IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

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I. LEGAL ARGUMENT

In his Answering Brief, Defendant advances the theory that Plaintiff "simply disagrees with the Governor's policy choices" and is only using this Court to "elevate minority political views above scientific rooted policy choices." Def. Br. at 16, 35. Plaintiff wholeheartedly disagrees with these statements, as nothing could be further from the truth.

Emergency powers are not an unlimited form of fiat that allows the executive branch to legislate without regard to procedural and constitutional protections. This is not a political point of view; it is a question of fundamental liberties and government overreach. As the Supreme Court of Wisconsin thoughtfully declared when reviewing an exercise of its Governor's executive emergency powers in response to the COVID crisis, "[t]he question in this case is not whether the Governor acted wisely; it is whether he acted lawfully."[1] Plaintiff is asking the same question here: Did Governor Carney act lawfully?[2]

Although it is easy to paint your adversary as a political sore loser, such broad brushstrokes are inapplicable here. At a minimum, the substantive legal questions

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[1] Fabick v. Evers, Case No. 2020AP1718-OA (WI Mar. 31, 2021) at 2. A true and correct copy of the March 31, 2021 Opinion of the Wisconsin Supreme Court in Fabick v. Evers, Case No. 2020AP1718-OA, is attached hereto in Plaintiff's Compendium of Authorities as Tab 1.

[2] Plaintiff, however, does agree with Defendant's first sentence: "This is a case about statutory interpretation." Def.'s Br. at 1.

raised by Plaintiff regarding the Defendant's exercise of his emergency powers include, but are not necessarily limited to:

- Can the Governor issue an emergency order which sets a deadline for ending of restrictions beyond the end date of the State of Emergency?[3]

- Can the Governor ever offer a justifiable excuse(s) to issue an Emergency Order with a deadline beyond the end date of a State of Emergency? If, so, was a valid excuse offered here?

- Can the Governor, via emergency powers, circumvent the procedural and due process protections contained within the State's Administrative Procedures Act? Is there ever a justifiable excuse to do so? Does this analysis change if the "emergency" events in question are reasonably foreseeable? Does this analysis change if the justifications are pretextual and/or a post hac rationalization?

A. Plaintiff Raises a Fully Justiciable Claim

It is well-settled that to obtain relief from this Court, a justiciable controversy must exist. Defendant challenges every aspect of legal justiciability,[4] but each and every requirement one is present in the instant case. The rights and claims being litigated by Plaintiff are not hypothetical, vague, or moot. Nor is Plaintiff is seeking an "advisory opinion" from this Court. This is a real, viable controversary where Plaintiff is seeking equitable relief that only this Court can give from an on-going harm caused by Defendant's unlawful actions.

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[4] See Def.'s Br. at 15-18.

1. Plaintiff Has Both Traditional and Taxpayer Standing

To establish standing under Delaware law, a plaintiff must demonstrate that: (i) she has suffered an 'injury-in-fact,' i.e., a concrete and actual invasion of a legally protected interested; (ii) there is a causal connection between the injury and the conduct complained of; and (iii) it is likely the injury will be redressed by a favorable court decision. Dover Historical Soc'y v. City of Dover Planning Comm'n, 838 A.2d 1103, 1110 (Del. 2003).

a. Defendant's Due Process Violations Confer Traditional Standing on Plaintiff

Defendant claims that Plaintiff cannot show how she or her child are injured by the school masking mandate, therefore, Plaintiff has no standing. Def. Br. at 16. Such a statement underscores Defendant's sheer lack of understanding of the matter being litigated.[5] As stated previously, the issue is not the school mask mandate itself, but the *process* used to extend the mask mandate. In other words, it's the HOW, not the WHAT.

[5] There are two separate and distinct aspects of injury/harm at this stage of the case. One is the "injury-in-fact" that goes to standing. The other, is the "irreparable harm" required for a preliminary injunction. To the extent Plaintiff raises data, studies, and expert opinions recognizing the harm of masking in children, that goes to the irreparable harm element of the preliminary injunction standard, not to the merits of Plaintiff's claims.

When viewing Plaintiff's claims through a due process lens, Plaintiff's standing is crystal clear. Plaintiff alleges that her (and her child's) procedural due process rights were violated when the Defendant unilaterally extended the school masking mandate via the February 7, 2022 Fourth Revision to the Declaration of a State of Emergency. This is an on-going "injury-in-fact" (i.e., a concrete and actual invasion of a legally protected interested). Next, there is a causal connection between the injury (violation of statutory, procedural, and constitutional due process protections) and the conduct complained of (the unilaterally extension of the school masking mandate via emergency order). Finally, the injury raised by Plaintiff (violation of due process) can only be redressed by a favorable Court decision in this matter.[6]

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[6] Moreover, courts in other states reviewing statewide school masking mandates have found standing for parents challenging said mandates. See, e.g., Corman et al v. Acting Secretary of Health, No. 83 MAP 2021 (Pa. Dec. 21, 2021) (striking down the Pennsylvania Acting Secretary of Health's school masking order); Demetriou, Michael et al vs. New York State Department of Health et al., Case. No. 616124/2021 (N.Y. Sup. Ct. Jan. 24, 2022) (finding the state health commissioner lacked the authority to require face coverings in indoor settings, including schools). A true and correct copy of the December 21, 2021 Opinion of the Pennsylvania Supreme Court in Corman et al v. Acting Secretary of Health, No. 83 MAP 2021, is attached hereto in Plaintiff's Compendium of Authorities as Tab 2. A true and correct copy of the Supreme Court, County of Nassau January 24, 2022 Decision and Order in Demetriou, Michael et al vs. New York State Department of Health et al., Case. No. 616124/2021 is attached hereto in Plaintiff's Compendium of Authorities as Tab 3. See also February 4, 2022 Temporary Restraining Order in Austin v. Board of Education of Community Unit School District #300, et al., Case No. 2021-CH-500002 (Ill. Cir. Ct.) previously provided in Plaintiff's February 15, 2022 Compendium of Authorities.

b. Defendant's Deployment of the National Guard Confers Taxpayer Standing on Plaintiff

Moreover, in limited cases, Courts have recognized taxpayer standing under Delaware law. See Reeder v. Wagner, 974 A.2d 858 (Del. 2009); Lechliter v. Delaware Dep't of Nat. Res. & Envtl., 2015 WL 9591587, at *11 (Del. Ch. Dec. 31, 2015); Lechliter v. Delaware Dep't of Nat. Res. Div. of Parks & Recreation, 2015 WL 7720277, at *7 (Del. Ch. Nov. 30, 2015). Such taxpayer standing is limited to allegations involving challenges either to expenditure of public funds or use of public lands. See O'Neill v. Town of Middletown, 2006 WL 205071 (Del.Ch. Jan. 18, 2006) (citing City of Wilmington v. Lord, 378 A.2d at 638).

When reviewing a taxpayer's challenge to the Wisconsin governor's emergency powers, the Wisconsin Supreme Court found that the deployment of the National Guard pursuant to an emergency declaration was a sufficient expenditure of taxpayer funds to give taxpayers a legally protected interest to challenge the Governor's emergency declarations. See Fabick v. Evers, Case No. 2020AP1718-OA (WI Mar. 31, 2021) at 7, attached in Plaintiff's Compendium of Authorities as Tab 1.

Here, Governor Carney mobilized Delaware's National Guard on or about January 3, 2022 simultaneously with the issuance of the January 3, 2022 State of Emergency. See January 3, 2022 Declaration of State of Emergency

for the State of Delaware Due to a Public Health Threat, attached to Pl.'s Opening Br. as Exhibit 4. See also Office of the Governor, Press Release, *Governor Carney to Issue State of Emergency to Fight COVID-19 Winter Surge*, attached hereto as Exhibit 13; Office of the Governor Press Release, *Governor Carney Signs Universal Indoor Mask Mandate*, (reporting that more than 300 members of the Delaware National Guard are assisting with COIVD-19 emergency response efforts), attached hereto as Exhibit 14; Brandon Holveck, *Amid a COVID-19 Surge, New Year's Gatherings Discouraged. National Guard to Support Hospitals*, DELAWARE NEWS JOURNAL, Dec. 30, 2021.

Thus, even if the Court were to find traditional standing somehow lacking, taxpayer standing is satisfied in this case.

2. Plaintiff's Claims Are Ripe

Next, Defendant argues that Plaintiff's claims are not ripe because until March 2, 2022, the unilateral extension of the school masking mandate is "valid and enforceable." Def.'s Br. at 14. In fact, Defendant brazenly states that "[Ms.] Lorrah does not contend otherwise." Id. The Defendant does not speak for the Plaintiff, and in fact, the Plaintiff has always maintained that the February 7th order extending school masking is invalid because it usurps the

Administrative Procedures Act and the limits on emergency regulations contained therein. See Pl.'s Br. at 19-23.

A claim is ripe when the facts of the case have matured into an actual controversy. A case is not ripe if the harm to the plaintiff has not yet occurred. "Ripeness, the simple question of whether a suit has been brought at the correct time, goes to the very heart of whether a court has subject matter jurisdiction." Bebchuck v. CA, Inc., 902 A.2d 737, 740 (Del. Ch. 2006). Delaware Courts decline to exercise jurisdiction over cases where a controversy has not yet matured to a point where judicial action is appropriate. See Stroud v. Milliken Enters., Inc., 552 A.2d 476, 479 (Del. 1988) (noting that the purpose of such a measured approach is to both preserve limited judicial resources as well as ensure an orderly development of the law). See also New Castle Cty. v. Pike Creek Recreational Servs., LLC, 2013 WL 6904387, at *7 (Del. Ch. Dec. 30, 2013) (noting that the ripeness doctrine exists "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies"), aff'd, 105 A.3d 990 (Del. 2014).

Defendant maintains this action is not ripe because the State is still lawfully under a State of Emergency until March 2, 2022. See Def.'s Br. at 14, 17-19. In fact, the Defendant has the audacity to argue that he might never

extend the current State of Emergency and that the March 31, 2022 date is, therefore, only advisory. See Def.'s Br. at 14. Such a statement is quite baffing when (1) the February 7, 2022 Fourth Revision to the Declaration of a State of Emergency is currently in effect; and (2) the Fourth Revision carries the full force and effect of law, including but not limited to criminal and civil penalties. See 20 Del. C. § 3115 *et seq.*

In addition, if March 2, 2022 is the "true" or "anticipated" end date of the school masking mandate, and the March 31st date is only "advisory," as the Defendant now claims, then the Court must ask why is March 31st the date that was announced in the Governor's Press Release publicizing the Fourth Revision on February 7th, published in the Governor's Weekly Email Communication on February 11th, and broadcasted at the Governor's Weekly Press Conference on February 15, 2022? See February 7, 2022 State of Delaware Press Release, attached to Verified Complaint as Exhibit B.; February 11, 2022 Email Update from the Office of the Governor, 1-2, attached to Plaintiff's Opening Br. as Exhibit 5; and replay of February 15, 2022 Press Conference, found at

https://www.youtube.com/watch?v=W5I9ouOu5aE. Why is March 31st – not March 2nd – the date the State is shouting from the rooftops?[7]

Finally, the Court need not adopt such a narrow construction of ripeness as advocated by Defendant. The moment the Governor signed the Fourth Revision that violated the procedural, statutory, and due process protections contained in the Emergency Procedures Act (the 30-day limitation) and the Administrative Procedures Act (the 180-day limitation), as well as the Delaware Constitution, this case became ripe.

3. Plaintiff's Claims Are Not Moot

Incredibly, after arguing that Plaintiff's claims are not ripe, Defendant turns around and also claims that they are simultaneously moot. See Def. Br. at 14, 20-21. Central to Defendant's argument is that "the Governor has acknowledged"[8] that the Fourth Revision will expire unless the Governor extends the State of Emergency on or before March 2, 2022. Id. at 14.

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[7] The answer, of course, is because the real end date of the school masking mandate is March 31, 2022 and any other explanation is a pretextual and/or a post hac rationalization as argued *infra*.

[8] It is completely unclear where this so-called "acknowledgment" came from or is even located in the record, as there is no affidavit or other attached exhibit with such an "acknowledgment" attached to Defendant's Brief.

A court will normally decline to hear "moot" issues. See McDermott Inc. v. Lewis, 531 A.2d 206, 211 (Del. 1987). Over the course of nearly a century and a half, the U.S. Supreme Court has developed the substantive and procedural aspects of the mootness doctrine, ultimately determining that mootness occurs when "an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit[]' at any point during litigation" unless certain exceptions apply. Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 160–61 (2016) (quoting Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 72 (2013)).

Contrary to Defendant's assertion, Plaintiff's claims are far from moot. Indeed, the challenged action (the Fourth Revision) is still in effect, and Delaware remains in a State of Emergency. Assuming *arguendo* the Court were to give weight to this mysterious "acknowledgment," the case is not moot under the long-recognized the doctrine of voluntary cessation - a principle that prevents gamesmanship and preserves judicial resources by requiring a defendant who changes his conduct mid-litigation to prove that it is "absolutely clear" he will not restart the challenged conduct if the case is dismissed as moot. This standard is "stringent," and the "heavy burden" of meeting it falls on the defendant — "the party asserting mootness." Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 189

(2000); see also City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) (applying standard to governmental entity).

Moreover, even if the Court were to somehow determine that the claims raised in Plaintiff's Verified Complaint were moot, this Court may invoke the exception to the mootness doctrine for matters of public importance that are capable of repetition yet may evade review. See Gen. Motors Corp. v. New Castle County, 701 A.2d 819, 824 n.5 (Del. 1997); McDermott Inc. v. Lewis, 531 A.2d 206 (Del. Supr. 1987) (where a change of circumstances made the appeal moot, the Court nonetheless will determine a question of public importance with a real impact on the law). See also Texaco Refining & Marketing Inc. v. Wilson, 570 A.2d 1146 (Del. Supr. 1990) (where the parties settled appeal from a ruling of an administrative agency, the Court "agreed to decide the legal issue because of its importance to the functioning of the Board and the prospect of recurrence.").

If ever there were a matter of "public importance capable of repetition, yet evading review" this is it. Here, Plaintiff is challenging the overreach of the executive branch's emergency powers. For approximately 18 of the past 23 months, the citizens of Delaware have lived under a State of Emergency. (March 12, 2020 to July 12, 2021, then January 3, 2022 to present). And children in Delaware have lived under a school masking mandate in some

form or another for nearly two full school years. The current State of Emergency may last days, months, or even years and there is only one person who can end it and no one knows when that will be, if ever.[9] Certainly, as COVID-19 continues to circulate in the community, the Defendant (and/or subsequent Governors) will seek to use the State's emergency powers.

In Federal Election Commission v. Wisconsin Right to Life, Inc., an advocacy organization claimed that restrictions on electioneering communications unconstitutionally prohibited the organization from broadcasting certain political advertisements shortly before the 2004 election. 551 U.S. 449, 457–60 (2007). Even though the case did not reach the Supreme Court until long after the 2004 election was over, the Court nonetheless

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[9] Governor Carney has long been criticized for his lack of transparency as well as his lack of clear, empirical benchmarks regarding his use of emergency powers during the COVID-19 pandemic. See, e.g., *An Open Letter to Gov. John Carney*, from Members of Delaware's House of Representatives, attached hereto as Exhibit 15 (noting that "[d]espite repeated requests, there has never been any public disclosure indicating what COVID-19 metrics your administration prioritizes in its decision-making process, what thresholds trigger the imposition of mandates, and what levels need to be achieved to remove restrictions once they have been imposed.").

In fact, at the February 15, 2022 Press Conference, in response to a media inquiry, the Governor indicated he would like to see the number of statewide COVID-19 hospitalizations at about 100 before he would end the State of Emergency. As of the filing of this brief on the afternoon of February 25, 2022, more than a month away from the March 31, 2022 school masking deadline, the current number of COVID-19 hospitalizations in Delaware is 104, and not a single case is a child. See https://myhealthycommunity.dhss.delaware.gov/locations/state.

> concluded that the case was not moot reasoning that the organization credibly claimed that it planned on running "materially similar" ads in advance of future elections, and the period between elections was too short to allow the organization sufficient time to fully litigate its constitutional challenges sufficiently in advance of the election date. Given that the Governor and his Cabinet *still* have failed to go through the proper procedures under the Administrative Procedures Act to lawfully extend the school masking mandate or see that a law is properly passed by the State Legislature,[10] it is highly likely that this very issue (the overreach of emergency powers) on this very subject matter (school masking) will be raised again, particularly during predictable seasonal COVID-19 surges.

Thus, this Court must conclude Plaintiff's action is sufficiently justiciable and adjudicate the merits of her motion for a preliminary injunction.

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[10] It is beyond outrageous that Defendant – who has had nearly two (2) years to seek legislative approval for a statewide masking mandate – now argues that Plaintiff's remedy is to seek relief with the General Assembly when this matter only arose on February 7, 2022, upon the signing of the Fourth Revision, *less than three (3) weeks ago*. See Def.'s Br. at 26 n.57.

B. The Wrongful Denial of Plaintiff's Freedom of Information Act Requests and Failure to Turn Over Factual Data, Studies, and Records Must Estop Defendant from Using Lack of Evidence as Either a "Sword" or a "Shield"

As explained in Plaintiff's February 18, 2022 *Motion in Limine*, attached as Exhibit 16 and incorporated herein by reference, after the close of business on February 17, 2022, the Department of Health and Social Services ("DHSS") denied Plaintiff's request for public information under two Freedom of Information Act (FOIA) requests. In the two FOIA requests at issue, Plaintiff was seeking data, studies, and other factual information on two subjects: the spread of COVID-19 in Delaware's elementary schools and the purported effectiveness of the COVID-19 vaccines. On January 27, 2022, Plaintiff sought documents, data, or studies from DHSS "regarding the spread of COVID-19 in Delaware elementary schools (Kindergarten-Fifth Grade) (public, private, and/or religious schools) from August 2020-present."[11]

[11] The second FOIA request was made on February 1, 2022 following the Governor's Weekly Press Conference on the same date and requested documentation to support the statement of Dr. Karyl Rattey, Director, Division of Public Health that the "absolute effectiveness" of 2 doses of a COVID-19 vaccine was "80 percent," but with a booster dose, the "absolute effectiveness" increased to a whopping 99-100 percent. After receiving Defendant's Answer Brief, however, Plaintiff concedes that Defendant does not appear to raise the effectiveness of vaccines as a justification for his actions. However, Plaintiff reserves the right to raise the issue of withholding this information should the matter be affirmatively raised by Defendant at oral argument on February 28, 2022.

Rather than release the requested documents, or work with Plaintiff to narrow her request, as required under the law, DHSS summarily denied her request claiming the documents were "records pertaining to pending or potential litigation." Then, the next business day, on February 22, 2022, the Defendant turns around and makes unsupported claims on ***the same subject*** of Plaintiff's denied FOIA request: the spread of COVID-19 in Delaware's schools. It simply doesn't work this way – a litigant cannot shield documents from someone who challenges him, and then advance unfounded and baseless claims on the same issues. Thus, Defendant must be estopped.

Specifically, the challenged statements made by Defendant that are relevant to the denial of Plaintiff's FOIA request are:

- That enjoining the school mask mandate would lead to a "significantly increased infection rate" in Delaware schools. Def. Br. at 4.

- That "studies" show that masking in schools "significantly reduces the number of COVID-19 infections." Def. Br. at 4.

- That ending the school masking mandate before March 31, 2022 "would put thousands of school students, teachers, parents and staff at greater risk of infection." Def.'s Br. at 34.

- That there is a "scientific likelihood of infection to a significant number of individuals" if the masking mandate is lifted before March 31, 2022. Def.'s Br. at 35.

- That ending the masking mandate would cause "undue hardship and risk" to the entire school system and would have "direct and

indirect effects" on children and adults in the State. Def.'s Br. at 35.

If Defendant has evidence for these statements, he must either produce the evidence now during the course of this litigation and in support of his opposition to the Plaintiff's instant motion, or in response to Plaintiff's FIOA request. Otherwise the Court should dismiss these assertions out of hand as being mere conjecture without any substantiated evidentiary support.

C. Defendant Has Failed to Put Forth Actual Evidence to Support the Sweeping Statements Forming His Legal Argument

Defendant makes many sweeping and speculative statements in his opposition.[12] However, once the Court examines these statements, as it must, the Court should conclude that Defendant – just like any other party appearing in this Court – cannot rely on unsupported assertions, speculation, or hearsay to carry his legal arguments.

Some of the completely unsupported statements Defendant makes include:

- "The evidence submitted on behalf of the Governor establishes that enjoining the mask mandate would lead to a

[12] In yet another brash display of pure hypocrisy, Defendant argues Plaintiff's assertion on hospital capacity – a single issue taken completely out of context by the Defendant – is speculative, yet his entire opposition brief is filled with speculative and conclusory statements. See Def.'s Br. at 26.

significantly increased infection rate. [No citation.]" Def. Br. at 4 (emphasis added).

- That the extension of the school masking mandate contained in the February 7, 2022 Fourth Revision "was explicitly based on guidance from the CDC and in consultation with local health experts" [No citation.] Def.'s Br. at 29.

- That the Governor's orders have changed "in accordance with the developing science." [No citation.] Def.'s Br. at 32.

- That the potential negative effects of extended mask wearing on children's learning is a "difficult and novel issue." [No citation.] Def.'s Br. 32.

- That the continued masking of school children "protects our most vulnerable citizens"[13] [No citation.] Def.'s Br. at 34.

- That the "Governor did his best to adapt the restrictions" based on science and public health opinions [No citation.] Def.'s Br. 34.

- "Various studies have shown that masking in schools *significantly reduces* the number of COVID-19 infections. [No citation.]" Def.'s Br. at 34 (emphasis added).

- That granting Plaintiff's motion "would put thousands of school students, teachers, parents and staff at greater risk of infection." [No citation.]" Def.'s Br. at 34.

- That there is a "scientific likelihood of infection to a significant number of individuals" [no citation] if Plaintiff's motion is granted. Def.'s Br. at 35.

[13] It is not clear who the State considers its "most vulnerable citizens."

- That an injunction would be an "undue hardship and risk" to the entire school system and would have "direct and indirect effects" on children and adults in the State. [No citation.] Def.'s Br. at 35.

The Statements of Dr. Karyl Thomas Rattay Are Conclusory, Unsupported by Evidence, and Are Inadmissible Hearsay

Other statements offered by the Defendant are **only** supported by the Declaration of Dr. Karyl Thomas Rattay, Director of the Division of Public Health within Delaware's Department of Health and Social Services.[14] For example, one such statement supported only by the Rattay Declaration, is:

- "The Center for Disease Control and Prevention ("CDC") recommends the use of masks to prevent the spread of COVID-19." Def.'s Br. at 9.
  - Defendant cites the Rattay Declaration at ¶¶ 9-12 to support this statement.
    - However, the Rattay Declaration at ¶¶ 9-12 does not have a factual source for this statement.

Other statements in Defendant's Brief supported only by the Rattay Declaration include the proffer that:

[14] Incredibly, the Defendant argues on the one hand that Plaintiff's signed and sworn Affidavit, in addition to scientific studies and opinions of experts, is not enough to support her argument that her daughter will suffer harm if the unlawful extension of the school masking mandate continues (see Def.'s Br. at 31, 33), but on the other hand offers the unnotarized Declaration of a single public official as the only support for a vast majority of his arguments.

- "there is no scientific consensus within the medical and public health communities as to any negative effect of mask-wearing on children." Def. Br. at 10.
    - Defendant cites the Rattay Declaration at ¶¶ 18-19 to support this statement, an alleged direct quotation.
    - Upon review, ¶¶ 18-19 of the Rattay Declaration does not state this, however, ¶ 20 does.
    - More importantly, however, ***¶ 20 of the Rattay Declaration has no citation. It is only a conclusion.***

Additional statements made in the Rattay Declaration are similarly baseless. For example, Rattay claims that "The CDC's recommendation of mask-wearing in schools is necessary to lessen and stop the spread of COVID-19 through source control and filtration for wearer protection." Rattay Declaration at ¶15. There is no citation to support this statement. Additionally, Rattay states as fact that there is "no natural immunity" from COVID-19. Rattay Declaration at ¶5. Not only is such a statement unsupported, it is also in complete contradiction to the CDC.[15]

Further, Exhibit J is a merely a declaration, not a sworn affidavit. The declaration is hearsay and is not subject to the business or public record exceptions of the hearsay rule. See D.R.E. 801 and D.R.E. 803(7); see also Ruffin v. State, 131

[15] For example, a CDC study released in mid-January 2022 found that individuals who recovered from COVID-19 had more protection against infection (i.e., natural immunity) than vaccinated individuals. See https://www.cdc.gov/mmwr/volumes/71/wr/mm7104e1.htm?s_cid=mm7104e1_w.

A.3d 295, 301 (Del. 2015). Finally, Rattay Declaration is not subject to judicial notice. See D.R.E. 201.

When the Court closely reviews the statements in Defendant's Brief and the statements of Dr. Rattay, coupled with the fact that the State has refused to release data and scientific studies to supports its claims, see *supra*, the Court can only come to one conclusion: that sweeping statements without even an iota of factual, legal, or evidentiary support must be rejected. The axiom "show me, don't tell me" must carry the day.

D. Defendant's Justifications Must Be Rejected as Unacceptable Pretext and/or Post Hoc Rationalizations

It is telling that in his opposition, the Defendant does not raise the three justifications widely publicized and reported as the reasons the unilateral extension of the school masking mandate was necessary (*i.e.*, to allow more children to be vaccinated; to allow schools to pass local mask requirements; and to allow the State to implement new quarantine and contact tracing rules for schools). See February 7, 2022 State of Delaware Press Release, attached to Verified Complaint as Exhibit B.; February 11, 2022 Email Update from the Office of the Governor, 1-2, attached to Plaintiff's Opening Br. as Exhibit 5; and replay of February 15, 2022 Press Conference, found at https://www.youtube.com/watch?v=W5I9ouOu5aE. Rather than sticking

with the original three reasons, Defendant now claims (without any factual support, see *supra*) that removing the school masking mandate before March 31st would result in a *significantly increased* COVID-19 infection rate, putting *thousands* of lives at stake, and that, in sum, the State's entire school system would colipase.[16] See Def.'s Br. at 34-35.

There is a single reason why Defendant's arguments are so hard to pin down: the Governor picked the March 31, 2022 school masking end date (beyond the duration of the current State of Emergency and beyond the 180-day limit of the APA emergency rule making authority) hoping that it would go unnoticed and now that his actions have been brought to light, all of the Defendant's arguments based on post hoc rationalization.[17]

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[16] These arguments are telling as to how far Defendant is willing to go to keep up the charade. Since the Fourth Revision, at least two States (Nevada and New Mexico) announced the ending of both their general masking mandate and school masking mandate which would occur simultaneously. See *Nevada Lifts Indoor Mask Mandate Immediately As COVID-19 Cases Drop*, Feb. 10, 2022, attached hereto as Exhibit 17; Jonathan Fjeld, *Gov. Lujan Grisham Announces Immediate End to New Mexico's Indoor Mask Mandate*, Feb. 17, 2022, attached hereto as Exhibit 18. At the time of the Nevada's Governor's decision, that State had 1,324 COVID-19 hospitalizations. As noted above, Delaware currently has 104. Moreover, to the best of Plaintiff's information and belief, neither Nevada nor New Mexico schools have suffered a vast increase in COVID-19 cases and their school systems to date remain intact.

[17] Government action is arbitrary, capricious, and unreasonable when it is based on post hoc rationalization, when it fails to consider an important part of the problem it is addressing, and when it fails to consider less restrictive alternatives before infringing on citizens' liberty. See, e.g., Dep't of Homeland Sec. v. Regents of the

It is undisputed that if the State of Delaware was not under a State of Emergency, the school masking mandate would have ended on February 8, 2022 because the 180-day limit of the emergency provisions of the APA would have been reached. It is also undisputed that once the State of Emergency ends, the statewide school masking mandate must also end since the Governor has not taken the proper steps to make the mandate permanent. Thus, the only way to keep Delaware's statewide school masking mandate in effect is to keep the State of Emergency going.

Mark A. Holodick, Secretary Delaware's Department of Education, is on record with yet another reason for the March 31st date. At the February 15, 2022 Weekly Press Conference (which was after the filing of Plaintiff's Verified Complaint and after Plaintiff filed her Opening Brief), Secretary Holodick indicated that the March 31st date was chosen after discussions with school board superintendents. This, Plaintiff contends, is the real reason for the school masking extension through March 31st, and if so, all of Defendant's fabricated reasons must fall away.[18]

Univ. of Cal., 140 S. Ct. 1891, 1905, 1909 (2020); Michigan v. EPA, 135 S. Ct. 2699, 2706 (2015).

[18] Plaintiff has issued a Subpoena for the oral deposition of Secretary Holodick on Thursday, March 3, 2022 at 10 AM. See February 22, 2022 Subpoena, attached hereto as Exhibit 19.

Soliciting some school superintendents input in an informal *ad hoc* committee is not a valid reason to trample on the due process rights of individual citizens and not a reason to exercise emergency powers. Nor does such a practice – done in secret – follow the letter or the spirit of the Emergency Procedures Act or the APA. Secretary Holodick's actions reveal the actions being taken are not emergency actions at all, but the implementation of standard policy that should be bound by non-emergency law.

II. CONCLUSION

The preliminary injunction standard under Delaware law "falls well short of that which would be required to secure final relief following trial, since it explicitly requires only that the record establish a reasonable probability that this greater showing will ultimately be made." Pell v. Kill, 135 A.3d 764, 783 (Del. Ch. 2016).

For the reasons set forth above and in Plaintiff's Motion for Preliminary Injunction and Answer Brief filed on February 15, 2022, Plaintiff respectfully request that this Court immediately issue a preliminary injunction.[19]

[19] Plaintiff also asks that bond be waived. See Rule 65(c), Rules of Chancery.

Respectfully submitted,

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Dated: February 25, 2022