

EXHIBIT "A"

STATE OF VERMONT

SUPERIOR COURT
ORLEANS UNIT

CIVIL DIVISION
DOCKET NO:

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.)

**VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF¹**

INTRODUCTION

Plaintiffs, Michael Desautels and Amy Ladeau, on behalf of themselves and their minor child R.D., Health Choice Vermont, Inc., and Children’s Health Defense, Inc., bring this Verified Complaint for Declaratory Judgment and Injunctive Relief against Defendant North Country Supervisory Union (hereinafter “NCSU”) to challenge its adoption of policies requiring students to wear face masks or coverings while in school and for denying R.D., the minor daughter of Michael Desautels and Amy Ladeau access to school buildings and educational services because of R.D.’s inability to wear a face mask. Plaintiffs contend NCSU (1) lacked the authority to adopt a mask mandate policy; (2) the mask mandate policy is preempted by the Vermont

¹ Plaintiffs are filing contemporaneously with this Complaint a Motion for a Temporary Restraining Order and/or Preliminary Injunction.

Department of Health's comprehensive statutory and regulatory scheme concerning communicable diseases; and (3) the mask mandate policy violate parents' right to due process under the Vermont Constitution because it violates their rights to care for their children and make healthcare decisions for them; (4) NCSU violated its own unenforceable mask mandate policy by denying R.D. access to school buildings and educational services.

PARTIES

1. Plaintiff, Michael Desautels (herein "Desautels"), is a resident of Troy, County of Orleans, Vermont and has been so for more than six months preceding the commencement of this action.

2. Plaintiff, Amy Ladeau (herein "Ladeau"), is a resident of Lowell, County of Orleans, Vermont and has been so for more than six months preceding the commencement of this action.

3. Desautels and Ladeau are the natural parents and legal guardians of R.D. (herein "R.D."), a minor child who is a student at Lowell Graded School which is a subsidiary unit of North Country Supervisory Union.

4. Plaintiff Health Choice Vermont, Inc. is a Vermont Nonprofit Corporation with a principal place of business at Main Street, Waitsfield, Vermont 05673. Plaintiff has members in its organization who have children in the North Country Supervisory Union.

5. Plaintiff Children's Health Defense, Inc. is a Georgia Nonprofit Corporation with a principal place of business at 1227 North Peachtree Parkway, Peachtree City, Georgia 30269. Plaintiff has members in its organization who have children in the North Country Supervisory Union.

6. Defendant North Country Supervisory Union (NCSU) is a school supervisory union with a principal place of business at 121 Duchess Avenue, Suite A, Newport, Vermont.

FACTUAL ALLEGATIONS

A. The Commissioner of the Vermont Department of Health and State Local Health Officials Have Exclusive Authority to Issue Health Orders

7. The Vermont Department of Health is charged with the “power to supervise and direct the execution of all laws relating to public health and substance abuse.” 18 V.S.A. § 1.

8. Along with that general authority, it has a duty to “[p]rovide methods of administration and such other action as may be necessary to comply with the requirements of federal acts and regulations as they relate to studies, development of plans and administration of programs in the fields of health, public health, health education, hospital construction and maintenance, and medical care.” 18 V.S.A. § 5(2).

9. The Department governs through a “State Board of Health,” which “consist[s] of seven members who shall be appointed biennially . . . by the Governor, with the advice and consent of the Senate,” “for a term of six years.” 18 V.S.A. § 101(a).

10. “Three members of such Board shall be doctors, one of whom shall be licensed to practice medicine and surgery in the State, one of whom shall possess special training and ability in psychiatry, and one of whom shall be licensed to practice osteopathy, surgery, and obstetrics in the State; one member of such Board shall be licensed to practice dentistry in the State.” 18 V.S.A. § 101(b).

11. “The Board shall supervise and direct the execution of all laws vested in the Department . . . ,” “may delegate such powers and assign such duties to the Commissioner as it may deem appropriate and necessary for the proper execution of provisions of this title,” and its

“authority . . . to adopt the rules shall extend to all matters relating to the preservation of the public health and consistent with the duties and responsibilities of the Board.” 18 V.S.A. § 102.

12. For example, the Board adopted a “Reportable and Communicable Diseases Rule” that became effective October 15, 2021.² That Rule addresses the reporting requirements for various communicable diseases, including COVID-19.

13. A “Commissioner of Health” is also appointed who “shall establish guidelines for conducting investigations and inspections and for determining whether a public health risk or public health hazard is a local or a State problem.” 18 V.S.A. § 104(e). “The Commissioner shall take cognizance of the interest of the life and health of the inhabitants of the State, shall make or cause to be made inspections, investigations, and inquiries respecting causes of disease and the means of preventing the same and the effect of all circumstances relating to or affecting the public health.” 18 V.S.A. § 107(a).

14. “Any delegation of responsibility and authority by the Board ***shall be made through the Commissioner*** and shall in no way relieve the Board of its accountability.” 18 V.S.A. § 106 (emphasis added).

15. With respect to implementing the Department’s duties and obligations, “[w]hen appropriate, the health officer shall make all practicable efforts to secure ***voluntary compliance***.” 18 V.S.A. § 124(a) (emphasis added). A “health officer” “means Commissioner of Health, the Commissioner's designee, or a local or district health officer.” 18 V.S.A. § 2(4).

16. “Means of securing voluntary compliance may include the following:
(1) encouraging voluntary cooperation by persons and affected groups to achieve the purposes of

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https://www.healthvermont.gov/sites/default/files/documents/pdf/Reportable%20Disease%20_%20Renewal%20Emergency%20Rule%209-15-21.Final_clean_.pdf

this title; (2) encouraging local units of government to handle violation problems within their respective jurisdiction by compact on a cooperative basis, and providing technical and consultative assistance therefor; (3) advising, consulting, contacting, and cooperating with other agencies of the State, local governments, industries, other states, interstate or interlocal agencies, and the federal government, and with interested persons or groups; and (4) encouraging voluntary compliance through warning, conference, or any other similar means.” 18 V.S.A. § 124(b).

17. If voluntary compliance cannot be obtained, the Department has the authority to issue “health orders.” 18 V.S.A. § 126. “The Commissioner or the selectboard may issue a health order to: (1) prevent, remove, or destroy any public health hazard; (2) mitigate a significant public health risk; (3) correct any violation of this title or any rules promulgated thereunder; or (4) correct any violation of a permit restriction or requirement.” 18 V.S.A. § 126(a).

18. A “significant public health risk” “means a public health risk of such magnitude that the Commissioner or a local health officer has reason to believe that it must be mitigated. The magnitude of the risk is a factor of the characteristics of the public health hazard and the degree and the circumstances of exposure to such public health hazard.” 18 V.S.A. § 2(12).

19. A “public health hazard” “means the potential harm to the public health by virtue of any condition or any biological, chemical, or physical agent.” 18 V.S.A. § 2(9).

20. Only *health officers*, however, may issue such health orders: “*The issuing authority for a State health order shall be the Commissioner. The issuing authority for a local health order shall be the selectboard.*” 18 V.S.A. § 126(b) (emphasis added).

21. The “Commissioner” is defined as the “Commissioner of Health, the Commissioner’s designee, or a local or district health officer.” 18 V.S.A. § 2(3). The “selectboard” is defined to “include[] trustees of an incorporated village, or a city council when appropriate.” 18 V.S.A. § 2(11).

22. Nothing in the authorities above provides any other state agency or local unit of government with the authority to issue a health order or compel anyone.

B. The Limited Authority of Supervisory Unions and School Districts

23. None of the provisions that apply to supervisory unions or school districts provides any of these government entities with the authority to implement a requirement that students wear masks in schools, let alone any *broad* health measure.

24. Vermont, like many states, follows “Dillon’s Rule.” Under that rule, “the power of the municipality is limited to what has been granted by the state.” *City of Montpelier v. Barnett*, 49 A.3d 120, 129 (Vt. 2012).

25. “John Forrest Dillon, for whom that principle is named, famously described this idea while Chief Justice of the Iowa Supreme Court: ‘Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control.’” *Id.* (quoting *City of Clinton v. Cedar Rapids & Mo. River R.R.*, 24 Iowa 455, 475 (1868)).

26. Accordingly, Vermont “adopted Dillon’s Rule, declaring that ‘a municipality has only those powers and functions specifically authorized by the legislature, and such additional functions as may be incident, subordinate or necessary to the exercise thereof.’” *City of*

Montpelier, 49 A.3d at 129 (quoting *Hinesburg Sand & Gravel Co. v. Town of Hinesburg*, 135 Vt. 484, 486 (1977)).

27. “For better or worse, this rule expresses the liberal commitment to the state as the centralized source of political power.” *City of Montpelier*, 49 A.3d at 129. “In practice, Dillon’s Rule operates as a canon of construction requiring that grants of power to municipalities be read as limited to those clearly enumerated.” *Id.*

28. “[I]f any fair, reasonable, substantial doubt exists concerning [a grant of power], it must be resolved against the [municipality], and its power denied.” *Valcour v. Village of Morrisville*, 104 Vt. 119, 130 (1932).

29. “Dillon’s Rule is properly applied in determining the authority of local school boards.” *Heatherly v. Campbell Cty. Bd.*, No. E2004-02004-COA-R3-CV, at *1 (Tenn. Ct. App. Mar. 10, 2005).

30. Accordingly, supervisory unions have limited duties and authority. Their duties consist of establishing a curriculum and ensuring schools follow it; ensuring students who study outside their supervisory unions take part in a comparable curriculum; administering state and federal funds; provide professional development programs for staff; provide special education services; administer financial and student data; procuring goods and services; negotiating contract terms with teachers and administrators; manage construction projects; provide transportation; provide human resources management; prepare an annual summary report of financial operations; and adopt truancy policies. 16 V.S.A. § 261a(a)(1)-(13).

31. The powers and authority of school districts are similarly limited. Their powers consist of determining educational policies; care for and administer its property; keep school buildings and grounds in good repair, safe, and sanitary; administer early education programs;

relocate or discontinue a schoolhouse or facility; establish and maintain appropriate accounting and reporting records; prepare and distribute periodic reports of the conditions and needs of the district school system; prepare and distribute an annual proposed budget; employ necessary personnel; provide learning materials; execute contracts on behalf of a school district; allow students who satisfy the requisite criteria to graduate; prevent school board member conflicts of interest; borrow funds when necessary; apply for grants when necessary; integrate home study students into its schools; inform students and their parents about school choice; present informational materials to the electorate on matters to be voted on; administer its section 504 obligations; make school facilities available for public purposes; enter into contracts with other school boards to provide various services and facilities; and enter into contracts with schools offer approved distance learning programs. 16 V.S.A. § 563(1)-(32).

32. Accordingly, none of these provisions provides these government entities with the authority to implement a requirement that students wear masks in schools.

33. Rather, the Department of Health's statutory and regulatory scheme concerning communicable diseases provides supervisory unions and schools with only *two* specific obligations and duties concerning such diseases.

34. First, school health officials must report cases of communicable diseases to the Commissioner of Health within 24 hours and provide certain identifying information concerning that case. 18 V.S.A. § 1001(a); Vermont Health Regulations, Chapter 4, Subchapter 1, Part 5, § 5.1.7.³

35. Second, school health officials must require students to provide records or certificates of certain immunizations in order to be enrolled in school and may exclude students

³ This emergency health rule became effective on October 15, 2021, and specifically includes COVID-19 among the diseases it covers. *See* Vermont Health Regulations, Chapter 4, Subchapter 1, Part 5, § 5.4.

who do not provide such proof. 18 V.S.A. §§ 1121(a), 1123, 1126. However, even the Immunization Rule adopted by the Department of Health pursuant to 18 V.S.A. § 1123 provides a religious exemption for children who have not received required vaccines due to religious beliefs Chapter 4, Subchapter 4, Part 6, § 6...

36. Nothing else in any of the statutory and regulatory schemes for supervisory unions, school districts, or the Department of Health provides supervisory unions and school districts with the authority to issue broad health measures. Instead, that authority resides solely with the Department of Health.

C. The Vermont Department of Health’s Statutory and Regulatory Scheme Concerning Communicable Diseases Preempts the Supervisory Unions’ Mask Mandates

37. 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.”).

38. “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.

39. As demonstrated above, the Vermont Department of Health has a comprehensive statutory and regulatory scheme concerning communicable diseases, and that scheme charges both the Department and local boards of health with various powers to address outbreaks, including the exclusive authority to issue “health orders.”

40. There is currently no order requiring citizens to wear masks issued under the emergency powers of the Executive Branch or through the administrative authority of the Department of Health.

41. Indeed, the Department's Health Commissioner has resisted issuing a state-wide mask mandate, and Governor Phil Scott has maintained that the current COVID-19 case data does not justify another state of emergency declaration.⁴

42. The Department's comprehensive statutory and regulatory framework concerning communicable diseases preempts 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.

43. Thus, neither supervisory unions nor school districts (including their principals, building supervisors, or other staff) have the authority to mandate face masks for students.

D. The Supervisory Unions' Mask Mandates

44. NCSU has issued a mask mandate for its schools which is as follows:

All staff and students are required to wear facial coverings while in the building, CDC recommends facial coverings in settings where other physical distancing measures are difficult to maintain. Vented masks are prohibited per CDC guidance. The following stipulations are for students, as well as staff, where applicable:

-Masks are developmentally appropriate when children can properly put on, take off, and not touch or suck on the covering.

-Students who have a medical or psychological reason that could be impacted by wearing a mask may qualify for an exemption. Certification from a licensed health care provider is necessary to qualify for an

⁴ <https://www.news10.com/news/vt-news/vermont-officials-resist-demand-for-mask-mandate/>

exemption through a formal process. These decisions must be made in partnership with the health care provider and the school.

-Facial coverings with ties are not recommended for young children as they pose a risk of choking or strangulation.

-Facial coverings may be removed during outdoor activities, depending on the applicable protocols at the time. Staff may take off their facial covering in select circumstances when physical distancing cannot be maintained, such as when a parent/caregiver is hearing impaired and reads lips to communicate. It is also recommended to use facial coverings with clear plastic windows to support communication when there is ongoing contact with individuals who are hearing impaired.

-The use of clear facial shields for adults is allowable as long as they meet all of the health guidance of the Vermont Department of Health. Face shields are not recommended. Face shields should extend below the chin and to the ears laterally, and there should be no exposed gap between the forehead and the shield's headpiece.

E. The Coronavirus Has Had No Impact on Children in Vermont or in the Defendant Supervisory Unions

45. Despite the measures above, the Coronavirus has had virtually no impact on children in Vermont or in the Defendant School Districts.

46. Of the 574 total deaths in Vermont from COVID-19, there have been zero deaths in the 0-19 demographic, just one death in the 20-29 demographic, and 65 deaths under the age of 60.⁵ The remaining deaths (509 deaths above the age of 60) comprise over 88% of the total

⁵ <https://www.healthvermont.gov/covid-19/current-activity/case-dashboard>

deaths in the state, and over 50% of the remaining deaths (291 deaths) occurred in people over the age of 80.⁶

47. During the 90 days ending on February 15, 2022, a total of twenty-nine (29) children had been admitted to hospitals in Vermont who were identified as being positive for COVID-19 infection. On information and belief, few or none of these children were admitted to a hospital *due* to COVID-19 as opposed to *with* COVID-19.

48. On information and belief, only a few children identified as COVID-19 positive are currently hospitalized in Vermont and, also on information and belief, few or none of these children are hospitalized *due* to COVID-19 as opposed to *with* COVID-19.

49. 53% of deaths attributed to COVID-19 in Vermont were in long-term care facilities.

50. As of February 14, 2022, the number of current Coronavirus-related hospitalizations in Vermont was 66, which represents seven percent (7%) of the staffed hospital beds available in Vermont.

51. As demonstrated above, COVID-19 has been highly selective in those among the population to whom it poses the most risk

52. The risk of serious COVID-19 illness in children is no different than their risk from the flu.⁷ A study last fall showed no statistically significant difference in the rates of hospitalization, admission to the intensive care unit, and medical ventilator use between children with COVID-19 and children with the seasonal flu.⁸

⁶ *Id.*

⁷ <https://www.npr.org/2021/05/21/999241558/in-kids-the-risk-of-covid-19-and-the-flu-are-similar-but-the-risk-perception-isn>

⁸ https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2770250?utm_source=For_The_Media&utm_medium=referral&utm_campaign=fm_links&utm_term=090820

53. Children and healthy adults under 60 have not been at risk with this virus.

COVID-19 presents a statistically insignificant threat to the health of children, young adults, and healthy adults of middle and even slightly advanced age.

54. There is no “state of emergency” in Vermont concerning COVID-19, nor is there any threat to children or healthy adults from the virus.

F. Face Masks Do Not Prevent the Spread of COVID-19

55. Even if there was a “state of emergency,” face masks have not been effective at preventing the spread of COVID-19.

56. A recent article in Bloomberg, titled “Mask Mandates Didn’t Make Much of a Difference Anyway,” concluded mask mandates do not prevent the spread of the most recent COVID-19 variant, Omicron.⁹ “Given the current understanding that the virus is transmitted in fine aerosol particles, it’s likely an infectious dose could easily get through and around loose-fitting cloth or surgical masks.”¹⁰

57. This conclusion is not new: Last year, in May 2021, the Centers for Disease Control and Prevention (“CDC”) published a large-scale study of COVID-19 transmission in U.S. schools that concluded that, while masking then-unvaccinated teachers and improving ventilation was associated with lower levels of virus transmission in schools, other measures like social distancing, classroom barriers, HEPA filters, and ***forcing students to wear masks did not result in a statistically significant benefit.***¹¹

⁹ <https://www.bloomberg.com/opinion/articles/2022-02-11/did-mask-mandates-work-the-data-is-in-and-the-answer-is-no>

¹⁰ *Id.*

¹¹ Gettings J, Czarnik M, Morris E, et al. Mask Use and Ventilation Improvements to Reduce COVID-19 Incidence in Elementary Schools — Georgia, November 16–December 11, 2020. MMWR Morb Mortal Wkly Rep 2021;70:779–784. DOI: <http://dx.doi.org/10.15585/mmwr.mm7021e1>

58. These broad mask mandates have been consistently debunked: “Many of America’s peer nations around the world — including the U.K., Ireland, all of Scandinavia, France, the Netherlands, Switzerland, and Italy — have exempted kids, with varying age cutoffs, from wearing masks in classrooms” and yet “there’s no evidence of more outbreaks in schools in those countries relative to schools in the U.S., where the solid majority of kids wore masks for an entire academic year and will continue to do so for the foreseeable future.” Zweig, David, “The Science of Masking Kids at School Remains Uncertain,” New York Magazine (Aug. 20, 2021).¹² Mr. Zweig’s article cites the opinion of another expert, Elissa Schechter-Perkins, the director of Emergency Medicine Infectious Disease Management at Boston Medical Center, who states “I’m not aware of any studies that show conclusively that kids wearing masks in schools has any effect on their own morbidity or mortality or on the hospitalization or death rate in the community around them.” *Id.*

59. These conclusions are buttressed by similar conclusions in numerous other studies conducted recently and over the last few years.

60. A Danish study¹³ released in November 2020 suggested face masks did not significantly protect mask wearers from contracting COVID-19 compared to those without masks.¹⁴

61. Another study concluded “[v]entilation, *cardiopulmonary exercise capacity and comfort are reduced by surgical masks* and highly impaired by FFP2/N95 face masks in healthy

¹² <https://nymag.com/intelligencer/2021/08/the-science-of-masking-kids-at-school-remains-uncertain.html>

¹³ <https://www.acpjournals.org/doi/10.7326/M20-6817>

¹⁴ <https://www.msn.com/en-us/health/medical/first-randomized-control-trial-shows-face-masks-did-not-reduce-coronavirus-infections-with-statistical-significance/ar-BB1b8zo2>

individuals.” *Effects of surgical and FFP2/N05 face masks on cardiopulmonary exercise capacity*, Fikenzer, Sven, et al., July 6, 2020.¹⁵

62. Another recent study concluded mask mandates were not associated with the spread of COVID-19 among U.S. States. *Mask mandate and use efficacy in state-level COVID-19 containment*, Guerra, Damian D., Guerra, Daniel J., May 25, 2021.¹⁶ That study noted “80% of US states mandated masks during the COVID-19 pandemic,” and while “mandates induced greater mask compliance, [they] did not predict lower growth rates when community spread was low (minima) or high (maxima).” In addition, the study stated “mask mandates are not associated with lower SARS-CoV-2 spread among US states.”

63. Numerous other studies have concluded face masks provide minimal to no protection. *See, e.g.*, “Are Face Masks Effective? The Evidence,” (Aug. 2021) (“[M]ost studies found little to no evidence for the effectiveness of face masks in the general population, neither as personal protective equipment nor as a source control,” and “[i]n many states, coronavirus infections strongly increased after mask mandates had been introduced.”);¹⁷ Chughtai AA, Stelzer-Braid S, Rawlinson W, Pontivivo G, Wang Q, Pan Y, Zhang D, Zhang Y, Li L, MacIntyre CR, “Contamination by respiratory viruses on outer surface of medical masks used by hospital healthcare workers,” *BMC Infect Dis.* 2019 Jun 3;19(1):491. doi: 10.1186/s12879-019-4109-x. PMID: 31159777; PMCID: PMC6547584 (respiratory pathogens on the outer surface of used medical masks may result in self-contamination, and the risk is higher with longer duration

¹⁵ https://link.springer.com/epdf/10.1007/s00392-020-01704-y?sharing_token=4AfWegbHOxk00hiHYtrplPe4RwlQNchNByi7wbcMAY4ZfoGR_ibmFHApWSw2JRb7yoFxeXb_xgdwNA2TYmPtz8OVhsr-eLNmHTAFlu6bFbQI5DaVnEieqTZNVL58LC3cW5QirGJONSGqeFdIMNEhxS2AmFJPw2wAfRsgDXHh9EII%3D

¹⁶ <https://www.medrxiv.org/content/10.1101/2021.05.18.21257385v1>

¹⁷ <https://swprs.org/face-masks-evidence/>

of mask use);¹⁸ MacIntyre, C Raina et al. “A cluster randomised trial of cloth masks compared with medical masks in healthcare workers.” *BMJ open* vol. 5,4 e006577. 22 Apr. 2015, doi:10.1136/bmjopen-2014-006577 (cloth face masks should not be used because moisture retention, their re-use, and poor filtration may result in increased risk of infection);¹⁹ Brainard, J., Jones, N., Lake, I., Hooper, L., Hunter, P. R., Facemasks and similar barriers to prevent respiratory illness such as COVID-19: A rapid systematic review, medRxiv 2020.04.01.20049528; doi:<https://doi.org/10.1101/2020.04.01.20049528> (“The evidence is not sufficiently strong to support widespread use of facemasks as a protective measure against COVID-19.”);²⁰ Person E, Lemercier C, Royer A, Reychler G., “Effect of a surgical mask on six minute walking distance,” *Rev Mal Respir.* 2018 Mar; 35(3):264-268 doi: 10.1016/j.rmr.2017.01.010. Epub 2018 Feb 1. PMID: 29395560 (wearing a face mask while walking significantly increases dyspnea);²¹ Jefferson, T., Jones, MA, Al-Ansary, L., et al., Physical interventions to interrupt or reduce the spread of respiratory viruses. Part 1 - Face masks, eye protection and person distancing: systematic review and meta-analysis, medRxiv 2020.03.30.20047217; doi:<https://doi.org/10.1101/2020.03.30.20047217> (“There was insufficient evidence to provide a recommendation on the use of facial barriers without other measures.”);²² Klompas, M., Morris, C. A., Sinclair, J., et al., Universal Masking in Hospitals in the Covid-19 Era, *N Engl J Med* 2020; 382:e63, DOI: 10.1056/NEJMp2006372 (“We know that wearing a mask outside health care facilities offers little, if any, protection from infection. . . . In many cases, the desire for widespread masking is a reflexive reaction to anxiety over the

¹⁸ <https://pubmed.ncbi.nlm.nih.gov/31159777/>

¹⁹ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4420971/>

²⁰ <https://www.medrxiv.org/content/10.1101/2020.04.01.20049528v1>

²¹ <https://pubmed.ncbi.nlm.nih.gov/29395560/>

²² <https://www.medrxiv.org/content/10.1101/2020.03.30.20047217v2>

pandemic.”);²³ Radonovich LJ, Simberkoff MS, Bessesen MT, et al. N95 Respirators vs Medical Masks for Preventing Influenza Among Health Care Personnel: A Randomized Clinical Trial. *JAMA*. 2019;322(9):824–833. doi:10.1001/jama.2019.11645 (concluding, among outpatient health care personnel, N95 respirators vs. medical masks resulted in no significant difference in the incidence of laboratory-confirmed influenza);²⁴ Bin-Reza, Faisal et al. “The use of masks and respirators to prevent transmission of influenza: a systematic review of the scientific evidence.” *Influenza and other respiratory viruses* vol. 6,4 (2012): 257-67. doi:10.1111/j.1750-2659.2011.00307.x (“[T]here is a limited evidence base to support the use of masks and/or respirators in healthcare or community settings.”);²⁵ Jacobs JL, Ohde S, Takahashi O, Tokuda Y, Omata F, Fukui T. Use of surgical face masks to reduce the incidence of the common cold among health care workers in Japan: a randomized controlled trial. *Am J Infect Control*. 2009 Jun;37(5):417-419. doi: 10.1016/j.ajic.2008.11.002. Epub 2009 Feb 12. PMID: 19216002 (face mask use in health care workers has not been demonstrated to provide benefit in terms of cold symptoms or getting colds);²⁶ Vittoria Offeddu, Chee Fu Yung, Mabel Sheau Fong Low, Clarence C Tam, Effectiveness of Masks and Respirators Against Respiratory Infections in Healthcare Workers: A Systematic Review and Meta-Analysis, *Clinical Infectious Diseases*, Volume 65, Issue 11, 1 December 2017, Pages 1934–1942, <https://doi.org/10.1093/cid/cix681> (“Our analysis confirms the effectiveness of medical masks and respirators against SARS. Disposable, cotton, or paper masks are not recommended. . . . [S]ingle-use medical masks are preferable to cloth masks, for which there is no evidence of protection and which might facilitate

²³ <https://www.nejm.org/doi/full/10.1056/NEJMp2006372>

²⁴ <https://jamanetwork.com/journals/jama/fullarticle/2749214>

²⁵ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5779801/>

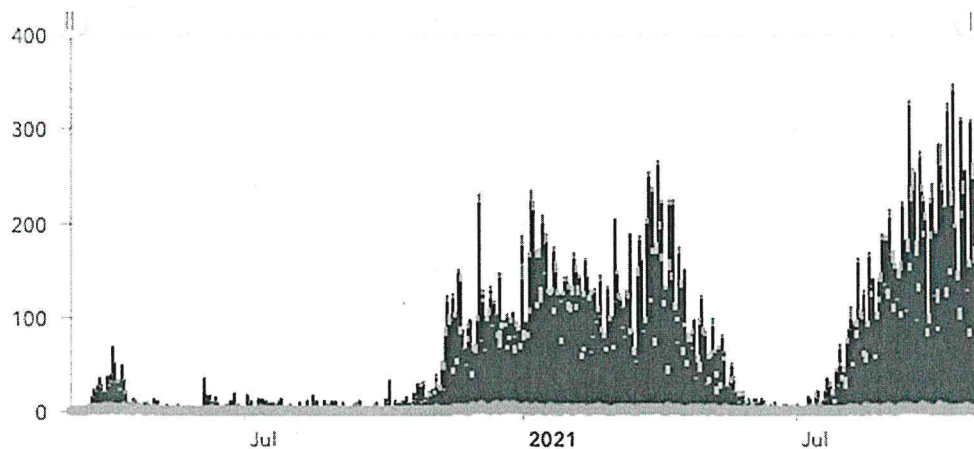
²⁶ <https://pubmed.ncbi.nlm.nih.gov/19216002/>

transmission of pathogens when used repeatedly without adequate sterilization.”);²⁷ Xiao J, Shiu E, Gao H, Wong JY, Fong MW, Ryu S, et al. Nonpharmaceutical Measures for Pandemic Influenza in Nonhealthcare Settings—Personal Protective and Environmental Measures. *Emerg Infect Dis.* 2020;26(5):967-975. <https://doi.org/10.3201/eid2605.190994> (concerning disposable medical masks or surgical masks, “[t]here is limited evidence for their effectiveness in preventing influenza virus transmission either when worn by the infected person for source control or when worn by uninfected persons to reduce exposure. Our systematic review found no significant effect of face masks on transmission of laboratory-confirmed influenza”).²⁸

64. Face masks do not prevent the spread of COVID-19, and wearing them does more harm than good.

65. Indeed, Vermont’s state-wide mask mandate did *nothing* to curb the spread of COVID-19 cases in the state, as the number of cases spiked in the fall of 2020 after the mandate went into effect in April 2020:

Vermont COVID-19 New Confirmed Cases , Probable Cases, and Deaths



²⁷ <https://academic.oup.com/cid/article/65/11/1934/4068747>

²⁸ https://wwwnc.cdc.gov/eid/article/26/5/19-0994_article

66. A report updated and released weekly by the American Pediatric Academy and the Children’s Hospital Association that tracks COVID-19 statistics in children demonstrates state-wide mask mandates had no effect on the number of cases in those states.²⁹ It shows cumulative cases per 100,000 children state by state (over the last 18 months). The distribution of higher and lower rates of cases does not correlate with the mask mandates in those states. States that held school mostly online last year, states that had in person school with mask mandates, and states that had school without mandates are scattered fairly evenly across the list.

G. The Impact of the These Face Mask Mandates on Plaintiffs’ Members’ Children

67. As noted above, Plaintiffs have members who have children who attend school in Vermont public schools and in the Supervisory Unions named as Defendants in this lawsuit and, thus, are required to wear masks while attending school.

68. The United States Food and Drug Administration, in its Emergency Use Authorization for surgical masks, defined a “surgical mask” as “a mask that covers the user’s nose and mouth and provides a physical barrier to fluids and particulate materials,” noting it is “regulated by [the] FDA as [a] Class II device[] under 21 CFR 878.4040 – Surgical apparel.” The latter statute identifies “surgical apparel” as “devices that are intended to be worn by operating room personnel during surgical procedures to protect both the surgical patient and the operating room personnel from transfer of microorganisms, body fluids, and particulate material. Examples include surgical caps, hoods, masks, gowns, operating room shoes and shoe covers, and isolation masks and gowns.” 21 CFR 878.4040(a).

²⁹ <https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/children-and-covid-19-state-level-data-report/>

69. 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.

70. The Defendant's mask mandate prevents the parents in this lawsuit from directing the care and upbringing of their children. The mandate prevents parents from making healthcare decisions concerning their children. Requiring a child to wear a mask – particularly as a tool to capture respiratory droplets in order to curb the spread of a virus – is a form of medical intervention and treatment that should be decided by the child's parents, not a school or school official with absolutely no training or expertise in the medical field.

71. Face masks were designed to work 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.

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

73. 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.

74. 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.

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

76. NCSU has enforced its mask mandate by isolating children who will not wear masks from their classmates and barring those children from the school.

77. 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 a 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.

78. Plaintiffs – through their members – have repeatedly communicated their concerns and these issues to NCSU, but it has refused to end the face mask mandates.

H. The Plaintiff Parents' Fundamental Right to Direct the Care and Upbringing of their Children, Including the Right to Make Medical Decisions for Them

79. Parents have a fundamental right to direct the care and upbringing of their children.

80. The Vermont Constitution states no person can “be justly deprived of liberty, except by the laws of the land, or the judgment of the person’s peers.” Part 1, Art. 10, Vt. Const. “[T]he term ‘laws of the land’ in Article 10 is synonymous with the term ‘due process of law.’” *Parker v. Gorczyk*, 170 Vt. 263, 272 (1999). This clause protects citizens from the arbitrary and unreasonable exercise of governmental power.

81. The Vermont Supreme Court has held “[t]he right to care for one’s children is a fundamental liberty interest that has long been protected by both the United States Supreme

Court and this Court.” *Boisvert v. Harrington*, 173 Vt. 285, 295 (2002) (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)); *see also Paquette v. Paquette*, 146 Vt. 83, 92 (1985) (“[T]he liberty interest of parents and children to relate to one another in the context of the family, free from governmental interference, are fundamental rights protected by the due process clause of the Fourteenth Amendment to the United States Constitution.”)

82. Courts elsewhere have agreed with this principle: The Supreme Judicial Court of Massachusetts has held “parents possess a fundamental liberty interest, protected by the Fourteenth Amendment, to be free from unnecessary governmental intrusion in the rearing of their children.” *Curtis v. School Cmte. of Falmouth*, 420 Mass. 749, 755 (1995); *see also In the Matter of McCauley*, 409 Mass. 134, 136 (1991) (“Courts have recognized that the relationship between parents and their children is constitutionally protected, and, therefore, that the private realm of family life must be protected from unwarranted State interference.”).

83. “Parents and children have a well-elaborated constitutional right to live together without governmental interference.” *Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 1999). “That right is an essential liberty interest protected by the Fourteenth Amendment.” *Id.*; *see also id.* at 1138 n.8 (“The claims of the parents in this regard should properly be assessed under the Fourteenth Amendment standard for interference with the right to family association.”).

84. “The right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state.” *Wallis*, 202 F.3d at 1141; *Thomas v. Kaven*, 765 F.3d 1183, 1194-95 (10th Cir. 2014) (“The Fourteenth Amendment protects the right of parents to make decisions ‘concerning the care, custody, and control of their children.’” (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000)); *PJ v. Wagner*, 603 F.3d 1182, 1197 (10th Cir. 2010) (“[T]he

Due Process Clause provides some level of protection for parents' decisions regarding their children's medical care."); *Kanuszewski v. Shah*, 18-cv-10472, at *1 (E.D. Mich. July 29, 2021) ("The Sixth Circuit held that parents have a fundamental right to direct their children's medical decisions."); *Panzardi v. Jensen*, 13-CV-4441 (MKB), at *4 (E.D.N.Y. Feb. 18, 2015) ("Parents have a 'constitutionally protected liberty interest in the care, custody and management of their children.' This liberty interest includes the right to direct medical care for their child.") (quoting *Southerland v. City of New York*, 680 F.3d 127, 142 (2d Cir. 2011)); see also *Emrikv. Chemung Cray. Dep't of Social Servs.*, 911 F.2d 863, 867 (2d Cir. 1990) ("[T]he constitutional liberty interest of parents . . . though not beyond limitation ... includes a significant decision-making role concerning medical procedures sought to be undertaken by state authority upon their children."); *Fla. Dep't of Children and Families v. F.L.*, 880 So.2d 602 (Fla. 2004) (recognizing that "[p]arents have a fundamental liberty interest, protected by both the Florida and federal constitutions, in determining the care and upbringing of their children").

85. Likewise, the Vermont Constitution states "all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." Part 1, Art. 1, Vt. Const.

I. R.D. has been Banished from School by NCSU for not Wearing a Mask:

86. R.D. is an elementary school student at the Lowell Graded School which is an elementary school within the Lowell School District which falls within the North Country Supervisory Union.

87. At the commencement of the 2021-2022 academic year, Desautels and Ladeau provided the Lowell Graded School with a doctor's note from a medical provider informing the Lowell Graded School that R.D. could not wear a face mask.

88. NCSU, through the Lowell School District and the Lowell Graded School, refused to provide R.D. with a medical exemption from the mask mandate despite being provided with a doctor's note from R.D.'s medical provider.

89. NCSU falsely claimed that its refusal to offer R.D. a medical exemption from the mask mandate was pursuant to guidance of the Vermont Agency of Education concerning mask mandates for local school districts.

90. The Agency of Education guidance, set out in its August 18, 2021 Memorandum, actually provided "Finally, locally-developed policies should provide appropriate exemptions for those students who cannot wear a mask, such as students with medical, behavioral or other challenges."

91. The August 28, 2021 Memorandum from the Agency of Education also referred to the Agency of Education's earlier guidance A Strong and Healthy Year revised April 8, 2021 which similarly provides "Students who have a medical or behavioral reason for not wearing a facial covering should not be required to wear one. These decisions should be made in partnership with the health care provider and school nurse. Guidance on Mask Exemptions in Children and Adolescents provides guidance for the rare conditions that allow children or adolescents to qualify for a mask exemption.." The Guidance on Masks Exemptions in Children and Adolescents referenced in the A Strong and Health Year guidance states "Because most children who meet mask exemption criteria for school attendance universally need IEPs to access

their education, we do not believe additional documentation from the medical home is necessary.”

92. NCSU persisted in its refusal to provide R.D. with a medical exemption from its mask mandate and isolated R.D. from the other students at the Lowell Graded School by requiring R.D. to spend the entire school day alone in a windowless room supervised only by a single school administrator.

93. NCSU ultimately barred R.D. from the Lowell Graded School building altogether which resulted in a *de facto* expulsion from school.

94. When Desautels and Ladeau attempted to leave R.D. at school without a mask, NCSU threatened to have Desautels and Ladeau arrested for trespassing and told Desautels and Ladeau that if they attempted to leave R.D. at the Lowell Graded School, NCSU would request that Vermont State Police place R.D. in emergency custody of the Vermont Department of Children and Families.

95. Desautels and Ladeau have been threatened with truancy action by the State of Vermont because R.D. is not attending the Lowell Graded School which has barred R.D. from the premises.

96. Ultimately, Desautels and Ladeau were forced to return R.D. to Lowell Graded School for in-person learning while wearing a mask, despite the extreme harm visited on R.D. from mask wearing, as a result of the harm to R.D. from being isolated from her peers and denied an education caused by NSCU’s mask mandate.

97. The actions of NSCU have caused emotional pain and suffering and loss of enjoyment of life to Desautels and Ladeau.

98. R.D. has suffered injury to her educational interests, emotional pain and suffering and loss of enjoyment of life as a result of the actions of NCSU.

CLAIMS

COUNT I

(Declaratory Judgment)

(NCSU Lacks the Authority to Issue Face Mask Mandate)

99. Plaintiffs repeat and incorporate by reference the allegations of the paragraphs above as if fully stated herein.

100. There is a genuine and bona fide dispute and an actual controversy and disagreement between Plaintiffs and NCSU regarding whether NCSU has the authority to issue face mask mandates.

101. NCSU lacks the authority to issue mask mandates 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 resides exclusively with the Department of Health.

102. Pursuant to the 12 V.S.A. § 4711, Plaintiffs request, in good faith, that this Court declare that the Supervisory Unions lacked the authority to issue face mask mandates, and, therefore, the mandates, including any extension or implementation of their requirements for the remainder of this school year and future school years, are void.

COUNT II

(Declaratory Judgment)

(NCSU's Face Mask Mandate is Preempted)

103. Plaintiffs repeat and incorporate by reference the allegations of the paragraphs above as if fully stated herein.

104. There is a genuine and bona fide dispute and an actual controversy and disagreement between Plaintiffs and NCSU regarding whether NCSU's face mask mandate is preempted by controlling authority vested exclusively in the Vermont Department of Health.

105. As explained above, a municipal law or rule that conflicts with state law is preempted.

106. The mandates at issue conflict with the Department of Health's comprehensive statutory and regulatory scheme concerning communicable diseases: they require students to wear face masks in school, but there is currently no state-wide or local health order that requires masks.

107. Pursuant to the 12 V.S.A. § 4711, Plaintiffs request, in good faith, that this Court declare that mandates are null and void because the Department's statutory and regulatory scheme concerning communicable diseases preempts them.

COUNT III

(Violation of Due Process – Parents' Fundamental Right to Care for their Children, Part 1, Art. 10, Vt. Const.)

108. Plaintiffs repeat and incorporate by reference the allegations of the paragraphs above as if fully stated herein.

109. Plaintiffs' members have a fundamental right to care for their children, and that includes the right to make medical and healthcare decisions for them. Part 1, Art. 10, Vt. Const.

110. The mask mandates infringe on this fundamental right.

111. The mandates do not serve a compelling government interest because there is no state of emergency; COVID-19 does not pose any 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.

112. Even if there was a compelling interest, the mask mandates here are not narrowly tailored to achieve that end because they apply to all students and contain no exceptions or exemptions, and any compelling interest can be accomplished by other means.

113. The mask mandates are also not rationally related to a legitimate government purpose because, as demonstrated above, there is no evidence masks have curbed the spread of COVID-19.

114. Defendants acted without regard for – and completely ignored – parents’ fundamental right in the care, upbringing, and education of their children, including the right to make healthcare and medical decisions for their children, and have placed children’s respiratory and physical health at risk and prevented them from attending school.

115. Accordingly, the mandates violate their rights under the Vermont Constitution.

COUNT IV
(Injunctive Relief – Face Mask Mandate)

116. Plaintiffs repeat and incorporate by reference the allegations of the paragraphs above as if fully stated herein.

117. Plaintiffs will likely succeed on the merits because the Defendants lacked the authority to issue mask mandates; the Department’s statutory and regulatory scheme preempts them; and the mandates violate parents’ Constitutional rights.

118. As a result of these requirements, parents and their children will continue to suffer irreparable harm.

119. Plaintiffs have no adequate remedy at law to redress the harm threatened by the continuation of these requirements.

120. The public interest favors the protection of children.

121. Plaintiffs is, therefore, entitled to an injunction prohibiting Defendants from enforcing and continuing their mask mandates.

COUNT V
(Injunctive Relief – R.D.)

122. Plaintiffs repeat and incorporate by reference the allegations of the paragraphs above as if fully stated herein.

123. NCSU has denied R.D. access to the school building at the Lowell Graded School which has resulted in a de facto expulsion of R.D. from the Lowell Graded School based on NCSU's mask mandate.

124. NCSU, for the reasons set out above, lacks authority to adopt and enforce a mask mandate against R.D.

125. R.D. suffers and will continue to suffer irreparable harm from being expelled from school by NCSU.

126. Plaintiffs are overwhelmingly likely to prevail on their claims against NCSU.

127. R.D. is entitled to a permanent injunction enjoining NCSU from barring R.D. from the Lowell Graded School building.

COUNT VI
(Intentional Infliction of Emotional Distress - Desautels, Ladue and R.D.)

128. Plaintiffs repeat and incorporate by reference the allegations of the paragraphs above as if fully stated herein.

129. NCSU acted intentionally to impose a mask mandate on school children within its supervisory union.

130. NCSU knew that mandating school children to wear face masks would not materially inhibit the transmission of COVID-19 to non-infected individuals or materially prevent non-infected individuals from becoming infected with COVID-19.

131. NCSU knew that mandating school children to wear face masks would cause emotional, developmental and educational harm to the school children subject to NCSU's mask mandate.

132. NCSU knew that R.D. had obtained the opinion from a medical provider that it would be harmful to R.D. to wear a face mask.

133. NCSU intentionally denied R.D. an exemption from being required to wear a face mask at the Lowell Graded School.

134. NCSU refused to allow R.D. to attend school unless R.D. wore a mask despite knowing that requiring R.D. to wear a mask would have no impact on the spread of COVID-19, would cause harm to R.D. and was contrary to the medical advice provided to R.D. by a medical provider.

135. NCSU's intentional conduct in requiring R.D. to wear a face mask to attend school was extreme and outrageous.

136. R.D., Desautels and Ladue have suffered extreme emotional distress as the proximate result of NCSU's actions described above.

137. NCSU is liable to R.D., Desautels and Ladue for intentional infliction of emotional distress.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:


- A. Declare Defendant's mask mandate to null and void because Defendant lacked the authority to issue it;
- B. Declare Defendant's mask mandate to be null and void because the Department of Health's statutory and regulatory scheme preempts the mandate;
- C. Declare Defendant's mask mandate to null and void because it violate parents' right to due process because they violate their right to care for their children;
- D. Enjoin the enforcement of Defendant's mask mandates;
- E. Enter judgment in favor of Plaintiffs on all counts;
- F. Award Plaintiffs R.D., Desautels and Ladue compensatory damages for their pain and suffering and loss of enjoyment of life.
- G. Award Plaintiffs their attorney's fees and costs; and
- H. Award such other relief as is just and equitable.

Respectfully submitted,

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

By Their Attorneys,

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Dated: February 17, 2022

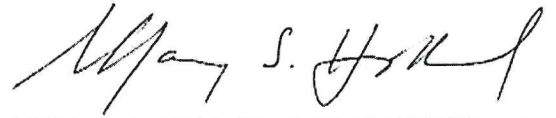
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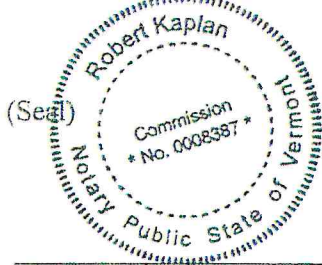
VERIFICATION

I, Jennifer Stella of Health Choice Vermont, Inc., certify that the foregoing facts are true and correct to the best of my knowledge and belief.

Jennifer Stella
Jennifer Stella

STATE OF VERMONT
COUNTY OF CHITTENDEN

The foregoing instrument was acknowledged before me this 17th day of February, 2022 by Jennifer Stella who acknowledged the same to be her free act and deed.



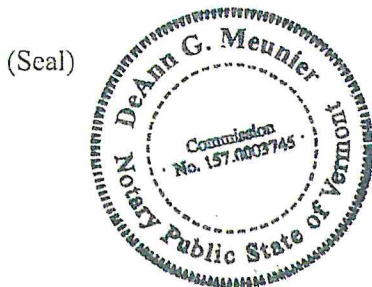
[Signature]
Signature of Notary Public
My Commission Expires: 1/31/2023

I, Michael Desautels, certify that the foregoing facts are true and correct to the best of my knowledge and belief.

Michael Desautels
Michael Desautels

STATE OF VERMONT
COUNTY OF ~~CHITTENDEN~~
Orleans

The foregoing instrument was acknowledged before me this 17th day of February, 2022 by Michael Desautels who acknowledged the same to be his free act and deed.



[Signature]
Signature of Notary Public
My Commission Expires: 1/31/2023