

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 OPENING BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

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Through Divine goodness, all people have by nature the rights of worshiping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and in general of obtaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for due exercise thereof, power is inherent in them; and therefore ***all just authority in the institutions of political society is derived from the people***, and established with their consent, to advance their happiness

Preamble, The Delaware Constitution (emphasis added).

I. PRELIMINARY STATEMENT

From lockdowns to travel bans, the global coronavirus pandemic has led to an unprecedented assault upon civil liberties even among the most developed democracies. Such unchecked restrictions have led to the normalization of emergency powers and accustomed citizens to extraordinary extensions of state power over large areas of their public and personal life. Under the American system of government, however, it is the duty, obligation, and responsibility of the courts to ensure that all branches of the government continue to act within the bounds of their authority even in the face of an unprecedented crisis. Thus, when citizens across this country have availed themselves of the courts – their only remedy to on-going, unlawful government action – these challenged COVID emergency orders and regulations have been struck down again and again.

For example, less than two weeks ago, on February 4, 2022, the County Circuit Court of Illinois declared Gov. J.B. Pritzker’s emergency rules for COVID mitigations in schools “null and void,” effectively stopping Illinois’ mask mandate in school buildings.¹ “Statutory rights have attempted to be bypassed through the issuance of executive orders and emergency rules,” Judge Raylene Grischow stated. “This type of evil is exactly what the law was intended to constrain.”

Like the parents in the Illinois case, Plaintiff in the case at bar challenges this State’s Governor’s unchecked flexing of his emergency rule-making power and seeks a preliminary injunction of the continued masking in Delaware schools under the February 7, 2022 Fourth Revision to the Declaration of a State of Emergency for the State of Delaware.

For the reasons set forth below, Plaintiff has shown reasonable probability of success on the merits of her claims, irreparable injury without immediate relief, and that the balance of the equities tip in favor of injunctive relief. This Court

¹ A true and correct copy of the 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.) is attached in Plaintiff’s Compendium of Authorities. It is critical to note that not only did the court rule that the Governor’s mandates were “not legally enforceable” but that the defendants were in violation of several state and federal laws by denying the students and parents due process.

should, therefore, immediately grant Plaintiff's request for a preliminary injunction.

II. STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

Plaintiff filed a Verified Complaint, Motion for Expedited Proceedings, and a Motion for Preliminary Injunction with this Court on the morning of February 9, 2022.² In the Verified Complaint, Plaintiff, a Delaware citizen and taxpayer, seeks to prevent her child, 6-year-old G.L., from being subject to the continued state-wide masking of Delaware school children in grades K-12 via the February 7, 2022 Fourth Revision to the Declaration of a State of Emergency for the State of Delaware which Plaintiff contends was enacted in violation of the Emergency Procedures Act and the Administrative Procedures Act, as well as due process.

On the afternoon of February 9, 2022, the Honorable Vice Chancellor Paul A. Fioravanti, Jr. ("Vice Chancellor Fioravanti") ordered a telephonic hearing on Plaintiff's Motion for Expedited Proceedings on February 11, 2022. In advance of the hearing, on February 10, 2022, the parties conferred and entered into an

² Plaintiff initially e-filed the pleadings and motions on the afternoon of February 8, 2022. However, the documents were not accepted by the Registrar due to her *pro se* status.

agreement regarding an expedited briefing schedule. This Stipulation was approved by the Court on February 11, 2022. At that time, Vice Chancellor Fioravanti set Plaintiff's briefing deadline for February 15, 2022 and also set a hearing on Plaintiff's Motion for Preliminary Injunction on February 28, 2022 at 9:15 a.m.

III. STATEMENT OF ALL RELEVANT FACTS

A. The First State of Emergency – March 12, 2022

On March 12, 2020, Defendant Carney declared a State of Emergency alleging a public health threat of COVID-19 ("COVID") pursuant to the statutory authority delegated to him under Delaware's Emergency Management Act. (Title 20, Chapter 31 of the Delaware Code).

On August 26, 2020, as private and religious schools throughout the state were preparing to re-open for the 2020-21 school year, Defendant Carney issued a 25th Modification to the March 12, 2020 State of Emergency Order requiring face coverings for all children in grades Kindergarten through 12th Grade while in school with very limited exceptions. A true and correct copy of the August 26, 2020 Twenty-Fifth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat is attached to the Verified Complaint as Exhibit C.

More than sixteen (16) months later, on or about July 12, 2021, Defendant Carney issued an Order terminating the March 12, 2020 State of Emergency due to COVID. A true and correct copy of the July 12, 2021 Termination of State of Emergency for State of Delaware Due to a Public Health Threat is attached to the Verified Complaint as Exhibit D.

B. Two State Agencies Implement Emergency Regulations in August 2021

On Friday, August 13, 2021, as schools across the state were preparing for the 2021-2022 school year, Susan S. Bunting, Secretary of the Delaware Department of Education (“DOE”), issued an Emergency Regulations requiring face masks in all Delaware childcare centers and schools. A true and correct copy of the August 13, 2021 Department of Education Emergency Order/Regulations are attached to the Verified Complaint as Exhibit E. Additionally, presumably because regulations promulgated by the DOE would not reach Delaware’s private and religious schools, the same day Molly K. Magarik, Secretary of the Delaware Department of Health and Social Services (“DHSS”), issued Emergency Regulations requiring “[a]ll schools that serve students kindergarten through twelfth grade shall require mask use by all students, faculty, staff, and visitors inside school buildings, regardless of vaccination status.” A true and correct copy of the August 13, 2021 Department of Health and Social Services Order/Regulations are attached to the Verified Complaint

as Exhibit F. Both masking regulations went into effect on Monday, August 16, 2021.

The August 13, 2021 DOE and DHSS' Emergency Regulations were enacted under 29 Del. C. § 10119 of Delaware's Administrative Procedures Act ("APA"), which allows a state executive agency to take emergency action upon an specific finding that there is an immediate danger to public health, safety and welfare, and that the urgent adoption of a regulation is necessary.

Because the APA's emergency provision allows an agency to adopt regulations without the normal procedural safeguards, such as advance publication and an opportunity for public comment prior to enactment, 29 Del. C. § 10119 expressly limits the time an emergency regulation can stand. Initially, an emergency regulation can remain in effect for up to 120 days. Then, at the end of the 120-day period, an emergency regulation can be renewed once for a period not to exceed 60-days. Specifically, the statute states:

§ 10119. Emergency regulations.

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:

- (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;³ 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.

29 Del. C. § 10119

Thus, the maximum amount of time an emergency regulation enacted under 29 Del. C. § 10119 can be valid is 180 days (120 days + 60 days). There are no further extensions permitted under 29 Del. C. § 10119.⁴

³ By letter dated January 26, 2022, Plaintiff filed a Petition for Recommendation with the DHSS urging that the Emergency Regulations enacted on August 13, 2021 and extended on December 14, 2021 be reconsidered and not further extended. A true and correct copy of the January 26, 2022 Petition for Recommendation to Secretary Molly Magarik is attached as Exhibit 1. To date, Plaintiff has not received a response to her Petition.

⁴ Administrative agencies derive their powers and authority solely from the statute creating them and defining their powers. See Retail Liquor Dealers Ass'n Delaware v. Delaware Alcoholic Beverage Control Commission, 1980 WL 273545,

The DOE and DHSS' August 13, 2021 Emergency Regulations were initially set to expire on December 14, 2021, however, both Secretaries extended their respective regulations for an additional 60 day period in early December 2021. A true and correct copy of the December 3, 2021 Department of Education Order is attached as Exhibit 2. A true and correct copy of the December 6, 2021 Department of Health and Social Services Order is attached hereto as Exhibit 3. Thus, by statute, the absolute ending date of the State's Emergency Regulations on school masking was **February 8, 2022**.

C. The Second State of Emergency – January 3, 2022

In January 2022, with Delaware experiencing a seasonal increase of COVID cases, on January 3, 2022, Defendant Carney issued a second Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat ("State of Emergency"). A true and correct copy of the January 3, 2022 Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat is attached as Exhibit 4.

Defendant Carney issued this State of Emergency pursuant to 20 Del. C. § 3115 *et seq.*, Delaware's Emergency Management Act which provides, in part, that:

[a] state of emergency shall continue until the Governor finds that the threat or danger has passed or the emergency or disaster has been dealt with to the extent that conditions

at *3 (Del. Super. 1980). Thus, the DOE and the DHSS had no ability to extend the respective emergency school masking regulations on their own.

necessitating a state of emergency no longer exist and terminates the state of emergency by subsequent order. No state of emergency can continue for more than 30 days without being renewed by the Governor.

20 Del. C. § 3115(c).

One week later, the January 3, 2022 State of Emergency was modified on January 10, 2022 when Defendant Carney issued an Amended First Revision to the State of Emergency for the State of Delaware due to a Public Health Threat, requiring individuals over the age of two to wear face masks in all indoor public settings, such as grocery stores, gyms, and restaurants. A true and correct copy of the January 10, 2022 Amended First Revision to the State of Emergency is attached to the Verified Complaint as Exhibit G.

On January 31, 2022, Defendant Carney extended the State of Emergency another 30 days as required by 20 Del. C. § 3115(c). Thus, as of the morning of February 15, 2022 (the date of the filing of this brief), Delaware currently remains under a state of emergency only until March 3, 2022 unless the State of Emergency is extended again.

On Monday, February 7, 2022 – the day before the DOE and DHSS Emergency Regulations were set to expire – Defendant Carney issued a Fourth Revision to the Declaration of a State of Emergency for the State of Delaware which, *inter alia*, extended the statewide masking mandate for all school children in grades

Kindergarten – 12th Grade until at least March 31, 2022. A true and correct copy of the February 7, 2022 Fourth Revision to the Declaration of a State of Emergency for the State of Delaware is attached to the Verified Complaint as Exhibit A (hereinafter “February 7, 2022 Order”). Specifically, the February 7, 2022 Order provides as follows:

Obligations for Mask Wearing in Child Care Facilities and Schools

All schools that serve students kindergarten through twelfth grade shall require mask use by all students, faculty, staff, and visitors inside school buildings, regardless of vaccination status.

The February 7, 2020 Order lifted the general indoor mask mandate for all individuals over the age of 2 effective Friday, February 11, 2022. Under the terms of the February 7, 2022 Order, however, the state-wide school masking mandate is to last until at least March 31, 2022.

The Defendant’s purported purpose for extending the school masking mandate while lifting the general masking requirement was: (1) to allow more children to be vaccinated; (2) to allow individual schools and school boards to pass local mask requirements; and (3) 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. See also February 11, 2022 Email Update from the Office of the Governor, 1-2, attached as Exhibit 5.

(announcing the end of Delaware’s Universal Indoor Mask Mandate and explaining why the school masking mandate would remain).

Plaintiff makes two claims for why the February 7, 2022 extension of the statewide school masking mandate is invalid and beyond the emergency powers of the Governor. First, Plaintiff argues the extension of the school masking mandate was enacted in violation of Title 20, Chapter 31 of the Delaware Code which requires that a state of emergency be renewed every 30 days and therefore, the February 7, 2022 Fourth Revision to the Declaration of a State of Emergency for the State of Delaware which extends of school children until at least March 31, 2022 is *per se* unlawful on its face.

Next, Plaintiff argues that because the Governor’s February 7, 2022 school masking mandate simply extends the August 13, 2021 Emergency Orders/Regulations of the DOE and DHSS which, under 29 Del. C. § 10119 cannot be extended past 180 days (February 8, 2022), the February 7, 2022 school masking mandate violates the Administrative Procedures Act, as well as state constitutional principles of due process, separation of powers and non-delegation of authority.

IV. STATEMENT OF THE QUESTION INVOLVED

Question: Is Plaintiff entitled to a preliminary injunction?

Suggested Answer: Yes. Plaintiff has demonstrated (i) a reasonable probability of success on the merits, (ii) a threat of irreparable harm if an

immediate injunction is not granted, and (iii) that the balance of the equities favors the issuance of an injunction.

V. LEGAL ARGUMENT

Under Delaware law, to obtain a preliminary injunction, a plaintiff must demonstrate (i) a reasonable probability of success on the merits, (ii) a threat of irreparable harm if an injunction is not granted, and (iii) that the balance of the equities favors the issuance of an injunction. Ivanhoe P’rs v. Newmont Mining Corp., 535 A.2d 1334, 1341 (Del. 1987); Revlon, Inc. v. MacAndrews & Forbes Hldgs., Co., 506 A.2d 173, 179 (Del. 1986). See also Mountain W. Series of Lockton Cos. v. Alliant Ins. Servs., Inc., 2019 WL 2536104, at *9 (Del. Ch. June 20, 2019). This Court has broad discretion to grant a preliminary injunction. Fletcher Int’l, Ltd. v. ION Geophysical Corp., 2010 WL 1223782, at *3 (Del. Ch. Mar. 24, 2010) (citing Data Gen. Corp. v. Digit. Comput. Controls, Inc., 297 A.2d 437, 439 (Del. 1972)). Where a plaintiff raises multiple claims against a defendant, plaintiff need only show a substantial likelihood of success on the merits on one claim. When a plaintiff raises constitutional issues, even if the plaintiff is unable to show a strong or substantial probability of ultimate success on the merits, an injunction may be issued where the plaintiff “at least shows serious questions going to the merits and irreparable harm.” Kentucky v. Biden, 2021 WL 5587446 (E.D. Ky. Nov. 30, 2021)

(granting preliminary injunction in case challenging Executive Order 14042 requiring COVID vaccines for the employees of federal contractors and subcontractors).

Delaware's three preliminary injunction elements are not to be considered independently of each other, with each element always deemed to be of equal weight. Rather, the elements are all related, and a court must engage in a delicate weighing and balancing of the various factors as is required to reach a decision under the circumstances of the individual case.⁵ Bayard v. Martin, 101 A.2d 329, 334 (Del. 1953), cert. denied, 347 U.S. 944 (1954); Gimbel v. Signal Cos., 316 A.2d 599, 603 (Del. Ch. 1974), aff'd, 316 A.2d 619 (Del. 1974).

A. Plaintiff Has Shown a Reasonable Probability of Success on the Merits

The first element of the injunction test requires the plaintiff to establish a reasonable probability of success on the merits. This relates to issues of law as well as issues of fact. Wylain, Inc. v. Tre Corp., 412 A.2d 338, 342 (Del. Ch. 1979); Allied Chemical & Dye Corp. v. Steel & Tube Co., 122 A. 142, 148 (Del. Ch. 1923). The preliminary injunction standard “falls well short of that which would be required

⁵ For example, in certain situations, a strong showing of success on the merits may compensate for a weak showing of irreparable injury. Allen v. Prime Computer, Inc., 540 A.2d 417, 421 (Del. 1988); Cantor Fitzgerald, L.P. v. Cantor, 724 A.2d 571, 579 (Del. Ch. 1998).

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) (quoting Cantor Fitzgerald, L.P. v. Cantor, 724 A.2d 571, 579 (Del. Ch. 1998)).

In determining the probability of success, disputed issues of fact will be found in favor of the moving party if it appears, after evaluating all of the evidence in the record, that there is a reasonable likelihood that on final hearing that fact will be so established by the proper standard of review. In other words, disputed facts will be resolved on the basis of how the dispute would probably be resolved at trial. See E.I. du Pont de Nemours & Co. v. Bayer CropScience L.P., 958 A.2d 245, 251-2 (Del. Ch.), app. refused mem., 956 A.2d 31 (Del. 2008).

Here, Plaintiff advances two legal theories to support her claim that the Defendant’s February 7, 2022 Order as it pertains to the masking of Delaware school children, including Plaintiff’s daughter, is unlawful.⁶

⁶ Plaintiff fully understands that the issue before this Court at this time is not whether masking is effective in general, or even whether masking is effective in schools. To be clear, Plaintiff is not arguing that masks simply “don’t work,” as the issue is far more nuanced than a simple soundbite. It is Plaintiff’s position that studies suggest that medical-grade masks when worn properly and consistently by all have been shown to slow the transmission of the COVID virus in certain settings. However, it is also now recognized that long-term masking has both benefits and costs, especially to children, and that the downside has never been part of the equation in Delaware’s emergency policy making, but more importantly, the statutory and constitutional procedural due process afforded to Delaware citizens have been completely side-stepped.

1. The February 7, 2022 Order Is Invalid on Its Face Because It Extends the Masking Mandate Beyond the Current State of Emergency End Date

The first question in looking at whether Plaintiff is likely to ultimately prevail on the merits is: Whether Governor Carney went beyond his executive authority when he extended the state's school masking mandate beyond the end date of the current State of Emergency?

There is no question that the Governor has broad power and tremendous discretion under Delaware's Emergency Management Act (Title 20, Chapter 31 of the Delaware Code). However, the Governor's authority is not absolute. Even for a good cause, including a cause that is intended to slow the spread of COVID, the Defendant cannot go beyond the authority authorized under the statute. See Kentucky v. Biden, 2021 WL 5587446. Thus, in issuing an order which contains provisions that go beyond the current end of the State of Emergency, Defendant violated the Emergency Management Act.⁷

Delaware's Emergency Management Act is clear that a declared State of Emergency can only last for 30 days. See 20 Del. C. § 3115(c). Delaware rules of statutory interpretation are well-established and "designed to ascertain and give effect to the intent of the legislators, as expressed in the statute." Del.

⁷ No other Declarations or Extensions issued by Defendant Carney contain a specific ending date other than the February 7, 2022 Fourth Revision to the Declaration of a State of Emergency for the State of Delaware.

Bd. of Nursing v. Gillespie, 41 A3d 424, 427 (Del. 2012) (internal citations omitted); Dewey Beach Enters., Inc. v. Bd. of Adjustment of Dewey Beach, 1 A.3d 305, 307 (Del. 2010). The Court must first determine whether the statutory provision is actually ambiguous. Taylor v. Diamond State Port Corp., 14 A.3d 536, 538 (Del. 2011); Dewey Beach Enters., 1 A.3d at 307. Under Delaware law, a statute is ambiguous if it is “reasonably susceptible of two interpretations,” Taylor, 14 A.3d at 538; Dewey Beach Enters., 1 A.3d at 307, or “if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature.” Del. Bd. of Nursing, 41 A.3d at 427.

When a statute is unambiguous, statutory construction is unnecessary. See Taylor, 14 A.3d at 538; Dewey Beach Enterprises, Inc., 1 A.3d at 307. Rather, the Court should give the words in the statute their plain meaning. See Zhurbin v. State, 104 A.3d 108, 110 (Del. 2014) (internal citations omitted) (“Where a statute contains unambiguous language that clearly reflects the intent of the legislature, then the language of the statute controls.”); Dewey Beach Enters., 1 A.3d at 307 (“If [a statutory provision] is unambiguous, no statutory construction is required, and the words in the statute are given their plain meaning.”); Hoover v. State, 958 A.2d 816, 819 (Del. 2008) (“If the

language of the statute is unambiguous, the plain meaning of the words control.”).

Delaware courts have held that the plain meaning of a statutory term is determined by considering the term in a common or ordinary way. See, e.g., Nw. Nat. Ins. Co. v. Esmark, Inc., 672 A.2d 41, 44 (Del. 1996) (considering the common and ordinary meaning of the term “under”); Moore v. Chrysler Corp., 233 A.2d 53, 55 (Del. 1967) (“Words in statutes must be given their common and ordinary meanings.”); State v. Virdin, 1999 WL 743988, at *3 (Del. Super. Aug. 20, 1999) (finding that “pregnant” has a common and ordinary meaning); O’Donald v. O’Donald, 430 A.2d 800, 803 (Del. Fam. Ct. 1981) (“[S]tatutes will be given their common and ordinary meaning . . .”). See also ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 101 (2012) (instructing that general terms are to be given their general meaning and afforded their full and fair scope, without being arbitrarily limited).

If a statutory provision is deemed to be ambiguous, then the Court must consider the statute as a whole and read each part “in light of the others to produce a harmonious whole.” Taylor, 14 A.3d at 538; Dewey Beach Enters., 1 A.3d at 307. The Court should read any ambiguous statutory terms in a way to promote the statute’s apparent purpose. Delaware Bd. of Nursing, 41 A.3d at 427. According to Chief Judge Robert Katzmann of the Second Circuit,

“legislation is a purposive act,” and the Court “should construe statutes to execute that legislative purpose.” ROBERT A. KATZMANN, JUDGING STATUTES 31 (2016).

Here, the specific language of Delaware’s Emergency Management Act under review is by this Court is 20 Del. C. § 3115(c) which provides, *inter alia*, that “[n]o state of emergency can continue for more than 30 days without being renewed by the Governor.” The language of this statute is clear and unambiguous and the plain meaning of the words should control. In other words, the statute requires that a state of emergency be renewed every 30 days and that any attempt to impose an order that extends beyond 30 days violates this provision.

Should the Court determine that the language in question is ambiguous, then the Court must look to the Emergency Management Act’s purpose. Under either analysis, however, the result is the same: the February 7, 2022 Fourth Revision to the Declaration of a State of Emergency for the State of Delaware which requires the continued masking of Delaware’s school children until at least March 31, 2022 is *per se* unlawful on its face.

In passing the Emergency Management Act, the General Assembly clearly wanted to provide a governor with the necessary tools to react, respond to, and recover from emergencies and disasters. See 20 Del. C. § 3101

(Declaration of policy and purpose). However, because the Emergency Management Act provides a governor such sweeping powers, including restricting or, in some cases, completely eliminating citizens' due process and other constitutional rights, the General Assembly included an essential caveat to ensure that the governor's emergency powers would be appropriately limited via the periodic renewal language. This language was not intended to be a mere formality, but was to ensure the necessary checks and balances required in a democracy when civil liberties and constitutional rights are potentially suspended.

Thus, looking at the entire Emergency Management Act's purpose, this Court can only come to one conclusion: that Defendant Carney lacked the authority to extend the school masking mandate beyond the ending date of the current State of Emergency (March 2, 2022).

2. Even If the State of Emergency Can Be Lawfully Renewed Until the End of March, the Masking Mandate Is Still Invalid Because It Violates the Delaware Administrative Procedures Act

Plaintiff anticipates a “no harm, no foul” type of argument from Defendant who will claim that once the current extension of the State of Emergency order can be renewed (on or before its expiration on March 2, 2022), the March 31, 2022 deadline for school masking would fall within the bounds of the new extension. This argument fails for three reasons.

First, it is unacceptable for a state actor to act unlawfully and then argue that his behavior should be excused due to the passage of time. Such an argument runs afoul of 20 Del. C. § 3131 (setting limits on the Governor's powers under a Public Health Emergency) which provides, *inter alia*, that:

- (6) The exercise of emergency health powers must promote the common good.
- (7) Emergency health powers must be grounded in a thorough scientific understanding of public health threats and disease transmission.
- (8) The rights of people to liberty, bodily integrity and privacy must be respected to the fullest extent possible consistent with the overriding importance of the public's health and security.
- (9) Guided by principles of justice, it is the duty of this State to act with fairness and tolerance towards individuals and groups.

20 Del. C. § 3131.

Surely, imposing mandates on citizens which extend beyond the current State of Emergency is not protecting civil liberties, nor is such an action “[g]uided by the principles of justice,” fairness, or even common decency.

Second, this argument exposes the fatal flaw in Defendant's anticipated argument: it assumes that conditions to extend the State of Emergency will still exist on or about March 2, 2022 and that the January 31, 2022 Extension of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat can be *lawfully* extended. As argued in Section V.A.1., *supra*, the

Governor's emergency executive powers are not absolute. A State of Emergency can only be extended every 30 days upon an express finding that the threat or danger which necessitated the declaration of emergency in the first place is continuing. See 20 Del. C. § 3115 ("The state of emergency shall continue until the Governor finds that the threat or danger has passed or the emergency or disaster has been dealt with to the extent that conditions necessitating a state of emergency no longer exist").

When Governor Carney declared a state of emergency on January 3, 2022, his stated reason was that such action was necessary because some Delaware hospitals were operating at above 100 percent capacity due to a seasonal spike in COVID hospital admissions. See January 3, 2022 Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat ("WHEREAS, despite administering over one and a half million doses of COVID-19 vaccines to individuals who live, work, and are educated in Delaware, Delaware has experienced an extraordinary surge in recent hospitalizations with some hospitals over 100% inpatient bed capacity amid crippling staffing shortages,"), attached as Exhibit 5.

If the parties can agree on one thing, it is that COVID is a rapidly evolving situation. Since the mid-January 2022, hospitalizations in Delaware have dropped and continue to drop at a rapid pace. As of the date of this brief,

Delaware hospitals are no longer operating at capacity. In fact, Delaware reported the only 266 COVID related hospitalizations on Sunday, February 13, 2022, the lowest figures since early December. Source: DHSS Website, <https://myhealthycommunity.dhss.delaware.gov> (last visited Monday, February 14, 2022). This number is less than one-third from the peak of 759 hospitalizations reported on Jan. 12, 2022. Department of Health and Human Services, Division of Public Health, COVID-19 Vaccine Communications Subcommittee Meeting Handout, Feb. 7, 2022, attached as Exhibit 6, at 5. This is the decrease in only one month and – following the trends prior spikes – COVID hospitalizations will continue to drop daily.

Most importantly, however, COVID cases and hospitalizations dropped enough for Defendant Carney to ***completely eliminate*** the need for indoor masking by the ***general public*** as of ***Friday, February 11, 2022***. Thus, to assume that the situation which necessitated the State of Emergency in the beginning of January 2022 would continue to the beginning of March 2022 is both unfounded and presumptuous.

Finally, it is clear from the face of February 7, 2022 Order that the school masking provisions issued by the Governor simply extend the DOE and DHSS's Emergency Orders/Regulations. Because the Governor's February 7, 2022 school masking mandate simply extends the August 13, 2021 Emergency Orders

of the DOE and DHSS which, under 29 Del. C. § 10119 cannot be extended past 180 days (February 8, 2022) the February 7, 2022 school masking mandate violates the Administrative Procedures Act.

Simply put: the clock has run out on the masking of Delaware's school children under the executive branch's emergency powers; there is no overtime.

Game over.

If the executive branch wants to impose a masking mandate beyond the 180 day limit contained APA, there are two possible options: (1) go through the proper (non-emergency) rule making process which includes publishing the proposed regulations, holding public hearings and allowing citizens the opportunity to be heard in advance of their adoption;⁸ or (2) request that the measure be passed by the General Assembly, which would also require public hearings and an opportunity for debate, before the measure would be voted on by duly elected representatives in both chambers of the house.

3. Defendant Cannot Put Forth Any Reason to Justify Violating State Statutes Limiting the Emergency Powers of the Executive Branch

Because the extension of the school masking mandate is invalid on its face, the Court does not have to look at Defendant's proffered reasons for his

⁸ Plaintiff is not conceding that the DOE and/or the DHSS actually has the delegation authority to make such a regulation under their authorizing statutes, as such an analysis is outside the scope of the matter currently before the Court.

actions. Taylor, 14 A.3d at 538; Dewey Beach Enterprises, Inc., 1 A.3d at 307. Indeed, the Court should simply find that there can be no justification for Defendant's blatant violation of the plain letter, as well as the spirit, of the established law. As the United States District Court for the Southern District of Georgia recently observed: a strong public interest, such as the mitigation of the spread of COVID, does not allow the government "to act unlawfully even in the pursuit of desirable ends." Georgia v. Biden, 2021 WL 5779939 (S.D. Ga. Dec. 7, 2021) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582, 585-86 (1952)) (enjoining nationwide the enforcement of President Biden's Executive Order 14042 mandating that all federal contractors and subcontractors working on covered federal contracts provide proof of COVID vaccination).

However, should the Court examine the Defendant's purported reasons to defend the school masking extension, such excuses must fail, particularly at this early stage of the litigation where Plaintiff must only show a reasonable probability of success on the merits.

As set forth above, the Defendant's justification for extending the school masking mandate while lifting the general masking requirement was: (1) to allow more children to be vaccinated; (2) to allow individual schools and school boards to pass local mask requirements; and (3) to allow the State

to implement new quarantine and contact tracing rules for schools. See Exhibit B to the Verified Complaint. See also Exhibit 5. Additionally, the Defendant has advanced a generalized proposition that “masking has helped keep kids in school.” Exhibit 5 at 2 (stating this twice on page 2). None of these reasons, either separately or as a whole, justify the State’s actions. Each proffer will be taken in turn.

- a. There is no definitive evidence for the sweeping statement that “masking has helped keep kids in school”

Starting with the blanket generalization that “masking has helped keep kids in school,” first, this statement is not a “fact” and the Court need not accept this statement as factual. The theory that mandatory masking prevents the spread of COVID in schools has no empirical or rational basis in medical science or statistical analysis. Margery Smelkinson, Leslie Bienen, and Jeanne Noble, *The Case Against Masks at School*, THE ATLANTIC, Jan. 26, 2022 (finding, *inter alia*, that only two randomized trials have measured the impact of masks on COVID transmission: one was a Denmark study which found no significant effect of masks on reducing COVID transmission; the second was a Bangladesh study that found surgical masks (but not cloth) were modestly effective at reducing rates of COVID symptomatic infection. “However, neither of these studies included children, let alone vaccinated children.”), found at <https://www.theatlantic.com/ideas/archive/2022/01/kids-masks-schools-weak-science/621133/> and attached hereto as Exhibit 7; David

Zweig, *The CDC's Flawed Case for Wearing Masks in School*, THE ATLANTIC, Dec. 16, 2021 (where nine experts debunked the CDC study, including one who called the study “so unreliable that it probably should not have been entered into the public discourse.”), found at <https://www.theatlantic.com/science/archive/2021/12/mask-guidelines-cdc-walensky/621035/>, and attached hereto as Exhibit 8.

Moreover, thousands of schools around the country have been open for nearly 2 school years without masks with no corresponding rise in COVID cases. Additionally, COVID is all around us. As the U.S. Supreme Court has recently observed, “COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable disease.” *NFIB v. OSHA*, 595 U. S. ____ (2022), Slip Op. (evaluating and ultimately striking down OSHA’s authority to mandate COVID vaccines). If a school age child tests positive for COVID, there is no way to pinpoint where the child contracted the virus.

Thus, unless Defendant can put forth actual scientific evidence that shows Delaware’s school masking mandate – which has been in effect in one form or another from August 2020 to present – has stopped the spread of COVID in schools and/or “helped keep kids in schools,” Defendant should be precluded from making

such sweeping statements as “evidence” to justify the extension of Delaware’s school masking mandate.⁹

- b. Extending the school mask mandate to allow additional time for some parents to obtain vaccinations for their children is not a legitimate interest to usurp state law

The State is understandably frustrated at the low COVID vaccine rates for children in Delaware, something the Governor pointed out in his weekly COVID Press Conference on February 8, 2022. However, the percentage of vaccinated children in Delaware is actually *greater* than the percentage of vaccinated people in the general population in the State. According to the State’s own data, the percentage of fully vaccinated Delawareans 5+ is 65.1%. See Exhibit 6 at 7. The percentage of fully vaccinated citizens of all ages is 61.4%. Id.

If parents choose to keep their children masked during the school day, they are more than able to do so. In fact, they can do so indefinitely if they choose, with or without their child being vaccinated. There is no rule, regulation, or emergency order preventing parents from doing this, and much like if a child needed glasses, medication, or some other medical device during

⁹ Since January 2022, Plaintiff has attempted to obtain documents, data and/or studies from the DHSS which evidence the spread of COVID in Delaware’s elementary schools via a Freedom of Information Act Request (FOIA). To date, DHSS has not produced a single page in response to Plaintiff’s request.

the school day, school officials, teachers, and staff could accommodate a child's use of a facial covering.

Further, the Defendant's "additional time" argument fails for two other reasons. First, COVID vaccines were approved for use in children ages 5-12 in late October 2021. The vaccines are widely available and are offered free of charge. Since the enactment of the Emergency Regulations in August 2021, DOE and DHSS officials knew the school masking provisions could only last a maximum of 180 days and *by law* could not be extended further. 29 Del. C. § 10119 (providing that emergency regulations cannot be extended past 180 days). Thus, the DOE and DHSS had more than 3 months (November 2021-January 2022, and part of February 2022) to implement an aggressive campaign to (i.) educate parents of the February 8, 2022 school masking deadline, (ii.) inform parents that the February 8, 2022 school masking deadline could not be statutorily extended, and (iii.) urge parents to have their children vaccinated in advance of the February 8, 2022 school masking deadline. These two executive agencies, along with the Governor's Office, choose not to do this.¹⁰ The failure of government officials to act when they

¹⁰ In fact, a review of the DOE and DHSS websites show a suspicious lack of information concerning the February 8, 2022 statutory deadline.

had the chance does not constitute a reason to violate state statutes or due process.

Next, there is no guarantee that extending the mask mandate until March 31, 2022 will even move the needle on vaccinations in Delaware's 5-12 year-old population, at least to a point that is acceptable to the State.¹¹ Families who are in favor of vaccinating their children likely already did upon the October 2021 approval of the vaccines for this age group. Conversely, the minds of parents who are on the fence or against vaccines are likely not going to be changed, especially with confusing and mixed messages, like when the Food and Drug Administration (FDA) announced on Friday, February 11, 2022 that it was abruptly putting the brakes on efforts to fast-track review of the Pfizer vaccine for children under 5.

c. The Court must reject any argument that Defendant can act unlawfully to achieve a lawful result

The final two arguments Defendant puts forth for extending the school masking mandate can be put into a single bucket: that the government is permitted to act unlawfully with the right hand (via the February 7, 2020

¹¹ An acceptable vaccination rate for the State's 5-12 year-olds has not been put forth by the DHSS and is anybody's guess at this point as the goalposts are constantly shifting. Moreover, it is well-established that COVID is overwhelmingly mild in children, even those who are unvaccinated, making the government's connection of increased vaccinations and the lifting of the school masking mandate questionable.

Order) so the left hand (local school boards and the DOE and DHSS) can act lawfully.

Arguing that it is permissible for the highest level of state government to act unlawfully – even for the shortest amount of time – to allow another arm of the government to take action fails the “sniff test.” And when the actions are taken against children, this position is truly unconscionable and should not even be considered by this Court.

Thus, Plaintiff has met the first-prong of the Preliminary Injunction test as it is likely that Plaintiff will ultimately prevail in her claims and that this Court will issue a Declaratory Judgment invalidating February 7, 2022 extension of Delaware’s statewide school masking mandate.

B. Plaintiff Has Made a Clear Showing of Irreparable Harm that Justifies the Extraordinary Relief of a Preliminary Injunction

“Irreparable injury is an indispensable and essential factor in determining whether to grant injunctive relief,” N.K.S. Distribs., Inc. v. Tigani, 2010 WL 2367669, at *4 (Del. Ch. June 7, 2010) (citing Kingsbridge Cap. Gp. v. Dunkin’ Donuts Inc., 1989 WL 89449, at *4 (Del. Ch. Aug. 7, 1989) and an injunction should not be granted in the absence of a clear showing of imminent irreparable harm to the plaintiff. In re Cogent, Inc. S’holder Litig., 7 A.3d 487, 513 (Del. Ch. 2010) (citing

Baxter Pharm. Prods., Inc. v. ESI Lederle Inc., 1999 WL 160148, at *4 (Del. Ch. Mar. 11, 1999)).

“Harm is irreparable unless ‘alternative legal redress [is] clearly available and [is] as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.’” In re Del Monte Foods Co. S’holders Litig., 25 A.3d 813, 838 (Del. Ch. 2011) (quoting T. Rowe Price Recovery Fund, L.P. v. Rubin, 770 A.2d 536, 557 (Del. Ch. 2000)). “To demonstrate irreparable harm, a plaintiff must present an injury of such a nature that no fair and reasonable redress may be had in a court of law and must show that to refuse the injunction would be a denial of justice.” CBS Corp. v. Nat’l Amusements, Inc., 2018 WL 2263385, at *4 (Del. Ch. May 17, 2018) (quoting Aquila, Inc. v. Quanta Servs., Inc., 805 A.2d 196, 208 (Del. Ch. 2002)).

Here, where Plaintiff is seeking relief from an overreaching executive order, the only remedy available is an equitable one. There is no remedy at law or monetary damages that can be collected in the future. In fact, Delaware’s Emergency Management Act *expressly precludes* such recovery. See 20 Del. C. § 3129 (Immunity from civil liability).

As a federal court recently found in the case striking down certain federal vaccine mandates, “complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance.” Georgia v. Biden,

2021 WL 5779939. Thus, anytime a citizen is forced to abide by an unlawful rule, law, or order of the government – even for a single day – there is irreparable harm.

The Defendant may argue that masking is a small inconvenience that school children must make “for the greater good” and that there is inadequate harm to meet the standard necessary for a preliminary injunction. However, such arguments must fail as the continual masking of school-aged kids is simply not a damage free intervention.

The negative effects of long-term masking in children are now widely known, and include the knowledge that the constant use of masks impedes the learning process and potentially causes significant social and emotional harm. Masking impairs verbal and non-verbal communication between teachers and students, limits facial identification, and has occasional physical side effects. Visualization of the entire face is of crucial importance to social, emotional, and speech development. It has been recognized that children need to see the expressions and reactions on the faces of their peers and teachers. This nonverbal feedback is how children often weigh their actions and behavior against those around them, developing social and emotional intelligence that is crucial to their educational and social growth. Indeed, researchers and pediatricians, some of whom initially supported masking in children but have now changed their position given new data and studies. *See Children, COVID, and the Urgency of Normal*, found at: [http:// www.urgencyofnormal.com](http://www.urgencyofnormal.com),

and attached to the January 26, 2022 Petition for Recommendation to Secretary Molly Magarik, Exhibit 1 (advocating for the end of school masking mandates by February 15, 2022). Furthermore, studies have found that children who wear masks in schools suffer physical discomfort (e.g., headaches), mental and emotional pain (e.g., less happiness, depression, anxiety, or irritability), and are less capable at school.

Erin Bromage, an associate biology professor at the University of Massachusetts, Dartmouth,¹² has recently opined that:

Schools should be moving toward masks coming off as the community infection numbers drop. Children are the least likely to have poor outcomes from infection, they have the opportunity to be vaccinated, and as long as the parent retains the right to have their children mask if they choose, then we should be moving to a situation where masks are optional. ***There are just too many negative tradeoffs in socialization and learning when children do not get to see faces and expressions.***

Why One Expert Has Evolved on Masks in Schools, Zachary B. Wolf, January 20, 2022, CNN.com, found at <https://www.cnn.com/2022/01/20/politics/covid-masks-schools-what-matters/index.html> (emphasis added) and attached as Exhibit 9. Prof. Bromage further went on to opine that “[w]e have spent too much time and

¹² Prof. Bromage worked with the governor of Rhode Island to reopen schools there, and later helped schools in southern Massachusetts reopen. See Michelle Goldberg, *Let Kids Take Their Masks Off After the Omicron Surge*, The New York Times, Jan. 28, 2022, attached as Exhibit 10.

effort applying the strictest measures to the least vulnerable population. We should be targeting those measures to the group of people that is most negatively affected by COVID.”

A January 2022 U.K. report on the efficacy of masks in school settings, not only failed to identify any clear evidence in favor of this practice, the authors found that:

Wearing face coverings may have physical side effects and impair face identification, verbal and non-verbal communication between teacher and learner. This means ***there are downsides to face coverings for pupils and students, including detrimental impacts on communication in the classroom.***

United Kingdom Department for Education, Evidence Summary, Coronavirus (COVID-19) And the Use of Face Coverings in Education Settings, January 2022, attached as Exhibit 11 (emphasis added).

The harm in allowing the overbearing and unlawful mandatory masking to continue until at least March 31, 2022 – and possibly beyond – is immeasurable, especially to young children, like Plaintiff’s daughter. See generally Plaintiff’s February 8, 2022 Affidavit in Support of Motion previously submitted to the Court. Plaintiff’s 6-year-old daughter has never known school without COVID restrictions and mandates. G.L., who is in the first grade, has had to learn to read and make friends without seeing her teacher’s mouth or other students’ faces. The potentially devastating effects of the extension of the school masking mandate to Plaintiff’s

daughter, include, but are not necessarily limited to impeding learning, physical symptoms such as dizziness and shortness of breath, as well as the on-going toll on her mental health and well-being. See Plaintiff’s February 8, 2022 Affidavit, ¶ 14.

Between the presumption of harm afforded to litigants challenging overreaching government actions, the harm of long-term masking of young children now recognized by a plethora of experts, the on-going nature of due process violations, and Plaintiff’s sworn statement describing the effects of continued masking on her daughter, Plaintiff has made a clear showing of irreparable harm necessitating a preliminary injunction.

C. Balance of Equities Favor the Issuance of an Immediate Preliminary Injunction

Finally, the balance of the equities favors the granting of Plaintiff’s requested relief. In evaluating the third and final prong of the preliminary injunction test, this Court must “balance the plaintiff’s need for protection against any harm that can reasonably be expected to befall the defendants if the injunction is granted.” Mills Acq. Co. v. Macmillan, Inc., 559 A.2d 1261, 1279 (Del. 1989). See also In re Del Monte Foods Co. S’holders Litig., 25 A.3d 813, 839 (Del. Ch. 2011).

Regardless of any laudable health goal or other pretense that the Defendant wishes to offer, the balance of the equities favors the issuance of Plaintiff’s requested injunction in this matter. Plaintiff’s 6-year-old daughter – like all Delaware school

children – have been under a masking mandate in one form or another since August 2020. Not a single lawmaker or member of the legislative branch has ever voted on the masking of Delaware’s school children. There have been no hearings on this issue. Due process has been cast aside.

Under the State Constitution, the power of the executive branch is limited to administering, interpreting, enforcing, and otherwise regulating the laws the General Assembly has enacted. The Governor and his Cabinet have had nearly two (2) years - since March 2020 - to have ushered the passage of a law concerning the masking of Delaware’s school children via the proper channels. The Governor has chosen to not do this. The failure of the Governor to act and go through the proper legislative channels as required by Delaware law and due process, should not impose unnecessary and potentially harmful burdens on children, particularly where the effectiveness of these measures is questionable.

If Defendant Carney’s unlawful extension of statewide school masking policies are causing harm to children, including Plaintiff’s daughter, such as impeding their learning, stunting their social development, and otherwise taxing their mental health, then the balance of equities must tip in Plaintiff’s favor. See, e.g., Dr. Vinay Prasad, *The Downsides of Masking Young Students Are Real*, THE ATLANTIC, Sept. 2, 2021, attached as Exhibit 12.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court immediately grant the motion for a preliminary injunction.

Respectfully submitted,



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