STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: June 6, 2022)

RICHARD SOUTHWELL, et al.,	:	
	:	
Plaintiffs,	:	
v.	:	**C.A. No. PC-2021-05915**
	:	
DANIEL J. MCKEE, in his official capacity as Governor of the State of Rhode Island; and NICOLE ALEXANDER-SCOTT, in her official capacity as Director of the Rhode Island Department of Health	:	
	:	
Defendants.	:	

DECISION

LANPHEAR, J. This matter came on for hearing before Mr. Justice Lanphear on May 2, 2022 on State Defendants' Motion for Judgment on the Pleadings.

In brief summation, the Plaintiffs are the parents of children subjected to the state's school mask mandate and seek injunctions and other relief against the Governor of Rhode Island and the Department of Health to limit enforcement of Executive Orders and emergency regulations underlying the mandate. After hearing, this Court denied Parent Plaintiffs' request for a preliminary injunction.[1] Although the evidentiary hearing extended over eight days, the parties did not agree to accelerate the case on the merits, so the Parent Plaintiffs' requests for permanent relief are still pending. Other counts remain in the Parent Plaintiffs' Complaint, including a request for Declaratory Relief suggesting that the Governor lacks the constitutional and statutory power to enact broad masking regulations and requests for injunctive relief.

[1] See Decision in this case, November 12, 2021.

I

Standard for Motion

"A judgment on the pleadings under Rule 12(c)… 'provides a trial court with the means of disposing of a case early in the litigation process when the material facts are not in dispute after the pleadings have been closed and only questions of law remain to be decided.'" *Premier Home Restoration LLC v. Federal National Mortgage Association*, 245 A.3d 745, 748 (R.I. 2021) (quoting *Nugent v. State Public Defender's Office*, 184 A.3d 703, 706 (R.I. 2018). A judgment on the pleadings "'may be granted only when it is established beyond a reasonable doubt that a party would not be entitled to relief from the defendant under any set of conceivable facts that could be proven in support of its claim.'" *Id.* (quoting *Nugent*, 184 A.3d at 706-07).

This is a significant burden for the State Defendants to meet on this motion, as the original hearing was quite contested. Substantial fact and expert witness testimony were submitted to the Court, as well as voluminous documentary evidence. This is not a case where the parties agree on the evidence or the facts.

II

Analysis

A. Mootness

The State Defendants' primary challenge to the case is that the relief sought, that is the challenge to the mask wearing requirement, "[t]eeters on [m]ootness." State Defendants' Mem. 10, Feb. 23, 2022. The Court presumes that the State Defendants used the term "teeters" as the Executive Order mandating the wearing of masks in schools under a Phase III reopening expired, which eliminated mask mandates in school after March 4, 2022.

The parties acknowledge that the masking requirements originally set forth in the Complaint expired in the spring of 2022 as the spread of the COVID-19[2] pandemic waned. They differ on whether the controversy is therefore moot. Parent Plaintiffs allege that illnesses periodically rise and fall so the issue is likely to be repeated. The State Defendants suggest that any future controversy will differ as each variant of the virus differs, science continues to progress, and vaccines have now shown great success in controlling the spread of the disease.

While the Rhode Island courts have discussed mootness, our federal courts have recently touched upon strikingly similar issues. Their application of mootness law demonstrates how complex the issue is and how it is difficult to see a bright line of demarcation in applying the mootness doctrine to the issues at bar.

In *Boston Bit Labs, Inc. v. Baker*, 11 F.4th 3 (1st Cir. 2021), arcades in Massachusetts alleged that the Governor of the Commonwealth had unfairly prohibited them from opening for business during the pandemic, while he had allowed casinos to open and operate. Within days of the suit, Governor Baker withdrew his order and moved to dismiss, claiming a "voluntary cessation." *Id.* at 7. The United States District Court found the claims to be moot, and the United States Circuit Court of Appeals affirmed, holding:

> "Federal judges decide only *live* controversies that will have a real effect on real parties in interest. So if a case loses its live-controversy character at any point in the proceedings, the mootness doctrine generally stops us from pumping new life into the dispute (regardless of how fascinating the party's claims are) by ousting the federal courts of jurisdiction and requiring us to dismiss the case.
>
> "The heavy burden of showing mootness is on the party raising the issue. And the key question is whether the relief sought would, if granted, make a difference to the legal interests of the parties (as distinct from their psyches, which might remain deeply engaged with the merits of the litigation). If the answer is no, then the court

[2] The SARS-CoV-2 virus is alleged to be responsible for the spread of "COVID-19," so-called.

> is not really deciding a 'case,' and (if a federal court) it is therefore exceeding the power conferred on it by ... the Constitution.
>
> "Bit Bar (we also repeat) explicitly targeted Order 43, which put arcades in Phase IV but kept casinos in Phase III. … Given this concatenation of events, there is simply no ongoing conduct to enjoin, thus mooting Bit Bar's injunctive-relief claim.
>
> "And the same goes for Bit Bar's declaratory-relief claim. Such a claim is moot if no substantial controversy of sufficient immediacy and reality exists to warrant the issuance of a declaratory judgment." *Id.* at 8-9 (internal citations and quotation marks omitted).

In affirming, the First Circuit refused to apply the voluntary cessation exception to mootness, which applies when the government withdraws a COVID restriction in the course of litigation, *see* Tandon *v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) ("[E]ven if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case."), as the First Circuit did not find that the conduct could be reasonably expected to recur. *Boston Bit Labs*, 11 F.4th at 10. Ironically, the same federal appellate court had considered a similar case just seven months earlier. In response to the COVID-19 pandemic, the Governor of Maine ordered that all persons visiting Maine be quarantined for fourteen days. When campgrounds claimed that the right to travel was impaired, the federal district court denied the initial request for injunctive relief. During an interlocutory appeal, the Governor withdrew her Executive Order. The appellate court held "that the plaintiffs' request for injunctive relief from EO 34's self-quarantine requirement is not moot…" *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153, 158 (1st Cir. 2021). The Court reasoned:

> "To be sure, nothing in the record suggests that the Governor rescinded EO 34 for litigation-related reasons rather than to account for changing conditions owing to the course of the virus itself. Indeed, any decision by the Governor to issue an executive order that imposes the same requirement to self-quarantine that EO 34 imposed would most likely be predicated on at least somewhat different facts and considerations. The dynamic nature of both the virus that has given rise to this

> pandemic and the public health response to it all but ensures that would be so, just as the dynamic nature of both the virus and the response appears to explain why EO 34 was rescinded in favor of EO 57.
>
> "Against this background, there is a question whether the issues presented by the plaintiffs' request for relief from EO 34's self-quarantine requirement—given that it has been rescinded—could recur. But, the Governor has not denied that a spike in the spread of the virus in Maine could lead her to impose a self-quarantine requirement just as strict as EO 34's. Thus, we cannot say that the Governor has carried 'the formidable burden' that she bears of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur. A contrary ruling, moreover, would run the risk of effectively insulating from judicial review an allegedly overly broad executive emergency response, so long as it is iteratively imposed for only relatively brief periods of time." *Id.* at 157-58 (internal citations and quotation marks omitted).

Here, the Court has no indication that our state will never impose another student masking requirement. The masking requirement was removed, not from a voluntary action of our Governor, but because of an Executive Order which expired on its own terms on March 4, 2022. (*See* Executive Order of the Rhode Island Governor, 22-19, Feb. 15, 2022.)[3] Our state appears to be in the same pandemic, resulting from strains of COVID-19 which the Circuit Court described as having a "dynamic nature." Moreover, new masking mandates have been imposed on students since the challenged masking mandate expired.[4] The Court is not persuaded that events occurring

[3] Note that the Rhode Island General Assembly added G.L. 1956 § 30-15-9(g) in July 2021 which arguably limits the duration of certain Executive Orders.

[4] During a recent uptick in COVID-19 cases, new masking mandates were imposed for students in Central Falls, New Shoreham, and Providence. "Providence Schools bring back COVID mask mandate," https://www.providencejournal.com/story/news/education/2022/05/23/providence-ri-schools-reimpose-covid-19-mask-mandate/9893892002 (last visited June 3, 2022). In filings submitted herein on May 27, 2022, the Parent Plaintiffs sought injunctive relief to stop the masking mandate in Providence, alleging that the Providence actions resulted from recommendations for masking from the Rhode Island Department of Health. Parent Plaintiffs' request for injunctive relief was continued after Providence ended the masking mandate. The Stipulation of continuance requires advance notice to the Parent Plaintiffs of future masking requirements, Stipulation, May 31, 2022. The State Defendants contested the issuance of an injunction and questions the Stipulation, which they did not execute. However, these documents further illustrate that temporary but mandatory masking has recently been imposed, at least on a local level.

after the filing have deprived the Parent Plaintiffs of an ongoing stake in the controversy. *Seibert v. Clark*, 619 A.2d 1108, 1110 (R.I. 1993).

This Court is left to conclude, at this point, that the masking requirement is a live controversy, likely to be reimposed if future conditions change. Although the Governor's Executive Order expired and the resultant mandatory masking of students has ceased, there is no assurance that it will not be back. Further, our High Court has stated:

> "This Court will review an otherwise moot case when the issues raised implicate matters of extreme public importance, which are capable of repetition but which evade review. Such issues usually relate to important constitutional rights, matters concerning a person's livelihood, or matters concerning citizen voting rights." *State v. Medical Malpractice Joint Underwriting Association*, 941 A.2d 219, 220-21 (R.I. 2008) (internal citations and quotation marks omitted).

The challenge based on mootness must fail, at this point.

B. Statutory Construction

The second ground upon which the State Defendants press its Motion for Judgment on the Pleadings is that the Executive Orders which were executed were appropriate and in accord with the revised statutory scheme. The State Defendants claim that the directives of the Governor to the Department of Health to establish regulations were also appropriate. Of course, many of these issues were previously ruled upon in this Court's Decision of November 12, 2021.

The prior Decision denied the granting of a preliminary injunction. This allowed the parties to proceed to a full trial and assumed that discovery was ongoing. The original Complaint herein also contained prayers for a permanent injunction and a declaratory injunction. Meanwhile, time passed, and the State Defendants moved for Judgment on the Pleadings. Apparently, the parties agreed to stay discovery pending a ruling on that motion. The Court never issued a stay of discovery. This left the case relatively dormant.

Since then, a new request for injunctive relief (regarding the new masking requirement) was requested, a stipulation was submitted, and the parties are in dispute over new issues. A motion for leave to file an amended complaint is now pending. While the issues are in such flux, it is inappropriate for the Court to attempt to rule on issues which may be of no consequence or to issue relief which may no longer be required. Accordingly, the Court passes (denying without prejudice) the other issues raised in the Motion for Judgment on the Pleadings.

The Court recognizes that a complaint, generally, need only contain "[a] short and plain statement of the claim showing that the pleader is entitled to relief," and a demand for judgment. Super. R. Civ. P. 8(a). However, the Court remains unclear concerning: the identity of the State Defendants intended to be included, the causes of action, and the specific relief prayed for. The Amended Complaint, which has now grown to fifty-three pages, should specify what declaratory judgment is prayed for and what specific conduct the Parent Plaintiffs are attempting to enjoin and restrain.

III

Conclusion

The Court finds that the issues raised are not precluded from further consideration because of mootness, at this point. As to the other issues, the Parent Plaintiffs are seeking to amend the Complaint extensively, and the parties have a right to be heard on the issue. Accordingly, the Motion for Judgment on the Pleadings is denied without prejudice.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Richard Southwell, et al. v. Daniel J. McKee, in his official capacity as Governor of the State of Rhode Island, et al.**
CASE NO:	**PC-2021-05915**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**June 6, 2022**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
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