

STATE OF VERMONT

SUPERIOR COURT  
ORLEANS UNIT

CIVIL DIVISION  
DOCKET NO: 22-CV-00597

MICHAEL DESAUTELS and AMY LADEAU )  
for themselves and as legal guardians and )  
next friends to R.D., )  
HEALTH CHOICE VERMONT, INC., )  
a Domestic Nonprofit Corporation, )  
CHILDREN'S HEALTH DEFENSE, )  
a GEORGIA Nonprofit Corporation, )  
Plaintiffs, )  
vs. )  
NORTH COUNTRY SUPERVISORY )  
UNION, )  
Defendants. )

**PLAINTIFFS' EX PARTE MOTION FOR TEMPORARY RESTRAINING ORDER  
AND/OR PRELIMINARY INJUNCTION**

Plaintiffs, pursuant to Vermont Rules of Civil Procedure 65(a) and (b), move, on an *ex parte* basis, for a temporary restraining order or, in the alternative, a preliminary injunction, enjoining Defendant North Country Supervisory Union ("NCSU") from enforcing its policies requiring students to wear face masks or coverings while in school.

Plaintiffs request that the Court issue a temporary restraining order, without notice, because (1) NCSU lacks the statutory authority to pass this mandate; (2) the mandate is preempted by the Vermont Department of Health's comprehensive regulatory scheme concerning communicable diseases; and (3) the mandate violates parents' rights to due process under the Vermont Constitution because they violate their rights to make healthcare and medical decisions for their children and otherwise direct the care and upbringing of their children.

## FACTUAL BACKGROUND

For purposes of brevity, Plaintiffs rely on the facts set forth in their Verified Complaint for Declaratory Judgment and Injunctive Relief filed contemporaneously with this Motion.

## ARGUMENT

### **A. Standard of Review**

“A party seeking a preliminary injunction ‘must establish irreparable harm and either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly in its favor.’” *Hoffman v. S. Burlington Sch. Dist.*, 2015 Vt. Super. LEXIS 96, \*2 (quoting *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002)). “There must be ‘a showing of irreparable damage during the pendency of the action.’” *Hoffman*, 2015 Vt. Super. LEXIS 96 at \*2 (quoting *State v. Glens Falls Ins. Co.*, 134 Vt. 443, 450 (1976)).

### **B. The Court Should Issue a Temporary Restraining Order or, in the Alternative, a Preliminary Injunction**

#### **1. Plaintiffs will likely succeed on the merits of their claims.**

##### **a. NCSU lacks the authority to issue face mask mandates (Count I).**

Last month, the United States Supreme Court, in *National Federation of Independent Business, et al. v. Department of Labor*, 142 S. Ct. 661 (Jan. 13, 2022), stayed a COVID-19 vaccine mandate imposed by the Secretary of Labor and the Occupational Safety and Health Administration (“OSHA”) on employers with over 100 employees because the Secretary lacked the statutory authority to impose such a broad health measure. *Id.* at 662. In doing so, the Court held “[a]dministrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.” *Id.* at 665.

Similarly, just two weeks ago, in *Austin, et al. v. The Board of Education of Community Unit School District #300, et al.*, Case No. 2021-CH-500002 (Ill. Cir. Ct. Feb. 4, 2022), an

Illinois state court issued a temporary restraining order against two state-wide executive orders requiring school children to wear masks because the Governor, Illinois Department of Public Health, and Illinois Board of Education lacked the statutory authority to enact these measures, and the measures violated the due process rights of parents and children codified in applicable Illinois statutes.

Analogous cases in other jurisdictions have concluded school districts and agencies that lack the express authority to issue broad health measures such as mask mandates or vaccine mandates may not do so. *See Demetriou, et al. v. New York State Department of Health, et al.*, Index. No. 616124/2021 (N.Y. Jan. 24, 2022) (Rademaker, J.S.C.) (permanently enjoining state-wide mask mandate that applied to anyone over the age of 2 while in a public place, including schools and school children, issued by the New York Commissioner of Health because the Commissioner lacked the statutory authority to enact such an order); *Matt Sitton, et al. v. Bentonville Schools, et al.*, Case No. 4CV-21-2181 (Ark. Cir. Ct. Oct. 12, 2021) (temporary restraining order against school district mask mandate because district lacked the express authority to do so) (at RA 961-80); *Corman v. Acting Sec'y of the Pa. Dep't of Health*, No. 83 MAP 2021, 2021 Pa. LEXIS 4348 (Dec. 10, 2021) (affirming appeals court decision declaring order by Acting Secretary of the Pennsylvania Department of Health directing all students, teachers, staff, and visitors in schools in the Commonwealth to wear face coverings, regardless of vaccination status, was void and unenforceable because Acting Secretary lacked the statutory and regulatory authority to issue the order); *State v. Biden*, Case No. 1:21-cv-00163-RSB-BKE, at \* (S.D. Ga. Dec. 7, 2021) (enjoining Executive Order 14042, which requires contractors and subcontractors performing work on certain federal contracts to ensure their employees and others working in connection with federal contracts are fully vaccinated against COVID-19, because, in



part, the Order exceeds the authority Congress granted to the President to address administrative and management issues in procurement and contracting); *Commonwealth v. Biden*, CIVIL 3:21-cv-00055-GFVT, at \*13 (E.D. Ky. Nov. 30, 2021) (enjoining same mandate for federal contractors because President exceeded his authority).

The facts in this case are precisely the same. As demonstrated in the Complaint, NCSU lacks the authority to issue this mandate because the state legislature did not expressly grant it any authority to enact mandates requiring students to wear face masks or coverings; rather, that authority – if any – resides exclusively with the Department of Health. *City of Montpelier v. Barnett*, 49 A.3d 120, 129 (Vt. 2012); 18 V.S.A. § 126(b). There is no Vermont statute, rule, or regulation that permits supervisory unions to enact face mask mandates. Thus, NCSU lacked the authority to mandate masks.

**b. The mandate is preempted by the Department of Health’s regulatory scheme concerning communicable diseases (Count II).**

As demonstrated in the Complaint, a municipal ordinance or rule is preempted if it conflicts with state law. *In re Zoning Permit of Patch*, 140 Vt. 158, 176 (1981) (when there is “a conflict between the preemptive exercise of state power and the attempted forestalling of that exercise by resort to the local ordinance. . . . [i]t is certainly true, and has several times been said that, in such a controversy the state policy requires the local authority to give way.”).

“Preemption usually must be invoked when the local law is a barrier to what the state has required to be done, or allows what the state has said must be prohibited.” *Id.* at 177.

The mandate here conflicts with the Department of Health’s scheme. That scheme addresses all aspects of communicable diseases and the various measures the state has determined are appropriate for dealing with outbreaks and highly-contagious diseases. The Department has the authority to investigate public health crises, and the *Department and State*

*Board* – not supervisory unions or school districts – have the authority to issue health orders concerning individuals infected with a communicable disease. The Board also had the opportunity to promulgate – and did promulgate – rules concerning COVID-19: the only directives it enacted were reporting requirements concerning COVID-19 and other diseases. The Department’s statutes and rules in this area are extensive and comprehensive and, thus, have preempted this entire regulatory field. They preempt any local measure that requires masks in schools because any such measures conflict with the Department’s scheme that does not require masks in schools to prevent the transmission of COVID-19.

**c. The mandate violates parents’ rights to make medical decisions for their children and to raise and care for their children (Count III).**

Parents have a fundamental right to raise and care for their children and make medical and healthcare decisions for them. Part 1, Art. 10, Vt. Const; *Boisvert v. Harrington*, 173 Vt. 285, 295 (2002). Plaintiffs have alleged this mandate violates these fundamental rights. The Court must, therefore, review such a challenge under strict scrutiny.

The mandate does not serve a compelling government interest because there is no state of emergency; COVID-19 does not pose a significant threat to the health of children; there is no evidence face masks have done anything to curb the spread of COVID-19; and face masks are harmful for children.

Even if NCSU had a compelling interest, its mask mandate is not narrowly tailored to achieve that end because it applies to children (for whom COVID-19 poses no significant risk); it applies to *all* children (regardless of whether any of those children had COVID-19, are vaccinated, or are health-compromised); it has no end date; it has no exceptions or exemptions; and any such compelling need or interest can be accomplished by other less-restrictive means.

NCSU acted without regard for – and completely ignored – parents’ fundamental rights in the care, upbringing, and education of their children, including the right to make healthcare and medical decisions for their children.

**2. Plaintiffs will suffer irreparable harm.**

As a result of NCSU’s conduct, Plaintiffs will continue to suffer irreparable harm. The Plaintiff parents’ children all attend school in NCSU’s schools and, thus, are required to wear masks while attending school.

First, the violation of statutory and procedural rights constitutes irreparable injury. *See, e.g., Austin, supra* at 21-22 (holding violation of statutory rights constitutes irreparable harm); *Shaeffer v. City of Lancaster*, 754 A.2d 719, 723 (Pa. Cmmw. Ct. 2000) (“Statutory violations are sufficiently injurious to constitute irreparable harm.”). “Allegations of statutory violations implicate a different calculus because such violations inherently offend the public interest. The need to demonstrate irreparable harm, a condition precedent to the grant of injunctive relief in civil litigation, is not a prerequisite where a plaintiff attempts to enforce a statute.” *Long Term Care Pharmacy Alliance v. Ferguson*, Civil Action No. 03-CV-10577-JLT, at \*1 (D. Mass. Apr. 1, 2003); *see also United States v. Richlyn Labs., Inc.*, 827 F. Supp. 1145, 1150 (E.D. Pa. 1992) (“The passage of the Food, Drug and Cosmetic Act is, in a sense, an implied finding that violations will harm the public and ought to be restrained if necessary.”); *Time Warner Cable of New York City v. Freedom Electronics, Inc.*, 897 F. Supp. 1454, 1460 (S.D. Fla. 1995) (“[S]everal federal courts have held that absence of justification for violation of clear statutory rights virtually eliminates the necessity of showing irreparable harm.”); *San Juan Cable LLC v. Telecomms. Regulatory Bd.*, 598 F. Supp. 2d 233, 235 (D.P.R.



2009) (when statutory violations are involved, only a “bare minimum” showing of irreparable harm is required).

Second, there is a presumption of irreparable harm where, as here, there is an alleged violation of a constitutional right. *See Deere and Co. v. New Hampshire*, 2013 WL 9889004 (Merrimack County Super. Ct. 2013); *see also Univ. of Hawaii Prof'l Assembly v. Cayetano*, 16 F. Supp. 2d 1242, 1247 (D. Haw. 1998) (“[a]n alleged constitutional infringement will often alone constitute irreparable harm”); *Donohue v. Mangano*, 886 F. Supp. 2d 126 (E.D.N.Y. 2012) (granting injunction and “a finding of irreparable harm is warranted” because “the constitutional deprivation is convincingly shown and that violation carries noncompensable damages”).

Third, wearing a mask restricts these children’s breathing: wearing masks makes it difficult for them to breathe because it restricts their oxygen levels and increases their carbon dioxide levels.

Face masks were designed to be worn in hospitals to prevent saliva droplets from landing on patients and fellow staff. The human body is designed to expel wastes through exhaling. Holding these wastes against the face can detrimentally impact a child: children inhale bacteria and viruses their bodies are attempting to get rid of, and those wastes sit in a moist environment on the skin.

For some of these children, masks also irritate their skin, cause acne, and lead to other skin problems.

These problems have caused these children to be afraid, suffer anxiety and stress, and experience light-headedness, trouble concentrating, and headaches. At times, they have caused a level of anxiety that has led some of these children to withdraw from social interaction.

Children rely on facial expressions to interpret what they hear. They respond to facial cues to interact and respond appropriately to teachers and peers. Wearing a mask forcefully eliminates this key part of human interaction.

Masks are also a distraction: they prevent children from listening to teachers' instructions and directions, inhibit social interaction, and children are not heard clearly when they speak through masks. These children feel disconnected from their friends, teachers, and other staff members. The grades of many of these children have also been negatively impacted.

In many instances, schools within NCSU have reprimanded these children if they do not wear masks. For example, NCSU has denied one of the Plaintiffs – R.D. – access to the school building at the Lowell Graded School, which has resulted in a *de facto* expulsion of R.D. from that school based on NCSU's mask mandate. This measure has prevented R.D. from receiving an adequate education.

Masks for children do more harm to their development than provide effective safeguards against spreading COVID-19. In the absence of evidence demonstrating that masks provide measurable protection against a respiratory illness such as COVID-19 among school-age children, requiring children to wear masks risks teaching them to be afraid of their bodies and afraid of their peers.

**3. Plaintiffs have no adequate remedy at law.**

If the Court declines to issue an order enjoining the conduct above, Plaintiffs will not have an adequate remedy at law. Their only recourse would be to continue with this lawsuit and be forced to wait some undefined period of time for NCSU to rescind its mask mandate. That mandate could remain in place for the foreseeable future. If this conduct continues, the rescission of these mandates may not happen until after the 2021-2022 school year. In that



scenario, by the time the Court conducts a hearing on the merits, these children will have had to complete the entire 2021-2022 school year under NCSU's mandate. Thus, a temporary restraining order or injunction is necessary in order to provide Plaintiffs with a complete remedy and to prevent the NCSU's conduct from irreparably harming these children further. The only available remedy is an emergency order enjoining the mandate.

**4. The public interest favors enjoining the mandate.**

The public interest will be advanced, not harmed, by granting the requested injunctive relief because the public favors the protection and safety of children. *See Heartland Academy Cmty. Church v. Waddle*, 335 F.3d 684, 690 (8th Cir. 2003) (holding there is "significant public interest in protecting . . . children"); *Reed v. Long*, 420 F. Supp. 3d 1365, 1379 (M.D. Ga. 2019); (holding children's safety is in the public interest); *D.R. v. Mich. Dep't of Educ.*, No. 16-13694, at \*12 (E.D. Mich. Nov. 2, 2017) ("It is clear that '[t]he maintenance of appropriate education services to disabled children is in the public interest . . . ."); *Newark Pre-School Council, Inc. v. U.S. Dep't of Health & Human Servs.*, 201 F. Supp. 3d 72, 81 (D.D.C. 2016) (holding a program that provides "comprehensive educational, health, nutritional, and social services to children from low-income families[] reflects th[e] public interest"); *R.F. v. Delano Union Sch. Dist.*, 224 F. Supp. 3d 979, 991 (E.D. Cal. 2016) (acknowledging "the public's interest in seeing that disabled children are educated").

**REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that the Court:

- A. Enjoin enforcement of the mandate;
- B. Schedule a hearing on this Motion, if necessary;
- C. Enjoin NCSU from extending or renewing its mandate for any portion of the 2021-2022 school year and beyond; and
- D. Award such other relief as is just and equitable.

Respectfully submitted,

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for themselves and as next friends to R.D.,  
HEALTH CHOICE VERMONT, INC.,  
CHILDREN'S HEALTH DEFENSE, INC.,

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Dated: February 17, 2022

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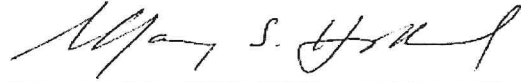
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