound by the 180-day limit of the APA. Rather, the Governor is only bound by any limitations set forth in Title 20, Chapter 31. As discussed, *supra*, the only durational limit on a state of emergency is that the Governor must reassess the circumstances at least every 30 days and renew if circumstances warrant. Because the Delaware Code expressly and unambiguously resolves conflicts of law in favor of the Governor's power under Title 20, Chapter 31, Lorrah's argument fails, and she cannot demonstrate a likelihood of success on the merits.

Lorrah's other arguments also fail. Lorrah also argues that the Fourth Revision violates the APA under 20 *Del. C.* § 3131, which Lorrah alleges limits the Governor's power under a public health emergency.[55] Initially, § 3131 concerns public health emergencies, not state of emergencies. The two are not the same.[56] Because the Governor's Fourth Revision was done pursuant to his power under a state of emergency, and not a public health emergency, § 3131 has no bearing on the instant case, and Lorrah's argument fails.

[55] Op. Br. at 20.
[56] See Ex. C at 2 (terminating the State of Emergency and implementing a State of Public Health Emergency).

Further, 20 *Del. C.* § 3131 is not part of the APA and expressly subordinates it by virtue of 20 *Del. C.* 3127. The APA is under Title 29, Chapter 101 of the Delaware Code. Further, 20 *Del. C.* § 3131 does not limit the Governor's powers; rather, that section puts forth the State of Delaware's findings regarding public health emergencies. Nothing in § 3131 limits the Governor's powers.[57] Rather, the Governor's powers during a state of emergency are delineated under 20 *Del. C.* § 3116.

Lastly, Lorrah argues that the Fourth Revision violates the APA because hospitals are no longer at capacity.[58] Initially, this argument fails because that fact has nothing to do with the APA. Further, Lorrah again incorrectly conflates the powers of the Governor with those of the APA. The APA does not dictate under what circumstances and to what extent the Governor can declare a state of emergency. Lorrah provides no evidence as to whether hospitals are operating at capacity. This assertion is as speculative as it is irrelevant. Lorrah further ignores the fact that the January 3, 2022 State of Emergency was declared because of, *inter alia*, the highly transmissible Delta and Omicron variants and the rising cases of COVID-19.[59] Indeed, between January 3, 2022 and February 21, 2002, Delaware had 64,294

[57] If Lorrah takes issue with the Governor's broad powers authorized under Title 20, her issues are better and more properly directed to the General Assembly.
[58] Or. Br.at 21-22.
[59] Ex. J at ¶33-34.

additional positive COVID-19 cases. Finally, the Court should not issue an injunction when "material facts are in substantial dispute."[60] Ultimately, Lorrah cannot show a likelihood of success on the merits for this claim, and therefore the Motion should be denied.

D. The Governor's policy choices are not an appropriate subject for litigation.

Lorrah appears to debate whether masks keep kids in school and the appropriate amount of time necessary to get children vaccinated.[61] Initially, these arguments contradict Lorrah's own statement that she is not debating the efficacy of masks.[62] Further, the arguments are not relevant to the resolution of Lorrah's claims. Lorrah's claims are based on the 180-day limit on agency orders under the APA and the duration of the mask mandate in relation to the duration of the State of Emergency; they have nothing to do with whether masks keep kids in school or the necessary amount of time needed to vaccinate children. Indeed, this Court has already made it clear that in matters of responding to the pandemic, the Governor's

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[60] *DeMarco v. Christiana Care Health Servs., Inc.*, 263 A.3d 423, 433 (Del. Ch. 2021) (citation omitted).
[61] Op. Br. at 25-29.
[62] Op. Br. at 14, fn. 6; Yusra Asif, *Gov. John Carney sued over extending school mask mandate through March*, Delaware News Journal, Feb. 17, 2022, attached as Exhibit K, at 2.

judgment may not be supplanted by contradictory policy views packaged as a litigant's invocation of equitable jurisdiction.[63]

Plaintiff's contention that she will win on the merits of the case included assertions that the Governor "cannot put forth any reason" to substantiate the need for continued mask mandates in Delaware public and private schools. Specifically, Plaintiff argued that "there is no definitive evidence for the sweeping statement that 'masking has helped keep kids in school.'"[64] Plaintiff cited to articles published by the political magazine *The Atlantic* to make the case that "no empirical or rational basis in medical science or statistical analysis" exists to support the claim attributed to Governor Carney that "masking has helped keep kids in school." *See Id*. Plaintiff misapprehends *her* burden of proof and persuasion.

Whether Plaintiff's assertions about any scientific support for the Governor's statement is correct is irrelevant to this case because courts, including the United States Supreme Court, have "recognized that courts (sic) should generally defer to 'the reasonable medical judgments of public health officials."[65] The importance of basing COVID-19 protocols on the "medical judgments of public health officials"

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[63] *See Republican State Comm. of Delaware v. Dep't of Elections*, 250 A.3d 911, 922 (Del. Ch. 2020).
[64] Op. Br. at 25.
[65] *See Doe v. Franklin Square Union Free School District*, 2021 WL 4957893 at *4 (E.D.N.Y. Oct. 26, 2021) (citing *Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 288 (1987).

was emphasized by the Seventh Circuit in *Mays v. Dart*, 974 F.3d 810 (7th Cir. 2020). "Even if not dispositive, implementation (and proper execution) of guidelines that express an expert agency's views on best practices are certainly relevant to an objective reasonableness determination." *Mays*, 974 F.3d 810 at 823.

Here, Lorrah seeks to enjoin the mask mandate contained in the Fourth Revision for all school children in public and private schools. This mandate, as has been stated in all previous Orders related to battling the COVID-19 pandemic, was explicitly based on guidance from the CDC and in consultation with local public health experts, and the Governor's reliance on information from public health officials was reasonable. Thus, Lorrah's argument fails.

Lorrah also erroneously argues that enough time has passed to get children vaccinated.[66] First, she states, "[a]ccording to the State's own data, the percentage of fully vaccinated Delawareans 5+ is 65.1%."[67] But this is a misleading reading of the State's vaccination records. Indeed, children between ages 5 and 11, who only became eligible for vaccination on October 29, 2021, have a vaccination rate of only 25.1%. Ultimately, Lorrah's argument is speculative at best because she fails to put forth any evidence to support the notion that enough time has passed to vaccinate school age children. More concerningly and unfairly, when making this argument,

[66] Op. Br. at 27-28.
[67] Op. Br. at 27.

Lorrah seeks to have this Court substitute its judgment about the time necessary to offer Delaware's children access to vaccination for the judgment of the Governor and public health officials. The judiciary is not the right venue for that kind of debate.

II. Lorrah Fails to Demonstrate Irreparable Harm

Even if Lorrah were reasonably likely to succeed on the merits of her claim, which she is not, she must also demonstrate that absent a preliminary injunction, she "will suffer immediate, discernible harm for which there is no adequate remedy at law."[68] "[T]his extraordinary form of equitable relief should not be granted if the injury to Plaintiff is merely speculative."[69] "An injunction will never issue merely because of the threat or possibility of great injury or by reason of mere apprehension of uncertain damage at some time in the future."[70]

Lorrah suggests that if the emergency order is found likely to be a statutory violation, such a violation in itself constitutes irreparable harm.[71] But the sole authority Lorrah cites is a federal opinion from Georgia considering the narrow issue of resource costs imposed on government contractors to identify employees and subcontractor employees and ensure their vaccination status in order to comply with

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[68] *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 586 (Del. Ch. 1998).
[69] *Id.*
[70] *Cook v. Oberly*, 459 A.2d 535, 540 (Del. Ch. 1983).
[71] Op. Br. at 31-32.

an executive order.[72] The opinion does not stand for the proposition that a likely statutory violation constitutes *de facto* irreparable harm. Indeed, this Court has recognized that in determining whether to issue a preliminary injunction, although "a failure by government to follow its own rules or regulations may give parties adversely affected by that action an opportunity to seek relief," "[t]he question it begs is whether the adverse affect is irreparable in nature." [73]

Here, Lorrah has not established irreparable harm. Lorrah's argument that she and her child will suffer irreparable harm rests on the claim that school masking requirements may cause social, emotional, and developmental harm to children.[74] In support, Lorrah cites various opinion pieces, an advocacy toolkit, a United Kingdom Department of Education report, and her own affidavit attesting to the "*potentially* devastating effects" of mask-wearing on her daughter.[75] None of these are competent evidence.

To be sure, the Governor fully recognizes that as the world has continued to confront this unprecedented and unpredictable pandemic, research has continued to develop and emerge. The Governor's own orders to combat the COVID-19 pandemic have changed over the course of the past two years in accordance with the

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[72] *See Georgia v. Biden*, 2021 WL 5779939, at *11 (S.D. Ga. Dec. 7, 2021).
[73] *Sierra Club v. Dep't of Nat. Resources and Envt'l Control*, 2005 WL 3359113, at *3 (Del. Ch. Dec. 2, 2005).
[74] Op. Br. at 32-35.
[75] *Id.*; Lorrah Aff. ¶ 14 (emphasis added).

developing science. Lorrah alleges potential negative effects of mask-wearing on children's learning. However, there is far from a scientific consensus on this difficult and novel issue. Indeed, the CDC continues to recommend "universal indoor mask use for students, staff members, and others in kindergarten through grade 12 (K-12) school setting" regardless of vaccination status. [76] The CDC also continues to monitor and analyze research studies, including research indicating that "masks are unlikely to produce serious impairments of children's social interactions."[77] The CDC has found that "[t]he limited available data indicate no clear evidence that masking impairs emotional or language development in children."[78]

Further, as discussed above, there is no evidence that Lorrah or her minor child is injured by the mask mandate, and there is no evidence that Lorrah's health is being affected by the school mask mandate. The Governor does not doubt the sincerity of Lorrah's concern for her daughter's well-being. But the weight of medical and public health authority does not establish immediate, irreparable harm justifying a preliminary injunction.

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[76] Ex. J at ¶13-14.

[77] https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html.

[78] https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html; see also Ex. J at ¶19.

III. A Preliminary Injunction Will Cause Harm to the Governor, School Districts, and the Public that Outweighs any Harm to Lorrah.

The Court must balance the injury to be prevented by granting the interim relief against the potential hardship to the party sought to be enjoined and, where relevant, to the public interest.[79] A court will not issue a preliminary injunction or a temporary restraining order when to do so would threaten the party sought to be enjoined with irreparable injury that, in the circumstances, seems greater than the injury that the movant seeks to prevent.[80] The plaintiff has the burden of establishing that the balance of the equities tips in her favor.[81] Lorrah fails to do so.

As discussed, *supra*, Lorrah has alleged only speculative harm, namely, that *if* masks are harmful to children, then the balance of equities tips in her favor.[82] However, a mere apprehension of injury at some indefinite point in the future is inadequate.[83] Lorrah has submitted no evidence to establish that either she or her daughter is suffering actual harm or will if the mask mandate is not preliminarily enjoined. If Lorrah cannot establish that she or her daughter is suffering harm, it is simply not possible for her to carry her burden to show that the balance of equities tips in her favor.

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[79] *Emerald Partners v. Berlin*, 726 A.2d 1215, 1227 n.18 (Del. 1999). *See also McCann Surveyors, Inc*. v. Evans, 611 A.2d 1, 2 (Del. Ch. 1987).
[80] *Katz v. Oak Industries, Inc*., 508 A.2d 873, 882 (Del.Ch. 1986).
[81] *Allied Chemical & Dye Corp. v. Steel & Tube Co*., 122 A. 156, 158 (Del. Ch. 1923).
[82] Op. Br. at 36 (emphasis added).
[83] *Cook*, 459 A.2d at 540.

Even if allegations of uncertain harm could support the grant of a preliminary injunction in some circumstances, under the conditions confronting the State of Delaware today, the balance of equities strongly favors denying Lorrah's request for a preliminary injunction.

The Fourth Revision lifted most mask mandates as of February 11, 2022. However, to protect our most vulnerable citizens, the Governor has provided time for other children to obtain vaccinations. The extension also gives schools and teachers, administrators and all of those individuals within the school system and those responsible for children to prepare for the change to the mask mandate. It is true that restrictions, rules and procedures changed frequently over the course of the pandemic; the science and the opinions of public health experts changed. The Governor did his best to adapt the restrictions to those changes in the interests of the citizens of Delaware. Further, there is a risk of greater harm to the public should the Court grant Lorrah's requested injunction than the alleged harm that will be avoided if the injunction is granted. Various studies have shown that masking in schools significantly reduces the number of COVID-19 infections. Granting the Motion would put thousands of school students, teachers, parents and staff at greater risk of infection. This must be weighed against Lorrah's speculative allegations of harm to a single person. The balance of equities requires this court to deny Plaintiff's request to enjoin the mask mandate because the scientific likelihood of infection to a

significant number of individuals outweighs the potential risk to a single individual that may flow from being required to continue wearing a mask.

The interest of the broader public outweighs Lorrah's individual hesitancy and her belief that the Governor exceeded his authority. There is no immediate or concrete harm that will befall Lorrah or her daughter if the Fourth Revision remains in place. Enjoining the Governor from implementing the provisions in the Fourth Revision, in contrast, would subject Delaware's school system to undue hardship and risk. This would have direct and indirect effects on children and adults throughout the State of Delaware. Lorrah cannot substitute her policy views for the judgment of subject matter experts. Were Lorrah to obtain the requested injunction, she will have, in effect, forced her personal views, unsupported by record evidence, upon the public via litigation. Doing so would convert equitable jurisdiction into a tool to elevate minority political views above scientifically rooted policy choices that maximize protection of the public and minimize the spread of a deadly disease. Lorrah's Motion must be denied because the balance of equities weighs strongly against the harm an injunction would cause to the public interest.

CONCLUSION

For the reasons stated above, Lorrah's Motion for a Preliminary Injunction should be denied.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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