DOCKET NO.: HHD-CV-20-6131803-S	:	SUPERIOR COURT
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CT FREEDOM ALLIANCE, LLC, ET AL.	:	JUDICIAL DISTRICT OF
	:	HARTFORD AT HARTFORD
v.	:	
STATE OF CONNECTICUT	:	
DEPARTMENT OF EDUCATION, ET AL.	:	MARCH 8, 2021

Memorandum of Decision on Summary Judgment

1. The law limits the power of the good lest the wicked inherit it.

Until recently, most of us have believed that the checks and balances within our legal system require no attention to keep them running smoothly. But recent events have undermined that confidence. Faith that government's three great gears—the executive, the legislative, and the judicial— are self-calibrating has been seriously undercut by a pandemic and by violence from the right and the left.

In this case, the CT Freedom Alliance claims that the pandemic has left power in this state dangerously imbalanced in favor of the executive branch. The Freedom Alliance is an organization that includes parents with children in the public schools. It has joined with individual parents to sue the Governor along with the Department of Education and its commissioner over these concerns.

The Alliance alleges that, with the state in the throes of the COVID-19 pandemic, Governor Lamont and those under him have assumed powers exclusively delegated by our state Constitution to the General Assembly. Specifically, they say the executive branch has no power to order children to wear masks in schools.

The court may take notice that Governor Lamont has exercised broad power over this state for nearly a year, single handedly modifying and suspending dozens of laws and effectively ruling this state by decree. He has done so in the name of laws the General Assembly itself passed, permitting him extraordinary powers in an emergency. The General Assembly for the most part has acquiesced. It has taken no action to approve or disapprove the bulk of the orders the Governor has issued.[1]

The court has reviewed the record before it showing what the Governor has done with particular emphasis on the authority he granted the Department of Education to require masks to be worn in schools. Based on this record, a reasonable fact finder would not call any of these things acts of wickedness or attempts at tyranny. Indeed, the record on summary judgment shows beyond rational debate that this state for the last year has faced a genuine crisis to the lives of its citizens. The Governor has taken measures being taken all over the world by honest, competent governments. The General Assembly's silence may have only meant that the majority of its members rationally approve of what he is trying to achieve.

But in our system of government, rational ends may not be achieved by legally impermissible means. Silence from the General Assembly is not enough. Our State Constitution is not merely a list of limitations. It is a call to action. Under it, each branch of government must do its job—uncomfortably sometimes— even the Judiciary.[2]

[1] Significantly, the only thing the General Assembly as a whole has validated is the entirety of Executive Order 7QQ, *except* the provision that may have a bearing on the need for a mask mandate regulation. Spec. Sess. P.A. 20-3 §16. The Governor's order authorizing a mask mandate is Executive Order No. 9.
[2] See Robert J. Pushaw, Jr., *Justiciability and the Separation of Powers*, 81 Cornell L.Rev. 393, 398 (1996) (It was a founding assumption that separation of powers is violated whenever any branch of government—including the courts—refuses to exercise the authority constitutionally conferred on them.).

Under our Constitution, the General Assembly may not allow itself—even contentedly— to sink into indefinite desuetude. If it could sit by satisfied with less important activities while another branch assumed without restraint the heart and soul of its powers, it would upend the checks and balances built into our Constitution. It would silence too the elected voices in state government who might object to the legislative majority and who are themselves a check against the consolidation of power in the hands of a single branch or political party.

To understand why a court might disapprove of the rationally right thing done in the legally wrong way, we would do well to understand why we enshrined the separation of powers in our highest law in the first place and what is at risk if we neglect it.

Some might well wonder whether any review of the relevant history is really necessary. After all, aren't the origins and implications of the three branches well enough known? Don't children—masked or unmasked—learn basic things about our Constitution in school?

It appears not. A survey by the Annenberg Public Policy Center revealed that only 26 percent of Americans can even name the three branches of government, not to mention understand them.[3]

In the light of this truth—and with soldiers so lately guarding the courthouse door—we would do well to focus with a clear eye on anything that might be suitable in a short-run crisis but legally abominable for the long run of democracy. So it is right to remember the historical background of the separate branches of our government in this case and what happens when they haven't been observed in even the richest, in even the

[3] https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions/.

most civilized, of nations. As Justice Oliver Wendell Holmes put it, sometimes a "page of history is worth a volume of logic."[4]

Extolled for our Federal Constitution by James Madison in *The Federalist Papers*, the checks and balances that keep the executive, legislative, and judicial branches in creative tension became the legal and philosophical underpinnings of American democracy and have been written into Connecticut's highest law since shortly after the nation's founding.[5]

Our founders' vision was that for each branch's power another branch might check that power with power of its own. Our nation's founders weren't the first to think of this. Its roots reach back to Aristotle, but most important to us they took a firm hold on the men our founders revered most—the great minds of the Age of Reason.[6]

In 1689 in section 141 of his *Second Treatise on Government*, the English philosopher John Locke saw as particularly harmful the willing transfer of legislative power between branches: "The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others." [7]

The French jurist the Baron de Montesquieu also saw a danger in the merger of the executive and legislative powers in 1748 in Book XI, Chapter VI of his *The Spirit of the Laws*: "When the legislative and executive powers are united in the same

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[4] *New York Trust Co. v. Eisner,* 256 U.S. 345, 349 (1921).
[5] https://guides.loc.gov/federalist-papers/text-41-50.
[6] Aristotle, *Politics* 1279-89 (H Rackham trans, 1932); https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwi99u7Uv4jvAhWHiOAKHRhLC30QFjACegQIFhAD&url=http%3A%2F%2Fscholarship.law.duke.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D3279%26context%3Dlcp&usg=AOvVaw22eZaGP607IHxvYLilJr5i&httpsredir=1&article=3279&context=lcp. (Article in *Law and Contemporary Problems* by Senator Sam Ervin, Jr.).
[7] https://www.gutenberg.org/files/7370/7370-h/7370-h.htm.

person…there can be no liberty", and further that, "[t]here would be an end of everything, were the same man, or the same body…to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals." [8]

These worries were by no means mere talk. Their thinking arose in the wake of an unchecked executive authority in both England and France. When Locke wrote his essays, the English still bore the scars from the turbulent reigns of Charles I, Oliver Cromwell, and James II and, when de Montesquieu wrote, France was still grappling with the absolutist legacy of Louis XIV.[9]

Connecticut formed its first government long before our nation existed. It was partly a reaction to the tyranny of Charles I. His claim in opposition to the English Parliament that power rested chiefly in his own hands set our founders firmly against being ruled by Charles or any strong executive.[10] For this reason in 1639—led by Thomas Hooker and Roger Ludlow—our founders adopted as "Fundamental Orders" a document declaring the mechanisms of government as Connecticut's highest law. It was the first legal document to do this. It was the world's first written constitution.[11]

The Fundamental Orders reveal at our roots a distaste for executive power. The Fundamental Orders installed firmly in the seat of power, the legislature. A governor was nominated by legislators and chosen by qualified voters at a legislative session for a

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[8] https://oll.libertyfund.org/title/montesquieu-complete-works-vol-1-the-spirit-of-laws#lf0171-01_label_797.
[9]https://www.google.com/books/edition/Absolutism_in_Seventeenth_Century_Europe/TEddDwAAQBAJ?hl=en&gbpv=1&dq=absolute+monarchy+in+the+17th+century&printsec=frontcover#spf=1614283983613 (particularly chapters 2 and 8).
[10] https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/civilwar/overview/petition-of-right/.
[11] https://portal.ct.gov/About/Early-History; https://www.newenglandhistoricalsociety.com/fundamental-orders-connecticut-constitution-declaration-independence/.

term of a single year with a two-year term limit. It allowed no separate judiciary. The governor sat in the General Assembly or "Court" as it was also known. Most important, the laws were made, executed, and violations punished by one branch supreme—the General Assembly.[12]

In 1662, during more pacific years in England, this overriding fear of executive power was preserved in the Charter granted Connecticut by the State's nominal overlord, Charles II.[13] Only in 1818 did the State yield to the prevailing national trend giving separate and thus equal power to executive and legislative branches—to allowing each branch to be a check on the other.[14] This balance remains in the constitution we adopted in 1965 under which we live today. It supplanted in law but did not erase in memory a system that particularly feared executive power.

The present language in Article Second of the Connecticut Constitution makes explicit that the powers of government will be spread over three "distinct" departments: the General Assembly, the Governor, and the Judiciary.[15] The framers of our current constitution recognized that if we are to preserve ourselves, we must preserve this balance. Since we adopted them, these checks and balances have been the foundation of all law, order, and prosperity in this state.

2. Those who submit to an imbalance of power in haste repent at leisure.

Those who in their lust for power feed on fear don't care if they undermine the rule of law and democracy itself. But trouble can come too from presumably well-

[12] www.cga.ct.gov/asp/Content/constitutions/DocsOfCTGov.pdf (Beginning at page 47; paragraph 10 is particularly important).
[13] https://jud.ct.gov/lawlib/history/charteroak.htm.
[14] https://portal.ct.gov/SOTS/Register-Manual/Section-I/1818-Constitution-of-the-State-of-Connecticut.
[15] Our current Constitution and all of its predecessors may be found at: https://www.cga.ct.gov/asp/Content/constitutions/DocsOfCTGov.pdf.

meaning leaders. When in emergencies they deviate from the rule of law they can also, even if unintentionally, weaken the foundations of our legal system. They weaken it by creating precedents to be exploited by those who are restrained, not by the public good, but only by their own appetites.

The elimination of checks on executive authority in particular can have fatal consequences for a country. It has happened regularly. It has happened frequently in other rich, hitherto stable Western countries when subdued or satisfied legislatures have tilted governments toward imbalance in favor of the executive. The imbalance has often turned to habit and the habit to tyranny. It usually begins with some emergency.

Rome wasn't built in a day but its descent into tyranny was almost that quick. Julius Caesar—conqueror of Gaul and the ardent suitor of the common Roman— was the immediate herald of the extinction of the long-tottering Roman Republic.[16] The end itself was accomplished by Caesar's nephew Octavian who ruled as Augustus, regarded as the first emperor of Rome. His reign rose from the emergency of a civil war. He won his power on the battlefield. He brought peace, and the Romans thanked him for it. But he kept power, and the Romans suffered for it. Not while Augustus lived. Augustus was comparatively modest and usually exercised his powers with restraint and in favor of the public good.[17]

[16] Begin at section 76:
https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Suetonius/12Caesars/Julius*.html.
[17] Begin at section 17:
https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Suetonius/12Caesars/Augustus*.html.

But within a single lifetime, Romans bade farewell to their Republic, embraced an enlightened despot, and when he died, unguarded by law, the Romans faced two tyrants under whom freedom and the public weal waxed or waned at whim or will.

Augustus was succeeded by his stepson, Tiberius. Tiberius was no threat in his earlier years. But things changed in his later years. In those years, Tiberius stayed in Capri where he could enjoy watching his visitors hurled from the cliffs and engage in his other demented entertainments. In Rome his agents purged the noble families of the city and confiscated their wealth.[18] His only saving grace was that he could not have been worse than his successor, Caligula. Among his lesser cruelties, Caligula executed disfavored Roman senators, made others of them into domestic servants, and had himself declared a god. His only saving grace was that he got himself murdered in the year 41 A.D.[19]

All of that seems far away. But it happened in England too, and not so long ago. Having chopped off the head of King Charles I, whom he had condemned as a tyrant, Oliver Cromwell became accepted by the war-weary English as ruler in 1653. The people were safe and allowed Cromwell power in exchange for that safety.

But the English soon found they had paid too dearly for order. Cromwell, the leader of the Parliamentary forces, had become a tyrant himself, dismissing Parliament and assuming the supreme title of the state— Lord Protector of England, Scotland, and Ireland. A shrunken and obsequious parliament was ultimately returned, but the

[18] Begin at section 24 and see section 62 et seq. in particular: https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Suetonius/12Caesars/Tiberius*.html.
[19] Begin at 22: https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Suetonius/12Caesars/Caligula*.html.

emergency never left. Despite bringing order—or at least submission— back to the country, Cromwell remained Lord Protector until the day he died. With the monarchy restored and apparently believing things are better done late than never, Charles II had Cromwell disinterred, hanged, and decapitated.[20]

It was in this atmosphere that Connecticut was born. Our founders were at the time English subjects. They were perhaps grateful to Cromwell for his role in removing the king who oppressed them. Some of them may have even enjoyed his infamous persecution of Catholics. Still, they appointed no lord protector here. They created no tyrant of their own to overthrow. They stuck instead to their legislature, and it continued to hold power firmly in its own hands.

There have been many tyrannies that have sprung from emergency powers and grafted themselves over the other branches of a functioning representative government. Some of the best examples have come during the Twentieth Century in Europe. These tyrants ultimately brought with them nothing but suffering for their peoples, for themselves, and for the world. But their examples have been badly overused—so much so as to have lost their power as a tool of reason useful here.

Indeed, no party here claims that Governor Lamont is a Hitler or a Mussolini. Nothing in the record suggests he is Augustus, Tiberius, Caligula, Charles I or Cromwell either. Nor is he likely to pave the way for an immediate successor who might fit that description. But the lesson of history is that democracies don't suddenly explode, they erode—sometimes fast sometimes slow—under the grinding weight of emergencies. It is,

[20]https://www.google.com/books/edition/Oliver_Cromwell_a_History/QgsyAQAAIAAJ?hl=en&gbpv=1&dq=Oliver+cromwell+tyrant&pg=PA426&printsec=frontcover#spf=1614287473011 (disinterment is described at page 490).

after all, almost never the first assault on the citadel of liberty that succeeds, but, without care, it is the first one that makes the next and the next more plausible, more expected, more irresistible. Emergencies are why we have a government of laws, not men.

If we pay no attention to what has happened now, a day may come when, in reliance on this Governor's decrees, a future governor may herald our end by declaring a limited emergency on one topic and then tackling it by executive order. Perhaps it will be global warming. Perhaps discriminatory zoning. Or perhaps another governor might say that a serious financial disaster justifies the suspension of the minimum wage, collective bargaining, prevailing wages, and competitive bidding for public contracts. The possibilities are endless.

It is perhaps better to take the drug away now—before the patient gets too used to it.

The patient got very used to it over the last decade or so in contemporary Russia, and it has made that care-worn country very sick indeed. After the fall of the Soviet Union, the Russian Federation adopted an admirable constitution that is nominally in force today. It promises equality before the law, freedom of speech, freedom of religion, freedom of movement, freedom from illegal search and seizure, economic freedom, and a host of things not guaranteed to us in our constitutions.[21] It seemed quite promising.

But gentle words don't always betoken gentle deeds. Today's Russia—at least when it counts—is a stranger to the rule of law. It still has its legislative body, the Duma.

[21] http://www.constitution.ru/en/10003000-03.htm.

But most observers have no illusions: they believe Vladimir Putin, rules Russia. Putin has used a series of economic and military emergencies—some of them of his own making—to steadily absorb more power.[22] Indeed, a recent article in the respected journal *Foreign Policy* claims Putin is exploiting the COVID-19 emergency for this precise purpose.[23]

Will the lesser protections guaranteed us in our constitution have any meaning if we don't enforce them in emergencies and the emergencies keep coming?

3. Our own past should worry us.

Can we still reassure ourselves with the long-held belief that America is the exception—that we are safe from abuses of our liberties and the concentration of power? Now, we likely cannot.

Our democracy has just survived its latest unhappy interlude—this time a physical assault in the name of one branch of government against another. To understand the present need for review and scrupulous adherence to constitutional practices at every level of government, we need only remember that this latest national assault on our basic constitutional principles was by no means the first. Worse yet, many of the others have succeeded.

The Civil War was a real emergency. The rule of law swayed in those deeply-troubled times and bent pretty low, but it didn't break. Congress still met and passed the laws. A presidential election was held and certified. The Republic survived.[24]

[22] https://www.wilsoncenter.org/publication/vladimir-putin-and-the-rule-law-russia.
[23] https://foreignpolicy.com/2020/05/18/putin-is-using-the-pandemic-to-consolidate-power/.
[24] https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1252&context=faculty_scholarship.

But American law has bent far too low in lesser winds. Far lesser crises have seen us toss aside until better times the legal values we claim to hold most dear. And if we enjoy our rights only in better times, they aren't doing us much good.

Partisan and exaggerated fear of the French brought us the Federal Alien and Sedition Acts of 1798. Irrational fear of Germans and ultimately Communists brought us the Sedition Act of 1918. Both sets of laws were justified by emergencies of a kind and flew directly in the face of First Amendment guarantees of freedom of speech by allowing the government to imprison people—not for just for inciting insurrection—but for merely criticizing the government.[25] This was only yesterday. There are people alive now who were born when it was illegal to criticize the government.

Worse yet, in 1942, during the emergency of World War II, race-based paranoia led President Franklin Roosevelt by executive order to send some 70,000 Japanese-Americans—*citizens* of this country—persons with rights under the law—to internment camps without charge or trial.[26] Many victims are still alive.

Fears of dangers to the country emanating from the Soviet Union led to witch hunts in the 1950s and the McCarran Internal Security Act. It prohibited federal employment based on political beliefs and required groups labelled communist by the powers of that day to register and be monitored.[27] Many of us were born during that era.

[25] https://www.freedomforuminstitute.org/2002/02/15/the-first-amendment-a-wartime-casualty/.
[26] https://www.freedomforuminstitute.org/2002/02/15/the-first-amendment-a-wartime-casualty/.
[27] https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=1425&context=gradschool_theses.

Sad to say, the courts have been consistently caught up in the mood of these moments. None of these laws were struck down by the judiciary.[28]

Things haven't changed. These "emergency" actions weren't all in the distant past. For nearly twenty years, since the attacks of September 11, 2001, the federal executive branch has become accustomed to committing acts of war, detaining persons without charge, and searching without warrants —all without caution or cavil from the courts.[29] But why should anybody care? There doubtless isn't anybody involved there that most of us know. Not yet, anyway.

Perceived dangers from African-Americans in the South have led governments and the police in those states—for years with the support of federal authorities—to deprive African-Americans of their civil rights and in some cases, their lives.[30] Forms of this have continued and are widely perceived to have continued up to the present day. Those in the group that is today called the LGBTQ+ community were until very recently feared to be serious threats to national security. They were banned from federal employment until the 1970s.[31] Indeed, homosexuals were banned from openly serving in the military until 2011. [32]

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[28] *Abrams v. United States*, 250 U.S. 616, 623-24 (1919)(Sedition Act of 1918); *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944)(Japanese internment); *Carlson v. Landon*, 342 U.S. 524, 544-45 (1952)(McCarren Ferguson Act).

[29] https://www.cato.org/commentary/usa-patriot-act-we-deserve-better. *See*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-40 (2010)(rejecting a constitutional challenge). Chris Edelson, *Power Without Constraint, The Post-911 Presidency and National Security* (2016)(particularly, chapter 4 on military force).

[30] See, e.g. https://harvardcrcl.org/wp-content/uploads/sites/10/2009/06/HLC104_crop.pdf.

[31] https://www.archives.gov/federal-register/codification/executive-order/10450.html (order banning federal employment). See also: https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1026379&version=1030388&application=ACROBAT.

[32] H.R. 2965: https://www.congress.gov/bill/111th-congress/house-bill/2965; S. 4023: https://www.congress.gov/bill/111th-congress/senate-bill/4023.

4. Slipping comfortably into oblivion.

The habit of expansive executive power can be made easier when it suits the ruling party. Indeed, as long as we have common aims with our leaders, it's easy to see nothing wrong with them accumulating power. After all, it saves time and trouble, and we are generally satisfied with the outcome.

It's only when leaders evolve into masters and masters transform into tyrants that we regret losing the means to keep them in check in the ways enshrined in our founding legal documents. And by then it is too late.

So, especially in difficult times, we must remember that the American system prevailing in this state is premised on keeping the various parts of government in check and operating within their spheres— in check even when we like them—in check even when we approve of what they are doing—in check even when we are afraid and they take on their shoulders burdens we would just as soon not bear ourselves.

5. Without legislative sanction, the Governor will likely exceed his powers under the Connecticut Constitution.

a. The executive does some legislating but only under strict limits.

The gravity of the matter should now be clear. Let us turn to the more conventional aspects of deciding the motions for summary judgment on the Governor's powers as filed by all parties in this case.

By creating three *distinct* branches of government in Article Second, our Constitution enshrines these distinctions as mandatory in form as well as function. Our Supreme Court in its 1940 decision in *State v. Stoddard* sternly reaffirmed that this is so. Indeed in that case the Court was unequivocal:

> The Constitution of this state provides for the separation of the governmental functions into three basic departments, legislative, executive and judicial, and it is inherent in this separation, since the lawmaking function is vested exclusively in the legislative department, that the Legislature cannot delegate the lawmaking power to any other department or agency.[33]

And *Stoddard* was only about regulating milk.

We have, of course, come a considerable distance from *Stoddard*. In 1982, Article XVIII was added to our Constitution to allow the executive branch to create regulations—*provided* they are not disapproved by the legislature after being formally submitted to it for action under statutory rules. As our Supreme Court reflected in 1991 in *Bartholomew v. Schweizer*, our courts have long understood that there is some overlap in the powers of the branches.[34] That though is no basis to say that one branch may graft itself over the roots of another.

So, what about our current circumstances? Do the powers assumed by the Governor during the Covid Crisis exceed his constitutional grasp?

The Governor has been acting under two statutes governing emergencies. General Statutes §28-9 relates to civil preparedness emergencies. It lists examples of such emergencies including "attack", "sabotage" and other "hostile" action, but it begins by broadly saying that the law applies to any "serious disaster". It permits in those instances a governor to declare a civil preparedness emergency and, during it, to modify or suspend any state law for six months and take other steps that are "reasonably necessary".

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[33] 126 Conn. 623, 627.
[34] 217 Conn. 671, 676.

The second statute is General Statutes §19a-131a. It allows a governor to proclaim a public health emergency and bestows certain powers to deal with it. General Statutes §28-9 says the governor may use his power to issue orders under that section for public health emergencies declared under General Statutes §19a-131a.

In any case, the defendant Governor Lamont has invoked them both. He has used them to issue sweeping orders to prevent the spread of COVID-19, and the Freedom Alliance claims that in doing so he violated the separation of powers. It also claims—and we will consider separately—that he has been negligent and deprived its members' children of their constitutional right to a free public education, along with their right to due process. At the heart of the Alliance's case is that they wish school children to be free of a requirement that they should wear masks in public schools.

b. COVID-19 is a Serious Disaster.

We can dispose first of The Freedom Alliance's weaker argument that a global pandemic isn't a "serious disaster". To support it the Alliance essentially reads the broad words "serious disaster" out of the statute and tries to confine the law to the enumerated but not exclusive list of "attack, sabotage or other hostile action". Why the court should read the words "serious disaster" out of the statute, the Alliance doesn't really say.

Instead of reading the words out of the statute, the court will give them their plain meaning. According to the Connecticut Supreme Court in 2007 in *Hummel v. Martin Transport*, that's what courts are supposed to do whenever possible and in

preference to substituting our subjective notions of the statute's purpose or its drafter's state of mind.[35]

According to Merriam Webster, a "disaster" is "a sudden calamitous event bringing great damage, loss, or destruction."[36]

Is the COVID-19 pandemic a "calamitous event"? Has it brought great loss? Is it a "*serious*" disaster?

For those inclined toward humanity, this pandemic is irrefutably a serious disaster. After all, when gauging disasters, humanists and humanitarians usually begin to measure their severity in terms of the number of dead. The founders of this state and this country— favoring as they did the value of the individual over the collective wisdom, over the interests of the state, over the commandments of the church, and even over the insatiable appetites of the economy—were humanists for certain and in some cases humanitarians.

So we must put COVID-19 in that perspective. COVID-19 has now killed over 7,000 individuals in this state—approaching double the number of Connecticut citizens killed in World War II, and the wars in Korea and Vietnam combined.[37] Yes, in this light, COVID-19 fits any rational definition of a serious disaster. This means the state is due a summary judgment on this question. As our Supreme Court held in 2007 in

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[35] 282 Conn. 477, 501. That Court's view was changed in response to General Statutes § 1–2z in which the legislature records that it wants courts to give words in statutes their plain meaning.
[36] https://www.merriam-webster.com/dictionary/disaster.
[37] World War II: (3,558), https://www.archives.gov/research/military/ww2/navy-casualties/connecticut; https://www.archives.gov/research/military/ww2/army-casualties/connecticut.
Korea (326), https://www.archives.gov/files/research/military/korean-war/casualty-lists/ct-alpha.pdf.
Vietnam (612), https://www.archives.gov/files/research/military/vietnam-war/casualty-lists/ct-alpha.pdf.

Weber v. U.S. Sterling Securities, whenever no reasonable fact finder could reach a different result, summary judgment is appropriate.[38]

c. The stakes for the future are high.

The Alliance makes a far better argument when it claims that either on its face or as practiced by the Governor, the powers he has exercised exceed his authority under the Connecticut Constitution.

Bear in mind that the law allows the Governor to modify or suspend *any* state law. Whatever easing may be in the offing, over the past year he has taken truly extraordinary steps. He has closed many businesses in this state. He has restricted political assembly. He has restricted religious assembly. He has restricted the free movement of citizens. He has constrained the rights of property ownership. He has changed the rules that apply to the courts. And yes, he has also ordered the wearing of masks. He has done so for just about a year. Indeed, he has issued nearly 100 orders with many subparts making sweeping changes in Connecticut life.[39]

The breathtaking scope of these orders and what future orders they might breed, in some other emergency, by some other governor, should mean that the Governor's current exercise of emergency power deserves more than mere acceptance from the legislature and more than a routine analysis by the courts. It must be examined with the future of the Republic in view.

d. The act does not and may not permit indefinite legislative inactivity.

[38] 282 Conn. 722, 728.
[39] https://portal.ct.gov/Office-of-the-Governor/Governors-Actions/Executive-Orders/Governor-Lamonts-Executive-Orders.

On its face General Statutes §28-9 says that the Governor must specify the period "during which such order shall be enforced" preceded immediately by the words for "the period not exceeding six months unless sooner revoked."

That statute grants no authority for the Governor's orders to exceed six months in force. It contains no provision for a renewed declaration or renewal of the orders for another six months and then another… and then perhaps another. To interpret the statute this way makes the six month limitation–sitting as it does alone and without even the suggestion of renewal—ineffective. Indeed, the legislature saw fit to include the words "unless sooner" revoked but not the words "unless later extended." We cannot assume this to be a mistake. On the contrary as our Appellate Court held in 1996 in *Keeney v. Fairfield Resources, Inc.* we must indeed assume the legislature made intentional choices and meant what it said, not what it did not say.[40]

Governor Lamont first declared a state of emergency on March 10, 2020. The six month limit on the orders he first adopted ended on September 6, 2020. The Governor extended the duration of his orders on September 1, 2020 and again since then.

The statute goes further. It requires the Governor to inform the legislature and to discuss with it the possible need for an emergency session. Presumably this was done here, and the legislature decided not to call itself into emergency session to review his orders.

But the legislature is now in its regular session. It convened in January. Yet it has done nothing to validate, invalidate, or shape the bulk of the Governor's actions even

[40] 41 Conn. App. 120, 131-32.

though his actions have been over the last year the most potent legal force in government and private life.

And there is more trouble. Both sides agree that General Statutes §28-9 provides no legislative check on the Governor's orders in this instance. The statute does provide in cases of disasters "resulting from man-made cause" that an order may be "disapproved by majority vote" of both parties' leadership in the House and Senate. But no such check applies here. The Governor is not obliged by that statute to consider any position taken collectively by legislative leaders.

Is there any place else that the Governor might look for guidance? General Statutes §19a-131a does allow legislative leaders to nullify the Governor's *declaration* of a public health emergency, but the statute says nothing about nullifying powers a governor gains under some other statute—specifically the orders a governor may issue under General Statutes §28-9.

Section 19a-131a also says a governor may renew the declaration of a public health emergency, but does not say a governor may renew orders issued under General Statutes §28-9. In fact, §19a-131a doesn't say anything at all about §28-9.

So while §28-9 does say a governor may apply its provisions about orders to a public health emergency under §19a-131a, §19a-131a doesn't say anything about applying its provisions about extensions and disapprovals to a civil preparedness emergency under §28-9.

There are even contradictory indications about whether §28-9 orders may apply to public health emergencies at all. General Statutes §28-9 does say that a governor may use that section's very broad powers during a public health emergency declared under

General Statutes §19a-131a. Yet this seems to contradict the list of specifically enumerated powers granted a governor in General Statutes §19a-131a:

> the Governor…may do any of the following: (1) Order the commissioner to implement all or a portion of the public health emergency response plan developed pursuant to section 19a-131g; (2) authorize the commissioner to isolate or quarantine persons in accordance with section 19a-131b; (3) order the commissioner to vaccinate persons in accordance with section 19a-131e; (4) apply for and receive federal assistance; or (5) order the commissioner to suspend certain license renewal and inspection functions during the period of the emergency and during the six-month period following the date the emergency is declared to be over.

If in a public health emergency a governor may borrow from the civil preparedness statute to "modify or suspend" any state law and take other steps that are reasonably necessary" than why does the statute that directly addresses public health emergencies contain a close-ended list of powers a governor has in a public health emergency?

There is plainly a contradiction here, and ignoring it would conflict with the basic rules about how courts read laws. In 2010 in *Wellswood Columbia, LLC v. Hebron* our Supreme Court told us to prefer specific lists over general ones.[41] In 1996 in *Keeney v. Fairfield Resources, Inc.* our Appellate Court told us that no words in a statute should be rendered meaningless by interpretation.[42] If the list in General Statutes §19a-131a isn't the limit of a governor's public health emergency powers, the list would be pointless, placing the whole emergency scheme and its checks on the Governor in

[41] 295 Conn. 802, 821.
[42] 41 Conn. App. 120, 131-32.

conflict with our basic rules about reading statutes. At best, the public health emergency statute's relationship to General Statutes §28-9 is intolerably vague. [43]

Affecting as it does constitutional bedrock, respect for the separation of powers requires unmistakable limits on what a governor may do in an emergency and for how long. There are no such limits here. Under the established case law, this means that with the General Statutes §28-9 six-month time period expired and the General Assembly in regular session, the breadth of power granted and exercised by the Governor likely violates the separation of powers in Article Second of the Connecticut Constitution.

As the Connecticut Supreme Court held in 1987 in *State v. White*, "[i]t is well established that although the power to make law is vested exclusively in the legislature, the legislature may create a law designed to accomplish a particular purpose and may expressly authorize the executive branch to "fill up the details" by prescribing rules and regulations for the operation and enforcement of that law." [44]

Yes, this means the executive branch can "fill up the details"—as opposed to enacting sweeping new laws—but even in filling in the details the *White* Court emphasized that there are limits:

> It is necessary, however, that the enabling statute declare legislative policy, establish primary standards or lay down an intelligible principle to which the administrative officer or body must conform.... If the legislature fails to prescribe the limits of the power delegated with reasonable clarity, or the power is too broad, its attempt to delegate is a nullity....While the modern trend of the legislature is liberal in approving delegation under broad regulatory standards so as to facilitate the operational functions of administrative agencies... agencies must, nonetheless, act according to the strict statutory authority.[45]

[43] If we strained to reconcile the two sets of language the best we might do is to see the powers in a public health emergency as capable of continuing beyond six months and the public health emergency orders issued under the civil preparedness statute as being strictly limited to six months.
[44] 204 Conn. 410, 418-19.
[45] Id.

This means that any form of executive lawmaking must be guided by the legislature, may not be broader than needed, and may not be indefinite. That is why Article XVIII of our Constitution only permits the executive branch to adopt even administrative regulations with the proviso that any one of them may "be disapproved by the general assembly or a committee thereof in such manner as shall by law be prescribed."

Lacking these basic protections, the emergency powers laws cannot withstand constitutional scrutiny. How can the separation of powers under our Constitution strictly limit the Governor's regulation of fish and game and strawberries but do nothing to constrain the awesome powers granted a governor in an emergency? It only makes the circumstances more serious when we remember that the Governor activated these powers himself by declaring a civil preparedness emergency and faces no active oversight from the legislature.

If our government is to remain a system of checks and balances, this may not be so—even if the legislature is satisfied with the arrangement. If it is not to be so, then the Governor may not continue governing by executive order without ratification of his prior acts, a time limit controlled by the General Assembly, and—as with man-made emergencies and ordinary regulations—a way for the legislature to disapprove his orders.

But if this court is convinced under the existing case law that the Governor's emergency orders will, without legislative authority, likely violate the constitutional separation of powers guarantee, may it act?

That remains to be seen because a "likely" excess isn't enough.

6. Our Supreme Court is expected to speak on matters at least as they stood in August 2020.

In *Casey v. Lamont* another judge of the Superior Court rejected a claim that the Governor had violated the separation of powers as of roughly August of 2020.[46] On December 31, 2020, our Supreme Court affirmed the lower court judgment, but it has yet to publish the opinion containing its reasons. Indeed, tellingly and with emphasis added, the Court in a concise initial order held only that "the governor's challenged actions ***to date*** have been constitutional." Both sides in this case agree that unless the Supreme Court adopts it, this court is not bound by the reasoning of the lower court in *Casey*.

They also agree that this court has to consider what has happened since *Casey*. This only becomes clearer given that the Supreme Court noted that it was only upholding the Governor's actions "to date".

Three things not considered in *Casey* are most important. First, the civil preparedness statute only allows the Governor to suspend or modify the laws for six months, and the public health emergency rules about disapproval and renewal don't apply to the emergency orders issued under the civil preparedness statute.

The six month period that applies to the Governor's statutory suspensions and modifications has expired, and the Governor has assumed he can extend his powers beyond that period without leave of the General Assembly.

Second, the General Assembly is now in its regular session and has not acted with respect to the powers at issue here.

Third, the key case relied on by the lower court in *Casey* has been overturned.

[46] 2020 WL 6121713 *4 (Superior Court, Judicial District of Waterbury, September 16, 2020).

Governor Lamont first declared a state of emergency on March 10, 2020. The six month limit on the orders he first adopted ended on September 6, 2020. The Governor extended the duration of his orders on September 1, 2020 and has extended them again since then.

The lower court in *Casey* had no occasion to consider the use of emergency orders beyond the six months allowed in the statute, and they haven't been ruled on by the Connecticut Supreme Court. The Supreme Court also hasn't considered the overbreadth of the open-ended and time unlimited "reasonably necessary" steps language. And yet these issues are enormously consequential. Will the Supreme Court's opinion address and decide these questions?

The General Assembly was not in regular session when *Casey* was argued and decided. The court that considered the challenge first and the Supreme Court may have reasonably assumed that once the General Assembly organized itself to function during the pandemic and convened in regular session that it would take up the task of approving or disapproving, guiding or limiting the Governor's orders in light of the facts of this particular emergency. Would it matter to the Supreme Court that this hasn't happened?

Finally, the lower court in *Casey* leaned heavily on the Michigan Court of Appeals decision in *House of Representatives & Senate v. Governor*. That court held that Michigan's emergency statute had adequate contours from the legislature to withstand a separation of powers challenge. [47]

[47] 2020 WL 4931701 (August 21, 2020).

But now that decision has been reversed by a 2020 ruling by the Michigan Supreme Court in *In re Certified Questions from United State District Court for the Western District of Michigan*.[48] That Court seized on a matter considered by this court but not ripe when *Casey* was argued in the lower court. It held that the time limit on a governor's emergency orders was unqualified by any right to renew them. It held that the powers granted and assumed in the act were too broad in scope, too lacking in standards and, as assumed, were being exercised with unlimited duration.[49] Will the Supreme Court consider this decision, particularly in light of the expiration of the six month period?

Even without the answer to these questions, the court remains convinced that, without legislative action, the Governor has likely exceeded his powers. But a "likely" violation isn't enough. In 1995, in *State v. Morrison*, our Appellate Court made it clear that the courts are to bend every effort to avoid finding a constitutional violation. Indeed, in that case it held that a constitutional violation must appear "beyond a reasonable doubt".[50] And at this stage, with possible guidance coming from the upper court, this court has reasonable doubts—not about the facts—but about the law.

It's possible the Supreme Court won't consider any of the new issues we have been discussing because it doesn't have to do so to uphold *Casey* which didn't have these issues in front of it. But this court cannot know what the High Court will do. It does know that the Court is going to do something, and do it soon. When it does, it is likely that it will at least provide guidelines useful to this decision if not decisive to it.

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[48] 2020 WL 5877599 (October 2, 2020).
[49] Id., *6-*18.
[50] 39 Conn. App. 632, 633-34.

If this court ignores the pending opinion and decides this part of the case now, it will most likely directly conflict with what our Supreme Court says.

Therefore, it is in the interest of justice and of all the parties to this case for the court to make its full ruling on separation of powers after the Supreme Court publishes its opinion. It may end the question or the court's legal doubts or it may mean that this court must apply a different standard but achieve the same result. In any case, the court will stay its decision on the separation of powers summary judgment motions pending the Supreme Court decision.

Once the opinion is published, the parties will file supplemental briefs on how that decision should affect this decision. The briefs must be simultaneously filed within 14 days of the Supreme Court's decision. They may not exceed twenty pages. The court will then schedule oral argument.

To recap, the court believes it likely that without legislative action the Governor will have exceeded his constitutional authority. There are likely defects in the text of the emergency statutes and in the Governor's use of them. The key points are:

- The Connecticut Constitution does not permit the General Assembly—no matter how willingly—to grant legislative power to the Governor without limits on what he can do, how he can do it, and how long he can do it.

- General Statutes §28-9 must include a way for the General Assembly to disapprove all orders the Governor issues under the statute.

- For his orders to date, the Governor must submit his orders to the General Assembly to be ratified or rejected.

- Orders issued under General Statutes §28-9 are only valid for six months. The statute does not say the Governor may renew them without legislative action. Therefore, the Governor must ask the General Assembly to renew his power to issue further orders. No powers granted under the act may be for unlimited duration.

There should be no mistake about what this opinion does *not* say. It does not suggest or decide that any of the Governor's actions to date should be invalidated by the courts, including the mask mandate in the schools. What happens next can hardly be decided with the basic legal ruling very much in doubt. This opinion casts no aspersions on any of the government officials who have struggled in good faith to save lives in this crisis. There is no basis on this record to do so. This opinion passes no judgment on the good faith of any branch of government. This opinion is less about the actions instituted by the government in this particular emergency and more about the institution of government.

What more the court writes on this subject will await the additional briefing following the Supreme Court decision**.** In the meantime, action on this aspect of the motion for summary judgment is stayed.

7. The mask order does not deprive children of their right to free public schools.

Article Eighth of the Connecticut Constitution guarantees children the right to free public primary and secondary schools. In 1977, in *Horton v. Meskill* our Supreme Court held that because it is specifically enumerated in the Constitution, "in Connecticut, elementary and secondary education is a fundamental right…." [51]

Declaring something a "fundamental right" usually means that infringements of that right are highly suspect. Indeed, in *Kerrigan v. Commissioner* in 2008 our

[51] 172 Conn. 615, 648.

Supreme Court held that infringement of a fundamental right must be strictly scrutinized.[52]

More recently, our Supreme Court's decision in 2018 in *CCJEF v. Rell* [53] spoke to some aspects of the scrutiny given to inadequate school policies under the education article in our Constitution. The 4-3 majority in that case focused on a test of educational adequacy used by the New York Court of Appeals in 1995 in *Campaign for Fiscal Equity, Inc. v. State*, a case that concentrated on buildings, pens, pencils, desks, books, curriculum and teachers.[54] The majority decision left some question about the constitutional scrutiny major educational policies would have to survive when they don't fit into one of those categories. The court rejected a standard that said major education policies should be rationally, substantially, and verifiably linked to teaching children.[55] But it did not expressly say whether under the *Campaign* test or outside of it how we might—or whether we might—judge major policies for adequacy.

Did the Court mean that policies like mask wearing in the public schools can be deeply personal and utterly irrational at the same time? Although it did not embrace the topic with enthusiasm, the State appeared to concede at oral argument that our education laws would at least have to be rational to be permissible. It's not much to ask. It is the lowest legal standard that can apply in this context.

Anyway, if a major educational policy can be irrational then—even in the Alliance's view—the mask wearing requirement would be constitutional under Article

[52] 289 Conn. 135, 159.
[53] 327 Conn. 650.
[54] 86 N.Y. 2d 307, 317.
[55] 327 Conn. at 699.

Eighth. But if it must be rational, no reasonable fact finder on this record could see the mask wearing mandate as irrational.

The Freedom Alliance attacks mask wearing chiefly by distorting the argument that supports it. It says that the government wrongly claims that masks prevent COVID-19. It offers articles and studies showing that masks don't always work, don't always help very much, that sometimes nobody gets infected even when they aren't worn, and that they can be inconvenient. It declares from this a false consensus that masks are useless against COVID-19 and actually spread the disease.

Even if these articles were considered evidence over the State's objections, these assertions don't matter because they are aimed at an argument the executive branch isn't making. What matters is whether the Governor could rationally believe that masks *contribute* to preventing the spread of disease, not whether they *alone* prevent it, not whether they always work, and not whether they are always needed. Given this standard, no reasonable fact finder could find that the Governor was irrational in believing that masks contribute to the prevention of the spread of disease, including COVID-19.

According to the Center for Disease Control, COVID-19 is mostly spread by respiratory droplets —the things we spray out of our mouths into the air when we breathe, sneeze, or cough.[56] These are the very droplets that we have been taught since childhood not to spray on other people. As the State points out, it doesn't take a PhD in infectious diseases for the court to take judicial notice that not spraying these infected droplets on others would be a helpful development in fighting the disease. The court can

[56] *See*, CDC Guidance, How COVID-19 Spreads (State's Exhibit A), p. 1.

take further notice that, under the laws of physics, respiratory droplets cannot land on us if they are stopped by a great distance, a wall, a bag over your head and, yes, by a mask over your nose and mouth.

Masks are not perfect. People may fiddle with them and touch the germs non-mask wearers have spewed on them. Yes, they slip down. Yes, they make some people drop their guard. No, they are not always needed. But lack of perfection doesn't matter. No instrument of science nor branch of government is likely to perform with perfection anytime soon—but neither is any other mortal institution. In the meantime, we will have to settle for reasoned behavior, and reasoned behavior plainly includes employing multiple tools to reduce risk—hand washing, social distancing, and mask wearing. On this record, no reasonable fact finder could conclude otherwise.

If the things any person knows as physical laws aren't enough to see that the mask mandate is rational while not being perfect, the experts and the science also say masks help. In addition to the Center for Disease Control and the National Institutes of Health, the 67,000 doctors of the American Academy of Pediatrics "strongly" recommend children wear masks in school.[57] The Infectious Diseases Society of America with 12,000 members recommends that masks be worn to reduce the spread of disease.[58] It not only recommends wearing masks, it supports its recommendation with key findings from the most recent scientific studies it says show that mask wearing is "an important mitigation factor" against COVID-19 [59] This same view, backed by the

[57] https://www.aappublications.org/news/2020/08/13/covid19facecoverings081320.
[58] https://www.idsociety.org/public-health/covid-19/masks/.
[59]https://www.idsociety.org/covid-19-real-time-learning-network/infection-prevention/masks-and-face-coverings-for-the-public/.

same science, has been adopted by the 163,000 member American College of Physicians. [60]

It is beyond reasonable debate that mask wearing is supported by common sense, scientists, and science. Children wearing them are going to school in this state. That isn't perfect, but our schools are mostly open, many schools have some in-person classes, and according to the State's survey in evidence in this case there have been few complaints about masks. No doubt COVID-19 is a disadvantage for school children. But the risk of sickness and death to them—slight though it may be—and the risk of sickness and death to those around them—significant as it may be—is also a disadvantage. It is not this branch's job to weigh these disadvantages against each other. Given that his decision in favor of masks was rational, there is no way for the court to conclude that the Governor or the Department of Education has deprived Connecticut children of the promise of free public schools by requiring them to wear masks.

Because the executive branch order requiring mask wearing in the schools is beyond a reasonable doubt the product of applying reason to fact, it easily withstands the Alliance's Article Eighth challenge and is suitable for a summary judgment in favor of the State.

8. The remaining claims are without merit.

The Alliance also claims the mask mandate violates the Connecticut Constitution Article First, § 1 promise that: "All men when they form a social compact, are equal in rights…."

[60] https://www.acponline.org/acp-newsroom/new-policy-supports-wearing-of-masks-to-reduce-transmission-of-covid-19.

While the court encourages innovation, the Alliance must admit that its claim depends upon an utter reinvention of this language. It claims this language guarantees individual liberty and supports the structure of our State Constitution. The theory seems to be that our government's structure is part of the social compact of the people and to interfere with it breaks the social compact.

The language doesn't give this much support. A court higher than this one would have to see this requirement as a kind of penumbra from the clause's mention of a social contract. After all, the main thing the language promises is equal rights. In 1988, in *Zapata v. Burns*, our Supreme Court held that this language means the same thing as the Equal Protection Clause of the United States Constitution—a clause that has nothing whatever to do with the separation of powers.[61] The Court has never deviated from this view and neither language nor precedent suggest that this court on its own should invent such a new and strained meaning for a matter—separation of powers—expressly dealt with in another part of the Constitution. The Article First, § 1 claim fails as a matter of law.

Next, the Alliance claims the children's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution have been violated because the statutory scheme for adopting regulations was not followed in developing the mask mandate. This claim must fail because the plaintiffs have no property interest in the hearings and notice they seek, and therefore under established case law no constitutional right to those procedures. This was made clear by our Supreme Court in 2001 in *Giaimo v. City of New Haven.*[62]

[61]207 Conn. 496, 504.
[62] 257 Conn. 481, 500-04.

The Alliance asks for procedural due process rights but seems also to be arguing for those rights using a substantive due process rationale. Suffice it to say that the idea of substantive due process—that a bad law is an unconstitutional law—is a recipe for the judiciary to swallow the power of both of the other branches. There is neither precedent nor reason to go down this path to destruction. The Alliance's due process claim fails on the undisputed facts for failing to show a protected property interest.

The Alliance also claims that the mask mandate violates the ordinary statutory procedures for adopting regulations. But if the Governor had the power to override the statute, this claim has no foundation. A decision on it will have to await a decision on the Governor's power. The court stays action on this claim until that time.

Finally, the Alliance claims negligence by the Department of Education and the State's highest executive officer. The Alliance doesn't pursue this claim in its brief and with good reason. If the standard that applies bans only irrational conduct, the Alliance can hardly claim relief for something like negligence that is far easier to prove. Besides, the Alliance has offered nothing to defeat the State's argument that it and its officials are immune from being sued for negligence unless specifically permitted. Because no such permission has been cited here the negligence claim fails under this rule as articulated by our Supreme Court in 1990 in *White v. Burns*.[63]

9. For democracy to survive it must get up and walk.

The protection of our system of government is no matter for slight regard. If a system is to be preserved it must be exercised as much as possible, particularly during

[63] 213 Conn. 307, 321.

emergencies. A system that does not function in an emergency safeguards us only when we *don't* need it the most.

For this reason this court believes the Governor likely cannot continue to carry out his emergency orders without some form of ratification and control from the General Assembly. But matters affecting this issue are currently before the Connecticut Supreme Court. Whether this court may act in any way on this question or what way it may act will doubtless be influenced by the pending decision. Therefore, this court will not act until its superior acts and will as indicated seek additional briefs once that has happened. The Second Count of the complaint remains before the court. As to it, along with regulations claim in Count One, the summary judgment motions remain undecided.

It's worth repeating what this decision does not say. It does not order anything to be done now. The Supreme Court will decide if such is to be the case. It does not suggest or decide that any of the Governor's actions to date are invalid in any way. Instead, it reflects the court's conclusion that without the Supreme Court's guidance in *Casey*, the law likely requires the following things:

- The Connecticut Constitution does not permit the General Assembly—no matter how willingly—to grant legislative power to the Governor without limits on what he can do, how he can do it, and how long he can do it.
- General Statutes §28-9 must include a way for the General Assembly to disapprove all orders the Governor issues under the statute.
- For what he has done to date, the Governor must submit his orders to the General Assembly to be ratified or rejected.
- Orders issued under General Statutes §28-9 are only valid for six months. The statute does not say the Governor may renew them without legislative action. Therefore, the Governor must ask the General Assembly to renew

> his power to issue further orders. No powers granted under the act may be for unlimited duration.

Nothing in this opinion suggests that the executive branch has done the wrong thing by requiring masks to be worn in school. It suggests only that the right thing must be done in the right way constitutionally. In fact, this opinion concludes from all the evidence that can reasonably be believed that the school mask mandate was a rational response to the COVID-19 crisis. In short, this opinion is less about the actions instituted by the government in this particular emergency and more about the institution of government.

This action remains pending as to counts one and two. A partial summary judgment will enter in favor of the State as to the remaining counts. No final judgment will be entered. No appeal period is running.

BY THE COURT

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Moukawsher, J.