



and all associated papers will be served on Defendant Desautels by sheriff or by an officer of the Newport Police Department today.

In support of this motion, the State submits the following Memorandum of Law and attached Affirmation of State Epidemiologist Patsy Kelso, Affidavit of Newport Police Officers Tanner Jacobs, and other supporting documents.

## **MEMORANDUM OF LAW**

### **Background**

As of February 19, 2021, 14,251 Vermonters had fallen ill from COVID-19, and 193 Vermonters had died of it. Kelso Aff. ¶ 40.

The virus that causes COVID-19 spreads quickly and easily. It also often spreads undetectably, as people with no symptoms may still transmit the virus. Kelso Aff. ¶ 10. “Community transmission” is when a communicable disease spreads within a community and some people are unsure about how or where they became infected. Vermont has been experiencing community transmission of COVID-19 at least since March 19, 2020. *Id.* ¶ 27.

COVID-19 can cause serious illness and death. Kelso Aff. ¶ 11. Older people and those with underlying medical problems are more likely to develop serious illness or to die, but anyone infected with COVID-19 is at some risk of developing serious illness and dying. *Id.* Patients who are seriously ill with COVID-19 may require hospitalization, including admission to an intensive care unit (ICU). *Id.* ¶ 12. It would pose a tremendous risk to public health if many people fell ill with COVID-19 at the same time and overwhelmed the capacity of the State’s health

care resources to care for them—for example, if the State experienced shortages in inpatient hospital beds, intensive care unit beds, ventilators, and personal protective equipment. *Id.* ¶ 15. If health care resources are overwhelmed, more people will die for lack of necessary care. *See id.* ¶ 30.

### Executive Order 01-20

To prevent these needless deaths, Vermont has attempted to slow the spread of COVID-19 throughout the State. The Governor has issued Executive Order 01-20,<sup>1</sup> declaring a state of emergency and implementing measures to slow the spread of COVID-19, and has amended that order several times with various addenda and directives. Among other requirements for the protection of public health, the Order and addenda generally require that all business, non-profit, and governmental entities protect their employees and the general public by ensuring that all employees wear masks or cloth facial coverings when in the presence of others.

### Mask Requirement for Employees

On April 17, 2020, Governor Scott issued Addendum 10 to his original Executive Order 01-20. Addendum 10 required that “[e]mployees must wear non-medical cloth face coverings (bandanna, scarf, or nonmedical mask, etc.) over their nose and mouth when in the presence of others. In the case of retail cashiers, a translucent shield or ‘sneeze guard’ is acceptable in lieu of a mask.”<sup>2</sup>

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<sup>1</sup> <https://governor.vermont.gov/sites/scott/files/documents/EO%2001-20%20Declaration%20of%20State%20of%20Emergency%20in%20Response%20to%20COVID-19%20and%20National%20Guard%20Call-Out.pdf>.

<sup>2</sup> [https://governor.vermont.gov/sites/scott/files/documents/ADDENDUM%2010%20TO%20EXECUTIVE%20ORDER%2001-20\\_0.pdf](https://governor.vermont.gov/sites/scott/files/documents/ADDENDUM%2010%20TO%20EXECUTIVE%20ORDER%2001-20_0.pdf).

On June 15, 2020, Governor Scott issued Amended and Restated Executive Order 01-20 (Restated EO 01-20), which superseded the original Executive Order 01-20.<sup>3</sup> Addendum 2 to Restated Order 01-20, which is currently effective, states that “[f]or the sake of clarity, the requirements for masks or facial coverings or permitted alternatives in specific circumstances shall continue to apply as set forth in the following guidance: Phased Restart Work Safe Guidance issued by the Secretary of the Agency of Commerce and Community Development (ACCD) permitting limited alternatives to face masks in limited workplace settings.”<sup>4</sup>

ACCD’s Phased Restart Work Safe Guidance requires: “Employees must wear face coverings over their nose and mouth when in the presence of others. In the case of retail cashiers, a translucent shield or ‘sneeze guard’ is acceptable in lieu of a mask if the employee works alone and does not interact with customers outside the work station.” Lindsay Kurrle, *New Work Safe Additions to the Be Smart, Stay Safe Order*, ACCD (Feb. 12, 2021), <https://accd.vermont.gov/news/update-new-work-safe-additions-be-smart-stay-safe-order>.

ACCD further clarifies the mask requirement in a FAQ document: “Do I need to require my employees to wear masks? Yes.” ACCD, *Pandemic State of Emergency FAQs for Business*, <https://accd.vermont.gov/covid-19/business/faqs>. It notes that “[i]n rare circumstances where an employee is physically unable to wear a mask,

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<sup>3</sup>

<https://governor.vermont.gov/sites/scott/files/documents/Amended%20and%20Restated%20Executive%20Order%20No.%2001-20.pdf>.

<sup>4</sup>

<https://governor.vermont.gov/sites/scott/files/documents/ADDENDUM%202%20TO%20AMENDED%20AND%20RESTATED%20EXECUTIVE%20ORDER%20NO.%2001-20.pdf>.

the employer should require a note from a doctor explaining their need for an accommodation, and the employer should implement other measures to protect the workplace and the employee.” *Id.* Furthermore, it clarifies that “In the presence of others’ means if there are other people around the employee, or if the employee is likely to interact with others, such as people coming into an office, interacting with customers, or when working outdoors in a public place.” *Id.*

#### Defendants’ Business Operation and Failure to Wear Masks

Defendants operate a retail mailbox, shipping, and copying store at 137 Main Street, Newport, Vermont, 05855. Defendants have refused to require their employees to wear masks while working in the presence of others, and Defendant Desautels has repeatedly refused to wear a mask while working in the presence of others.

In November 2020, the Newport Police Department received reports that Defendants were not complying with the Governor’s mask requirement for employees. Officer Nicholas Rivers conducted a compliance check on November 9. *See Attachment B.* The officer spoke to Defendant Desautels, who was not wearing a mask and said that there was “no way” he would wear a mask and “he would shut down before doing so.” *Id.* The officer relayed that information to the Attorney General’s Office.

The Attorney General’s Office sent Defendants a letter informing them of the Governor’s mask requirement for employees on November 10, 2020 and advising them to immediately follow all safety and health protocols. *See Attachment D.*

On February 1, 2021, the Newport Police Department received another report that Defendants were violating the mask requirement. *See Attachment B.* Officer Jacobs performed a compliance check and observed one employee wearing a mask but Defendant Desautels not wearing a mask. *Id.*

On February 11, 2021, the Attorney General's Office passed along a report to the Newport Police Department that Defendants were not complying with the mask requirement. *See Attachment B.* Officer Carmen Visan prepared paperwork about the Governor's mask requirement for employees and another officer, Officer David Jacobs, hand-delivered it to Defendants. *See id.* Defendant said that he was not going to change his beliefs on the matter. *Id.*

On February 16, 2021, the Newport Police Department received another report via the Attorney General's Office that Defendants were violating the mask requirement. *See Attachment B.* Officer Nicholas Keithan conducted a compliance check on February 16. *Id.* When he arrived, he found a printed sign on the door. The sign said: "We choose not [to] wear a mask and if you're uncomfortable with this, we ask that you do not come in to ensure your comfort. If you decide to come in do not ask us to put a mask on. Thank you for your understanding." *Id.* When he entered the building, he saw an employee without a mask. *Id.* Defendant Desautels was also not wearing a mask. *Id.* Officer Keithan tried to inform Defendant Desautels of the Governor's orders and provide literature about the order. *Id.* Defendant Desautels said it was a violation of his rights to put something on his face that he does not want to wear. *Id.*

The Attorney General's Office sent Defendant Desautels a cease-and-desist letter on February 17, 2021. *See* Attachment E.

On February 18, 2021, the Newport Police Department received another complaint of noncompliance with the mask requirement. *See* Attachment B. Officer Royce Lancaster went to the store and spoke with Defendant Desautels. *Id.*

Defendant and an employee were not wearing masks. *Id.* Defendant Desautels said he was aware of the mask compliance violation and said he had heard from the Vermont Attorney General's Office and was pushing back as it was something he believed in. *Id.*

On February 19, 2021, Officer Joshua Lillis conducted a compliance check at Defendant's business. *See* Attachment B. He saw one employee in the business, who was not wearing a mask. *Id.* Officer Lillis told her she was not in compliance with the mask mandate, and she replied "yep." *Id.*

On February 22, 2021, Officer Royce Lancaster of the Newport Police Department went to Defendants' business to do a compliance check. Defendant Desautels told Officer Lancaster that his attorney has told him to not let Newport Police in the store to conduct compliance checks without a warrant. He also said that although he is no longer operating as a UPS store, he is continuing to operate. Defendant Desautels was not wearing a mask. *See* Attachment F.

By continuing to operate in violation of the Governor's emergency orders, Defendants are jeopardizing the health of their employees, customers, and the Vermont public-at large.

## Discussion

Pursuant to 20 V.S.A. § 40, the Attorney General “may bring an action for injunctive relief in the superior court of the county in which a violation occurs to compel compliance with the provisions of [the Emergency Management] chapter.”

A party seeking injunctive relief pursuant to Vermont Rule of Civil Procedure 65 must satisfy four factors: (1) that the movant is likely to succeed on the merits; (2) that there is a threat of irreparable harm; (3) that the threat of irreparable harm outweighs the potential harm to other parties; and (4) that injunctive relief is in the public interest. *In re J.G. Juvenile*, 160 Vt. 250, 255 n.2 (1993). These factors are functionally indistinguishable from factors considered under the analogous federal rule. *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 19 n.3, 205 Vt. 586, 178 A.3d 313.

“A temporary restraining order may be granted without written or oral notice to the adverse party or that party’s attorney only if it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party’s attorney can be heard in opposition.” V.R.C.P. 65(a); *see also P.E.T.E.L. Properties, Inc. v. McDonnell*, Docket No. 396-6-07 Rdcv, 2007 WL 6787222 (Vt. Super. Ct. June 21, 2007) (emergency ex parte temporary restraining order granted where clear and ongoing violation of terms of easement threatened property owner’s horse-boarding business); *see also Vt. Women’s Health Ctr. v. Operation Rescue*, 159 Vt. 141, 617 A.2d 411 (1992) (temporary restraining order prohibiting, among other



things, physically blocking entrance to health center, attempting to enter building, or directing bullhorns or yelling at health center).

**I. The State is likely to succeed on its Complaint for relief.**

**a. The Governor has the authority to order that employees wear masks or cloth facial coverings when in the presence of others.**

The Governor has the authority, in responding to the COVID-19 pandemic, to order employees to wear masks when working in the presence of others. First, the Governor had the authority to declare the COVID-19 pandemic to be a state of emergency. As a result, the Governor can properly access emergency police powers to protect public health. The Governor’s mask requirement for employees is an appropriate exercise of those powers, because it is rationally related to the public health and taken in good faith. Even if the Court applies a more stringent test, the Governor’s decision to require masks for employees working in the presence of others is lawful.

As a preliminary matter, the Governor was justified in declaring a state of emergency in Executive Order 01-20.<sup>5</sup> The Governor may declare a state of emergency “in the event of an all-hazards event . . . that causes or may cause substantial damage or injury to persons or property within the bounds of the State in any manner[.]” 20 V.S.A. § 9. An “all-hazards event” includes a “health or disease-related emergency . . . which poses a threat or may pose a threat . . . to property or public safety in Vermont[.]” 20 V.S.A. § 2(1). This language

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<sup>5</sup> Executive Order 01-20, and all associated addenda and directives, are available at <https://governor.vermont.gov/document-types/executive-orders>.

unambiguously encompasses current events surrounding COVID-19—a pandemic disease that has been swiftly spreading throughout Vermont. Indeed, a Vermont court has already accepted the statutory basis for EO 01-20 and some of its addenda. *See Attachment C, State of Vermont v. Club Fitness of Vermont*, Docket No. 202-5-20 Rdcv, slip op. at 22-24 (Vt. Super. Ct. Sept. 24, 2020).

The Governor has the authority to require Vermonters to wear masks when in close contact with others outside their household to prevent the spread of COVID-19. When there is no state of emergency, the Governor has the general authority to “make, amend and rescind the necessary orders, rules and regulations to carry out the provisions of this [emergency management] chapter,” 20 V.S.A. § 8(b)(1). Now that he has properly declared a state of emergency, the Governor also has the power to enforce those rules, 20 V.S.A. § 9(1), and to “perform and exercise such other functions, powers and duties as may be deemed necessary to promote and secure the safety and protection of the civilian population.” 20 V.S.A. § 11(6).

The mask requirement for employees is well within the Governor’s broad statutory authority to respond to a health emergency.

The mask requirement for employees is also, moreover, an appropriate use of the State’s police power. A State has inherent authority “to enact quarantine laws and health laws of every description.” *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). “Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Id.* at 27. The police power is “the governmental power of

conserving and safeguarding the public safety, health, and welfare.” *State v. Quattropani*, 99 Vt. 360, 133 A. 352, 353 (1926). And the executive’s powers are at their peak where the executive is expressly empowered by statute to act to protect public health. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

The State is likely to succeed in enforcing the Governor’s order as a valid exercise of emergency power. The public-health justification for the Governor’s mask requirement for employees overwhelmingly shows it is necessary to promote and secure the safety and protection of the civilian population of Vermont during the COVID-19 pandemic. The virus that causes COVID-19 spreads mainly from person to person, primarily through respiratory droplets produced when an infected person coughs, sneezes, or even breathes. *Kelso Aff.* ¶ 19. Because respiratory droplets are now understood to be the primary method of transmission, the use of facial coverings is very important to minimizing the transmission of the virus in places where people from multiple households may interact. *Id.* ¶¶ 19–20, 37. Indeed, mask-wearing is a key tool in slowing the spread of COVID-19. *Id.* ¶ 20. Requiring the wearing of masks or cloth facial coverings when in the presence of others is therefore supported by authoritative public health guidance. *See id.* ¶¶ 24, 37. Any increase in occurrences of non-compliance with the mandatory health and safety guidance is likely to increase total case counts which in turn is likely to increase hospitalizations and adverse medical outcomes for Vermonters. *Id.* ¶ 44.

And courts have consistently upheld mask requirements implemented in response to COVID-19. *See Stewart v. Justice.*, No. CV 3:20-0611, 2021 WL 472937, at \*5 (S.D.W. Va. Feb. 9, 2021) (dismissing challenge to mask mandate because “Governor consulted with public health officials, relied on data provided by credible sources, and collaborated with other public agencies to protect the public from a virus that has already killed thousands of West Virginians. Therefore, the Court finds that there is a rational basis for the Orders and that they bear a real and substantial relation to this public health crisis.”); *Frantz v. Beshear*, No. 3:20-CV-00034 (WOB), 2021 WL 254299, at \*5 (E.D. Ky. Jan. 25, 2021) (dismissing challenge to mask mandate because “Court easily finds a rational relationship between Governor Beshear’s mask mandate and limiting the spread of COVID-19 in Kentucky”); *Delaney v. Baker*, No. CV 20-11154-WGY, 2021 WL 42340, at \*13 (D. Mass. Jan. 6, 2021) (upholding mask mandate because “Governor Baker’s orders for all residents to wear masks are rationally related to the interest in stemming the spread of COVID-19”); *Resurrection Sch. v. Gordon*, No. 1:20-CV-1016, 2020 WL 7639923, at \*3 (W.D. Mich. Dec. 16, 2020) (finding plaintiffs unlikely to succeed on challenges to mask mandate); *Cangelosi v. Edwards*, No. CV 20-1991, 2020 WL 6449111, at \*5 (E.D. La. Nov. 3, 2020) (“the face covering requirement does not violate any right guaranteed by federal law”); *Machovec v. Palm Beach Cty.*, No. 4D20-1765, 2021 WL 264163, at \*6 (Fla. Dist. Ct. App. Jan. 27, 2021) (upholding determination that “facial covering mandate ‘has a clear rational basis based on the protection of public health’”). As one court recently noted in dismissing a challenge

to a mask mandate, the mask mandate “seeks to protect the public health, safety and welfare,” which is “a legitimate governmental interest,” and the mandate “is rationally related to [that] legitimate governmental interest” – and the plaintiffs did “not point to a single court holding otherwise.” *Oakes v. Collier Cty.*, No. 220CV568FTM38NPM, 2021 WL 268387, at \*3 (M.D. Fla. Jan. 27, 2021) (quotation omitted).

**b. Defendants are violating the Governor’s mask requirement.**

As described above, Defendants are violating the employee mask requirement despite repeated attempts by the Newport Police Department and the Attorney General’s Office to bring them into voluntary compliance. *See* Attachments B, D, E, F. Defendants are still violating the requirement, and have expressed that they intend to continue to do so. *See* Attachments B, F.

In short, Defendants are in repeated and flagrant violation of the Governor’s Order and the addenda.

**II. Defendants’ continued operation in defiance of the Governor’s orders will cause immediate and irreparable injury to the health and safety of Vermont.**

The risks that someone may transmit or become infected with COVID-19 due to Defendants’ clear violation of the Governor’s executive order is too great to permit Defendants to continue to operate their business while in violation of the executive order.

As described above, the State’s response to COVID-19 has been to limit the ways in which Vermonters could be exposed to the disease. The State has set a

strategy to slow the spread in order to protect those at greatest risk, ensure capacity at healthcare facilities, and minimize the risk to the public. Without the concerted cooperation of Vermonters modifying their behaviors in accordance with the Governor's orders, many more people will die. Kelso Aff. ¶¶ 30, 38-39.

Defendants' violation of the mask requirement for employees creates a high-risk environment for the spread of the virus. By violating the mask requirement, Defendants are placing their employees and customers at risk, as well as the Vermont public at large. The virus spreads quickly and undetectably—particularly when people are not masked. Kelso Aff., ¶¶ 10, 23. A maskless employee who is unknowingly infected with COVID-19 could come into work at Defendant's store and easily spread it to everyone else there throughout their shift. And a person – a customer or an employee – who becomes infected at Defendants' store could go home and very quickly spread the disease to, at a minimum, everyone in their household.

Moreover, Defendants, by flouting the Governor's orders, are not only at high risk of spreading the disease within Vermont. They are also setting an example that, if left unchecked, could encourage others to follow. In this way, too, their behavior spreads greater risk throughout the community and the State. *See id.* ¶¶ 42–45.

Immediate injunctive relief is necessary to prevent this imminent and irreparable injury to the State and the public. “Irreparable harm is injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages.” *New York v. United States Dep't of*

*Homeland Sec.*, 969 F.3d 42, 86 (2d Cir. 2020). The harm Defendants are causing to the State by increasing the risk of COVID-19 transmission is actual, imminent, and irreparable; money could not remedy it. *See, e.g., Stagliano v. Herkimer Cent. Sch. Dist.*, 151 F. Supp. 3d 264, 273 (N.D.N.Y. 2015) (granting temporary restraining order allowing teachers to use sick leave for their children and noting that “the obvious potential for such issues as developing chronic health issues or spreading contagious diseases underscores the need for equitable relief”). Because virus transmission can occur daily, or even hourly, immediate injunctive relief is the only possible remedy.

This Court should grant the State’s motion for a temporary restraining order to direct that Defendants follow the Governor’s orders and the guidance issued thereunder—as so many compliant Vermont businesses have—to limit the spread of COVID-19 and to protect our collective public health.

**III. Defendants’ harm to the public health and safety far outweighs any conceivable harm to Defendants from an injunction.**

The harm to the public from Defendants’ actions, as described above, far outweighs any conceivable harm to Defendants from an injunction issued by this Court. As noted above, Defendants can point to no constitutional rights that will be violated by requiring them to abide by the same public-health order as every other business in the State. Courts have held that mask requirements do not violate, or are unlikely to violate, the Free Speech Clause of the First Amendment, *Stewart*, 2021 WL 472937, at \*5; the Free Exercise Clause of the First Amendment, *Delaney*, 2021 WL 42340, at \*13, *Resurrection Sch.*, 2020 WL 7639923, at \*2; the Freedom of

Assembly Clause of the First Amendment, *Oakes*, 2021 WL 268387, at \*8; due process, *Frantz*, 2021 WL 254299, at \*3; equal protection, *Resurrection Sch.*, 2020 WL 7639923, at \*2, *Oakes*, 2021 WL 268387, at \*2; or indeed “any right guaranteed by federal law.” *Cangelosi*, 2020 WL 6449111, at \*5. Any inconvenience or annoyance that compliance with the Governor’s Order and addenda might cause Defendants is far outweighed by the harms their violations are causing to the public health.

#### **IV. Injunctive relief is in the public interest.**

For all the same reasons discussed above, an injunction restraining Defendants from continuing to violate the Governor’s Order and addenda is in the public interest. Where, as here, the government is party to a suit, the final two factors—balance of the equities and the public interest—merge. *New York*, 969 F.3d at 58–59.

Moreover, where a violation of the law has been alleged, as it has here, that “has been considered a strong factor in favor of granting a preliminary injunction.” C. Wright & A. Miller, 11A *Fed. Prac. & Proc. Civil*, § 2948.4 (3d ed. 2020). “It even has been held that when the acts sought to be enjoined have been declared unlawful or clearly are against the public interest, plaintiff need show neither irreparable injury nor a balance of hardship in his favor, nor a likelihood of success on the merits.” *Id.* As described above, failing to wear a mask or cloth facial covering when working in the presence of others is a clear violation of the Governor’s properly constituted emergency order.



Finally, courts in other jurisdictions have found that the public interest weighs in favor of upholding COVID-19 emergency orders of the kind at issue here. *See Legacy Church, Inc. v. Kunkel*, 455 F. Supp. 3d 1100, 1165 (D.N.M. 2020) (finding public interest in limiting COVID-19 outbreak greater than public interest in gathering, where no First Amendment issues were found); *Hartman v. Acton*, No. 2:20-CV-1952, 2020 WL 1932896, at \*11 (S.D. Ohio Apr. 21, 2020) (“While the immediacy and irreparability of harm to Plaintiffs [business owners] is speculative, the harm to the public if the Director’s order is enjoined is potentially catastrophic.”). For the same reasons that upholding an emergency order is in the public interest, enforcing the Governor’s order and addenda in this case also serves the public interest.

This factor, like the others, weighs strongly in favor of granting a temporary restraining order here.

WHEREFORE, for the forgoing reasons, the State respectfully requests that the Court issue an order that:

1. grants this temporary restraining order immediately restraining Defendants from violating Restated Order 01-20 and its addenda and ACCD’s Phased Restart Work Safe Guidance, and specifically ordering Defendants to require their employees, agents, and contractors to wear masks or facial coverings over their nose and mouth while working in the presence of others at Defendants’ place of business; and furthermore requiring that in order to confirm compliance with this temporary restraining order, law enforcement

shall not be denied the same access to Defendants' business as is held out to members of the general public; and

2. sets a hearing date as soon as possible on this motion for preliminary injunction to require that Defendants comply with any and all applicable COVID-19-related Executive Orders and addenda and guidance issued thereunder; and requiring that in order to confirm compliance with this preliminary injunction, law enforcement shall not be denied the same access to Defendants' business as is given to members of the general public.

DATED at Montpelier, Vermont this 23rd day of February 2021.

Respectfully submitted,

THOMAS J. DONOVAN, JR.  
ATTORNEY GENERAL

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