

to the motion for a preliminary injunction, ECF 15) the arguments that this Court should abstain pursuant to the *Younger* abstention doctrine.

Additionally, Plaintiff's temporary restraining order is based upon matters outside the pleadings.

Notwithstanding abstention and that this motion seeks relief that is outside the pleadings, Dr. Skoly claims that a proposed permanent regulation published by the Department of Health ("DOH") on February 24, 2022 proves his point that vaccination is as effective as wearing an N95 mask; and since the proposed permanent regulation "is Defendants' actual practice in Rhode Island today," this Court should allow Dr. Skoly to return to practice immediately. The Plaintiff's motion makes serious errors – and omits material information – that warrants this Court's careful consideration. The motion should be denied.

The Plaintiff's motion acknowledges, but at the same time ignores, the key point – what DOH publicly announced and filed on February 24, 2022 represents a proposed regulation, it is not yet effective and is drafted in contemplation of conditions that have not yet occurred, that is, lower infection rates in the State. Indeed, Plaintiff's Exhibit BB, ECF 18-3, is entitled "**PUBLIC NOTICE OF PROPOSED RULEMAKING**," and indicates that a hearing date on the proposed permanent regulation is set for March 8, 2022, with the end of public comment on March 27, 2022. After public comment and due consideration, the final regulation may or may not mirror the proposed regulation. Whatever the content of a permanent regulation may be, at the time this motion for a temporary restraining order is heard,

the governing regulation continues to be the Emergency Regulation, 216-RICR-20-15-8.

The Plaintiff's Exhibit Z, ECF 18-1 – the Cost-Benefit Analysis – makes DOH's position and intentions clear. For example, the DOH proposed regulation indicates that while COVID-19 conditions have improved since the pandemic began in March 2020, "infections have not dropped to classify it as an epidemic or endemic." ECF 18-1, at 3. The analysis reiterates that while "Rhode Island has improved in vaccination rates and masking compliance, these abatement factors are not at the level where COVID-19 can be deemed endemic." ECF 18-1, at 4. Contrary to Dr. Skoly's representation that the proposed permanent regulations represent the DOH's "actual practice in Rhode Island today," the Cost-Benefit Analysis indicates that the proposed regulations are aspirational and prospective: "[w]hile the proposed regulation provides more options for health care workers than the emergency regulation, it reflects the projected data that we are slowly moving into an endemic stage for COVID-19." ECF 18-1, at 9.

Finally, in the concluding paragraphs, the analysis summarizes that "[w]hen the emergency regulation was issued, Rhode Island was in a very different place in terms of infection rates, hospitalizations and deaths," that "[a]s of mid-February, cases, hospitalizations and deaths are rapidly declining," and that Rhode Island is "shifting the COVID-19 strategy from a pandemic to an endemic." ECF 18-1, at 19. *See also* ECF 18-1, at 21 ("As the State prepares to move into the endemic phase, the Department must shift policies to match the new stage."). The proposed permanent

regulations make clear that the requirements set forth therein do not represent the current practice or regulatory requirements, but instead represent a possible future regulatory framework.

Dr. Skoly's contends that "Defendants concede that they would be acting 'capriciously' if they did not allow N95 masking to be an alternative to vaccination." ECF 18, at 3. In support, Dr. Skoly quotes selectively from the Cost-Benefit Analysis (of the proposed permanent regulation) and attributes to the DOH:

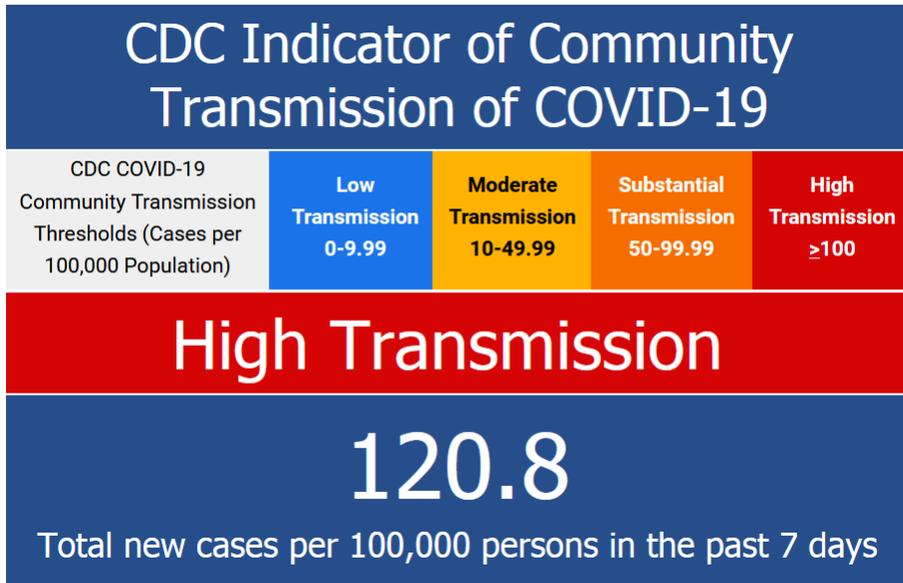
"Thus, a reasonable alternative to being up to date [with vaccines] is to wear a medical grade N95 mask ..."

ECF 18, at 3 (alterations made by Dr. Skoly). Importantly, Dr. Skoly omits the language coming after "N95 mask...." The omission of this language is material and without explanation. The full sentence reads: "Thus, a reasonable alternative to being up to date is to wear a medical grade N95 mask *when transmission is substantial.*" ECF 18-1, at 15 (emphasis added).

Dr. Skoly inexplicitly omits from his memorandum the triggering language for when DOH considers an N95 mask to be a reasonable alternative to vaccination: "when transmission is substantial." This language is material because not since on or about August 11, 2021 has the transmission of COVID-19 in Rhode Island been classified as "substantial." Rather, from on or about August 11, 2021 until the present time, Rhode Island has been in a "high" transmission classification – the highest level and the classification above "substantial."

In this respect, the Centers for Disease Control and Prevention ("CDC") has four levels of community transmission of COVID-19: 0-9.9 cases, per 100,000 people

represents “low” transmission; 10-49.99 cases, per 100,000 people represents “moderate” transmission; 50-99.99 cases per 100,000 people represents “substantial” transmission, and 100 and above cases per 100,000 people represents “high” transmission.



The above image taken from the DOH’s website on March 4, 2022 demonstrates the CDC classifications, and represents the current transmission level as of March 3, 2022. See <https://ri-department-of-health-covid-19-data-rihealth.hub.arcgis.com/>.¹

The Plaintiff’s failure to indicate that the DOH’s basis for a reasonable alternative was based on a lower transmission level is material and should defeat this motion.

¹ On Friday, March 4, 2022, the seven day average dropped to 112.3 per 100,000 people. The DOH website also indicates that the CDC is providing updated guidance concerning measuring community spread. It appears this guidance is set forth herein: <https://www.cdc.gov/coronavirus/2019-ncov/science/community-levels.html>.

The Cost-Benefit Analysis includes statements concerning unvaccinated healthcare workers performing in-person medical care provided they wear an N95 mask when the transmission level is “substantial,” which is entirely consistent with DOH’s planning to loosen restrictions as the transmission level decreases and Rhode Island shifts from a pandemic to an endemic stage. *See* ECF 18-1, at 21 (“As the State prepares to move into the endemic phase, the Department must shift policies to match the new stage.”). At the time this second motion for a temporary restraining was filed by Dr. Skoly seeking an immediate return to practice dentistry under the conditions set forth in the proposed permanent regulations, however, Rhode Island has not adopted the proposed regulation and the transmission level remains “high.”

Dr. Skoly also claims that DOH has admitted that it is “permitting over 1,100 unvaccinated health care workers to keep their jobs so long as they are N95 masked.” ECF 18, at 3. Dr. Skoly arrives at this number based on “299 workers with medical exemptions and 854 workers who refuse to be vaccinated....” ECF 18, at 3. Dr. Skoly draws the wrong conclusion from these numbers. First, as to the 299 workers with medical exemptions, that number proves that DOH is complying with its regulation by exempting healthcare workers who have a specified medical condition warranting an exemption.² Second, as to the 854 unvaccinated, non-medically exempt workers, Dr. Skoly fails to demonstrate that they have all been permitted to provide in-patient care in violation of the emergency regulation. The emergency regulation does not

² At the time of the *Dr. T.* hearing, there were 365 medical exemptions. *Dr. T. v. Alexander-Scott*, 2022 WL 79819 * 4 (D.R.I. 2022)

speak to whether healthcare workers “are allowed to keep their jobs,” as Dr. Skoly puts it. Rather, it regulates who may provide in-person patient care and/or enter health care facilities. Whether these 854 persons retain their jobs by being placed on unpaid leave, continue to provide non-in-person care (such as telemedicine), or otherwise continue to be employed in a manner that comports with the emergency regulation is of no moment to the DOH, provided that these 854 persons do not provide in-person care and/or enter a health care facility. *See e.g., Dr. T. et. al v. Alexander Scott*, 2022 WL 79819 * 5 (D.R.I. 2022) (“DOH would expect the employer to ... consider alternative work-conditions, such as telemedicine....”) (quoting Dr. Alexander-Scott affidavit). That DOH noted in a Cost-Benefit Analysis report the expected cost of these 854 persons returning to in-person care if the proposed permanent regulation is adopted is hardly remarkable and does not establish that these persons are currently providing in-person care in violation of the emergency regulation. *See* ECF 18-1, at 10.

Any remaining arguments or assertions are simply unsupported. Dr. Skoly claims that other than himself, “the Defendants have accepted ‘vaccination **or** N95 masking” for months. ECF 18, at 2. Except for persons who are medically exempt, Dr. Skoly presents no evidence or argument that other unvaccinated persons are permitted the opportunity to vaccinate or use a N95 mask and enter health care facilities under the emergency regulation. The insinuation that Dr. Skoly is being treated differently from all other health care workers and health care providers is simply belied by this Court’s precedent. *See Dr. T. et. al v. Alexander Scott*, 2022 WL

79819 * 5 (D.R.I. 2022). *See also id.* at * 10 (“The plaintiffs have presented an RIDOH Notice of Violation and Compliance Order to a hospital in support of their argument that accommodations are impossible for those declining the vaccine due to purported religious beliefs.”).

Dr. Skoly bases this motion on information that is either incorrect (854 non-medically exempt health care workers are practicing in-person medicine) or that was deliberately omitted (a reasonable alternative to vaccination might be N95 masking when the transmission levels drop to “substantial”). The Court should decline Dr. Skoly’s invitation that this Court exercise its equitable powers to craft a singular exemption for him and allow him to practice immediately pursuant to the conditions set forth in the proposed regulation – a regulation that is currently subject to public comment and that may or may not be adopted in the proposed form at some future date. If that logic were to be applied, then any time a law or a regulation may be changed with some future effective date – a process which also takes time – a person could ask that the future law or regulation apply to him immediately. That’s not how laws or regulations work. Departments must be able to modify regulations without upsetting the existing regulatory landscape, undermining their enforcement powers, or circumventing public comment.

Plaintiff fails to establish a likelihood of success on the merits and this Court should abstain, the potential for irreparable harm beyond that incurred since October

1, 2021, or that the balancing of equities favors the Plaintiff. Dr. Skoly also seeks to change, rather than preserve, the status quo. The motion should soundly be denied.

Respectfully submitted,

Daniel J. McKee, in his official capacity as
the Governor of the State of Rhode Island,
and James McDonald, MD, MPH, in his
official capacity as the Interim Director of
the Rhode Island Department of Health

Defendants,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I filed the within via the ECF filing system and that a copy is available for viewing and downloading. I have also caused a copy to be sent via the ECF System to counsel of record on this 7th day of March, 2022.

/s/ Chrisanne Wyrzykowski