

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

CHESTER MOONEY, SHANNAN  
POZZI, and KEVIN RUBIO,

Petitioners,

v.

STATE OF OREGON, acting by and  
through the OREGON HEALTH  
AUTHORITY; KATE BROWN, in her  
official capacity as Governor of Oregon  
and as Chief Executive of the Oregon  
Health Authority;

Respondents.

Court of Appeals No.: A174300

EMERGENCY MOTION UNDER  
ORAP 7.35

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**PETITIONERS' EMERGENCY MOTION TO STAY ENFORCEMENT OF  
RULE PENDING REVIEW (ORAP 7.35)**

Petitioners request that the court grant a temporary stay of: OHA 2288K the “Statewide Mask, Face Shield, Face Covering Guidance” (attached as Exhibit A), and the connected New “Statewide Indoor and Outdoor Rule” (attached as Exhibit B) which was declared effective July 15, 2020 (collectively the “Rule”). We request the court stay these actions, which are legally “rules” as defined in ORS 183.310(9), until 21 days from this motion or August 12, 2020, pending a response from the State, a reply from Petitioners and a decision by this court. The Petitioners have filed

Page 1

EMERGENCY MOTION UNDER ORAP 7.35

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an emergency motion because Petitioners, along with nearly every other Oregonian will be forced to comply with an illegally adopted rule, which violates state law, the Oregon Constitution and the United States Constitution.

## **BACKGROUND**

On June 30, 2020 the Director of the Oregon Health Authority (OHA) issued what he deemed a “Guidance” which is otherwise known as the “Statewide Mask, Face Shield, Face Covering Guidance” labeled OHA 2288K. Exhibit A. The Director did not comply with the legal requirements of ORS Chapter 183 in any form or fashion. OHA has refused to withdraw or stay the Rule pending this appeal.

In a similar way, on July 13<sup>th</sup>, the Governor gave a speech proclaiming a new “rule” requiring face coverings indoor and outdoor as well as banning private gatherings of more than 10 people (the “Indoor/Outdoor Edict”). Yet the new unwritten edict, is apparently published nowhere other than on the OHA website as seen in Exhibit B, also did not follow ORS Chapter 183 and yet remains apparently unpublished so will be treated as part of OHA 2288K for purposes of this appeal.<sup>1</sup> In fact, there was no rulemaking process followed by OHA for either OHA 2288K, nor the newer unpublished Indoor/Outdoor edict. OHA 2288K and the mask

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<sup>1</sup> If in fact the new Indoor/Outdoor edict is or becomes a separate rule, Petitioners challenge that rule as well as the constitutionality of these ‘guidances’ under the Oregon APA (ORS Chapter 183) as they are capable of repetition yet evading review.

guidance are rules under Oregon law and agencies must follow rulemaking procedures. Even as of July 22, the day of this emergency motion, the Governor has stated that OHA will be issuing more, or revised, or further guidance relating to this same Rule. The Rule qualifies as a rule by definition of ORS 183.310(9). However, OHA is not following the law.

Among other things, ORS Chapter 183 requires: 1) notice of the proposed rule (ORS 183.335); 2) Publication of the rule in the Bulletin ORS 183.335(1)(b); 3) 21 days advance notice of the rule to allow public input or objection; 4) a fiscal impact statement of rule; a citation of the statutory or other legal authority relied upon and bearing upon the promulgation of the rule; 5) citation of the statute or other law the rule is intended to implement; 6) a statement of the need for the rule and a statement of how the rule is intended to meet the need. (ORS 183.335(2)). In creating OHA 2288K and the 10 person Indoor/Outdoor mask rule, the Director of OHA did not follow these legal requirements.

Petitioners' counsel conferred with DOJ attorneys on July 22, 2020 and OHA would not agree to withdraw or stay the Rule.

### **POINTS AND AUTHORITIES**

The legal standard for the Court of Appeals granting a stay is similar to that of a preliminary injunction. Pursuant to ORS 19.350(5), the court will normally consider:

Page 3

- (a) the likelihood of the appellant prevailing on appeal;
- (b) whether the appeal is taken in good faith and not for the purpose of delay;
- (c) whether there is any support in fact or in law for the appeal; and
- (d) the nature of the harm to the appellant, to other parties, to other persons and to the public that will likely result from the grant or denial of a stay.

***(A) The Petitioners have a high likelihood of prevailing on appeal.***

**I. The Rule is invalid because it fails to comply with ORS 183.335**

Petitioners are highly likely to prevail on appeal because the Director of OHA must follow state law on rulemaking. The Director has no authority to waive or violate state statutes. ORS Chapter 183 contains the state statutes and legal requirements that an agency must follow when creating new administrative rules. Specifically, ORS 183.335 covers the statutory process for rulemaking and establishes the various procedures an agency must comply with for a rule to be enforceable and valid. Neither the Director of the OHA, nor the agency itself, can waive or violate state statutes. Article I, Section 22 of the Oregon Constitution dictates that the provisions of statutes cannot be suspended by anyone but the legislature. Yet the Agency has created OHA 2288K without following ORS 183.335(1)(2) or (3). It is true that ORS 401.168 gives the Governor some authority to waive some agency rules or orders when in a state of emergency, but it does not give the Director the ability to waive or ignore statutes, nor ignore the requirements

Page 4

of the Constitutions, thus the Governor clearly cannot delegate such power either. ORS 183.335 is clearly a statute, it not discretionary, its thus its terms are mandatory. Furthermore, the Governor cannot suspend state statutes. Or. Const. Art. 1, Section 22.

OHA 2288K is identified by the Director as “guidance” whereas the new Indoor/Outdoor edict is advertised as a rule, however both fall under the legal definition of a “rule”.

183.310 Definitions for chapter. As used in this chapter: ...

(9) “Rule” means any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include: ... (e) Executive orders of the Governor.

Notably, neither OHA 2288K, or the Indoor/Outdoor edict, is or even pretends to be an executive order nor did the Governor issue them<sup>2</sup>, and thus it falls squarely within ORS 183.310.

## II. The rule is invalid because it violates the Constitution(s)

The Oregon Legislature, by statute, gave the Governor certain powers during an emergency. Those powers are limited and constrained by the scope of the authority given by the legislature. The legislature did not give the Governor the

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<sup>2</sup> The Rule does not purport to be one of the Governor’s Executive Orders between 20-3 and 20-31 at the time of this writing. Notably executive orders also cannot violate Article 1, Section 22 of the Oregon Constitution.  
Page 5

ability to repeal laws, amend laws, nor to violate the Oregon or U.S. Constitutions. Specifically on point is the constitutional mandate that laws cannot be suspended. Or. Const. Art. 1, Section 22. ORS 401.168 may give the Governor the ability to suspend the provisions or rules or orders, but it does not, and cannot, give her or the OHA Director the authority to waive, ignore, amend or repeal state statutes, nor the Constitution of the State of Oregon or the United States.

**(a) The Constitution and state law prohibit OHA from rulemaking outside the procedures mandated by state law.**

The Oregon Constitution is based upon the principles of separation of powers. In its simplest form, the separation of powers doctrine provides that each branch of government is confined to exercising those powers within its particular sphere, and any attempt by one branch to exercise a power properly belonging to another branch violates the separation of powers. Here, the legislature has established ORS Chapter 183, and specifically ORS 183.355 governing agency rulemaking. The agency cannot simply ignore the requirements put upon it by state law. Article III, § 1 of the Oregon Constitution provides that “[t]he powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided.” As a result, the constitutional separation of powers

Page 6

in Oregon mandates that the Legislative branch be entrusted with policy decisions, while the Executive branch's responsibility is in implementing and enforcing the policies enacted.

In Oregon, there are “two inquiries to determine whether there is a separation of powers violation.” *Rooney v. Kulongoski (Elections Division # 13)*, 322 Or 15, 28, 902 P2d 1143 (1995). The first is whether one branch of government has unduly burdened the action of another “in an area of responsibility or authority committed to that other department.” *Rooney*, 322 Or at 28; *State ex rel. Dewberry v. Kitzhaber*, 259 Or App 389, 408 (2015). The second is whether one branch is “performing the functions committed to” another branch. *Rooney*, 322 Or at 28.

In conducting those inquiries, courts must bear in mind that the “roles that governmental actors are asked to play not infrequently interact in material ways” and that “the separation of powers does not require or intend an absolute separation” between the branches of government. *Id.* Yet, as here, OHA is acting outside their power and engaging in a clear legislative act because they ignore ORS Chapter 183 (the APA) and the lack of an authorizing statute by the state Legislature. This is improper and specifically prohibited by the Constitution. *See State v. Davilla*, 234 Or App 637, 645 (2010) (“Three provisions of the Oregon Constitution, taken together, prohibit the delegation of legislative power to make laws.”).

First, Article I, § 21, provides, among other things, that no law shall “be

Page 7

passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution.”<sup>3</sup> Second, Article III, § 1, provides that the “no person charged with official duties under one of these [three separate] branches, shall exercise any of the functions of another.” And, third, Article IV, § 1(1), provides that the “legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.” *See generally, City of Damascus v. Brown*, 266 Or App 416, 440, 337 P3d 1019 (2014).

Neither the Executive nor OHA possesses the authority to amend, delete, ignore, or in any way violate the legislative requirement that OHA follow the law when making rules. A rule adopted outside an agency’s authority is invalid. *Oregon Newspaper Publishers Ass’n. v. Peterson*, 244 Or 116, 123–124, 415 P2d 21 (1966). This is simply because the citizens of Oregon, by adopting the state constitution, granted the Legislative branch the power to legislate; therefore, the power to enact legislation “is not by implication to be delegated to nonelective officers.” *Peterson*, 244 Or at 124. Moreover, the tendency of administrative action to expand beyond

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<sup>3</sup> To the extent OHA or the State argues it has authority via the Governor to violate the law under either of the emergency powers statutes, those statutes themselves are unconstitutional to the extent they violate Article 1, Section 22 by purporting to suspend a law. Further, facemask Rule at issue here does not cite any Executive Order of the Governor, or nor has the Governor listed any of the relevant laws or rules as one’s she has claimed to waive under her emergency powers.

Page 8



the scope of any delegable authority is “perhaps as natural as nature's well-known abhorrence of a vacuum.” *Peterson*, 244 Or 116, 124. If such an undelegated expansion is determined, the result is, of course, a violation of the delegation of powers articulated in the Constitution.

Branches of government can only act within the parameters specifically granted to them by the Constitution. *Board of Comm's of Clackamas County v. Dep' of Land Conservation and Development*, 35 Or App 725, 582 P2d 59 (1978) (holding that Agencies are creatures of the government; their authority goes only as far as their enabling acts provide). To that end, if OHA wants to use its authority to pass a rule, whether that comes in the form of a guidance, statewide rule, directive or other mandate, it must do so in conformity with ORS Chapter 183 *et seq.*

The legislative branch is given the legislative authority, the Governor is given executive authority, and the two are separate. Or Const. Art. III §1 and IV § 1. The legislature has exercised its authority and enacted state statutes which control and govern OHA's rulemaking. Any statute, rule or other police power that is subordinate to the constitution that purports to give legislative authority to the Governor or an administrative agency is invalid. *Board of Com'rs of Clackamas County*, 35 Or App 725 (1978); *see, e.g.* ORS 401.168(1) (purporting to give the Governor during a state of emergency “all police powers vested in the state by the Oregon Constitution”). Likewise, the unlawful exercise of authority by an

Page 9

administrative agency is void ab initio and invalid. *Or. Soc'y of Enrolled Agents v. State*, 283 Or. App. 558, 389 P.3d 1153 (2017). Thus, the legislature did not give, and could not give, the OHA nor any administrative agency, legislative power to simply ignore state laws that govern rulemaking. It follows that the Director of OHA had to follow state statutes when creating any new rules such as OHA 2288K, and it didn't.

Article 1, section 22 of the Oregon Constitution relates to the suspension of operation of laws, dictating, "The operation of the laws shall never be suspended, except by the Authority of the Legislative Assembly." Accordingly, the legislature did not, and could not, amend the Oregon Constitution, nor suspend Constitutional rights during a period of alleged "emergency," by enacting any of the provision of ORS Chapter 401. It is a fortiori that is because Constitutional rights supersede any power that either the legislature holds or that the Chief Executive may be given pursuant to a statute<sup>4</sup>. For this reason, both the Governor and OHA must follow the Constitution. Neither the Governor nor the Director of the OHA is authorized to change or illegally deprive anyone of any Constitutional rights during the period of alleged "emergency".

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<sup>4</sup> It is worth noting that the Governor has not invoked the powers given to a governor under Article X-A of the Oregon Constitution, so all of her actions are being done, at best, under statutory authority.

Further, the Legislative branch, and not the Executive, is in the best position to weigh the concerns of affected people, businesses, and the general public, and an Executive, and by extension an administrative agency may not, without any legislative guidance, reach its own conclusions about the proper accommodation among those competing interests. The Governor may have some limited power to waive rules and waive orders during an emergency, but OHA cannot do so, and the Governor also cannot delegate legislative authority to an agency.

**(b) OHA 2288K violates Petitioners free speech rights.**

Article I, § 8, of the Oregon Constitution states: “[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever...” The Oregon constitutional standard provides that all expression is equal and equally protected. *Bank of Oregon v. Indep. News, Inc.*, 298 Or 434, 439–40, 693 P2d 35 (1985), meaning that, with very few and limited exceptions, all speech and expressive conduct are constitutionally protected. *Moser v. Frohnmayer*, 112 Or App 226, 829 P2d 84 (1992); *City of Eugene v. Powlowski*, 116 Or App 186, 840 P2d 1322 (1992). Such protections are guaranteed whether the speech or expression is written, spoken, verbal, or nonverbal. *See, e.g., State v. Stoneman*, 323 Or 536, 920 P2d 535 (1996).

Here Petitioner’s right to refrain from talking about their medical conditions, and why they cannot or choose not to wear a mask, is clearly implicated and

Page 11

infringed by being compelled by the OHA 2288K rule requiring them to explain to strangers why they are not wearing a mask, and by Petitioners being forced to ask for an accommodation before they can have “full and equal access to services”. OHA 2288K p. 3. Likewise, Petitioners’ simple act of expressive conduct in intentionally refusing to comply with the controversial unilateral dictates of the Oregon Governor and the agencies that she commands, are thereby banned. Particularly when there is so much controversy and political discourse around the effectiveness, necessity of, and political nature of the facemasks<sup>5</sup>. Petitioner Mooney has had heart bypass

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<sup>5</sup> Sun Young Kyung et al., *Risks of N95 Face Mask Use in Subjects With COPD*, 65 Respiratory Care 658 (2020), <http://rc.rcjournal.com/content/65/5/658> (accessed July 14, 2020) (“Breathing frequency, blood oxygen levels, and exhaled carbon dioxide levels also showed significant differences before and after N95 use.”); Jonathan J. Y. Ong et al., *Headaches Associated with Personal Protective Equipment—A Cross-Sectional Study Among Frontline Healthcare Workers During COVID-19*, 60 Headache 864 (2020), <https://headachejournal.onlinelibrary.wiley.com/doi/epdf/10.1111/head.13811> (accessed July 14, 2020) (concluding that “[m]ost healthcare workers develop de novo PPE-associated headaches or exacerbation of their pre-existing headache disorders”); Jian Hua Zhu et al., *Effects of long-duration wearing of N95 respirator and surgical facemask: a pilot study*, 1 J of Lung, Pulmonary & Respiratory Research 97 (2014), <https://medcraveonline.com/JLPRR/JLPRR-01-00021.pdf> (accessed July 14, 2020) (“Long-duration wearing of N95 respirator may induce physiological stress on the wearer, making regular tasks more challenging, and causes headaches among healthcare providers.”); S. J. Fletcher et al., *Carbon dioxide re-breathing with close fitting face respirator masks*, 61 Anaesthesia 910 (2006), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1365-2044.2006.04767.x> (accessed July 14, 2020) (“In the event of an influenza pandemic, large numbers of healthcare workers may need to wear these respirators for prolonged periods and problems with hypercapnia might reduce the tolerability of these devices.”);

surgery and it is physically unsafe to wear a mask, yet he is compelled to wear a mask or else explain his medical history to store owners, store employees and others or else be denied entrance to places like grocery stores. Mooney Declaration ¶¶3,4. He has already been denied entrance to a grocery store. He has researched the matter as it relates to himself personally and refuses to endanger his own health by wearing

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Lim EC et al., *Headaches and the N95 face-mask amongst healthcare providers*, 113 *Acta Neurologica Scandinavica* 199 (2006), <https://europepmc.org/article/med/16441251> (last accessed July 14, 2020) (concluding that healthcare providers “may develop headaches following the use of the N95 face-mask. Shorter duration of face-mask wear may reduce the frequency and severity of these headaches”); Russell Blaylock, MD, *Face Masks Pose Serious Risks to the Healthy*, May 11, 2020, <https://www.technocracy.news/blaylock-face-masks-pose-serious-risks-to-the-healthy>; Lisa M. Brosseau & Margaret Sietsema, *Commentary: Masks-for-all for COVID-19 not based on sound data*, Apr 1, 2020, <https://www.cidrap.umn.edu/news-perspective/2020/04/commentary-masks-all-covid-19-not-based-sound-data>; Jim Meehan, MD, *The Pandemic of Bad Science and Public Health Misinformation on Community Wearing of Masks*, June 14, 2020 (an extensive discussion by a physician and former medical journal editor) (“Masks force you to re-breathe a portion of your own breath, including all the stuff (infectious viral particles) the lungs were trying to remove from the body (more on this later).”), <https://www.meehanmd.com/blog/2020-06-12-healthy-people-should-not-wear-face-masks.>; “Face masks are not needed in everyday life. The best way to protect oneself and others is to keep at a distance from other people and to maintain good hand hygiene.” Public Health Agency of Sweden, *What is your advice regarding face masks?* (Q&A). “Face masks in public spaces do not provide any greater protection to the population,” Johan Carlson, Swedish Public Health Agency, Press Conference (May 13, 2020). “The virus can gather in the mask and when you take it off, the virus can be transferred to your hands and thereby spread further.” Anders Tegnell, Swedish epidemiologist. *Id.*

a mask. OHA 2288K imposes an unconstitutional choice upon Mr. Mooney: either endanger his health or be compelled to tell everyone he encounters about his health issues and disclose private medical information.

Likewise, Petitioner Pozzi has a different kind of health issues, psychological trauma, that she is forced to disclose or else she is denied services, harassed and suffer re-injury every time she has to encounter someone in relation to the mask mandate in OHA 2288K. Pozzi Declaration ¶¶2-4. She too is compelled to re-live the crimes that were committed against her every time she has to wear mask, explain why she isn't wearing a mask by asking for an accommodation just so she can buy food, or face harassment and fear of the police being called to a store for not wearing a mask. *Id.* She has had to do that many times in just the last few weeks. *Id.* Petitioners Pozzi, Mooney and Rubio all share the same protest and opinion that they cannot be forced to wear a mask against their wishes, against their health interests and they choose to not wear a mask both as an expression of their protest against OHA 2288K and the mask mandate and because they all know that it physically harms them and other people in ways they cannot support or condone. Pozzi Declaration ¶ 5; Mooney Declaration ¶ 5; Rubio Declaration ¶¶ 3-5.

The First Amendment to the U.S. Constitution not only protects traditional forms of speech but also symbolic acts and expressive conduct, especially as a form of political protest. *See Texas v. Johnson*, 491 US 397, 109 S Ct 2533 (1989) (flag

Page 14

burning); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 US 503, 89 S Ct 733 (1969) (holding that high school students who were suspended for wearing armbands to protest the Vietnam War were entitled to protection under the First Amendment, in spite of school officials’ “undifferentiated fear or apprehension of disturbance”). Likewise, the U.S. Supreme Court has invalidated state-mandated expressive acts that conflict with the free exercise of religious liberty. *W. Va. State Bd. of Educ. v. Barnette*, 319 US 624, 63 S Ct 1178 (1943) (holding that students who were Jehovah’s Witnesses could not be compelled to salute the American flag). Whereas, on the other hand, the U.S. Supreme Court has explained that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *United States v. O’Brien*, 391 US 367, 376, 88 S Ct 1673 (1968). *Wooley v. Maynard*, 430 US 705, 97 S Ct 1428 (1977) (invalidating a “state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable”). Here, the protections afforded by mandating people wear a mask to show compliance with the Governor’s political policy, or to speak, interact about their necessity of an accommodation does not serve a sufficiently compelling governmental interest, that could not be fulfilled by letting them refrain from

Page 15

wearing a mask as a show of protest, any more than the State can mandate the wearing of the American Flag or deny the wearing of a protest armband, or mandate that everyone use a license plate that conveys a message they disagree with.

Indeed, as this court has stated, “[t]he sweeping protection of [the] clause extends to all forms of speech, regardless of the social acceptability or offensiveness of the content, *State v. Robertson*, 293 Or 402, 416 (1982), and regardless of the context of the communication.” *Merrick v. Board of Higher Education*, 116 Or App 258, 265, 841 P2d 646 (1992). Under the Oregon Constitution, commercial speech is afforded the same protection as noncommercial speech. *Northwest Advancement, Inc. v. State, Bureau of Labor, Wage and Hour Div.*, 96 Or App 133, 772 P2d 934 (1989); *Ackerley Communications, Inc. v. Mult. Co.*, 72 Or App 617, 696 P2d 1140 (1985). Here we have speech in both a non-commercial settings and commercial settings.

OHA 2288K requires the mask everywhere unless a person over 12<sup>6</sup> specifically “requests an accommodation”. Exhibit 1, p.3 (OHA 2288K page 3). The Rule thus requires communication, the disclosure of information in private or commercial settings, it specifically requires a person who wants to obtain any goods

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<sup>6</sup> As of July 22, 2020 the Governor announced that OHA may be changing this in the future to be all those of 5 years of age. This edit or change in the Rule by OHA is intended to be included in this appeal.  
Page 16



or services to request an accommodation or else they cannot legally be served. This compels speech and mandates the disclosure of private health information - essentially just to live.

With respect to the commercial speech requirement, the state may only limit commercial speech in certain circumstances. In *Cent. Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 US 557, 100 S Ct 2343 (1980) the U.S. Supreme Court established a four-part test for analyzing commercial speech regulations. Under the *Central Hudson* approach, a restriction upon commercial speech is valid if: (1) the regulation restricts communication that concerns lawful activity and is not misleading; (2) the asserted government interest is substantial; (3) the regulation directly advances the asserted government interest; and (4) the regulation is not more extensive than necessary to serve that interest. *Cent. Hudson Gas & Elec. Corp.*, 447 US 557, 566, 100 S Ct 2343, 2351. In *Lorillard*, the Court further narrowed the *Central Hudson* test saying that a state must demonstrate that the harms it recites are real, and that the restriction will materially alleviate them, rather than just speculate, or conjecture. *Lorillard v. Reilly*, 533 US 525, 555, 121 S Ct 2404 (2002). Thus, because the facemask Rule by its terms offers no constitutional relief against the compelled speech in these instances for Petitioners and everyone who must “request an accommodation”, the Rule violates the 1<sup>st</sup> Amendment to the U.S. Constitution and Article 1, Section 8 of the Oregon Constitution.

Page 17

***(B) This appeal is taken in good faith and not for the purpose of delay.***

Petitioners make this appeal as quickly as possible as the rules change on nearly a weekly basis. As noted above, OHA may be changing this Rule again this week. Petitioners are attempting to expedite the decision and not delay this matter. With that in mind, Petitioners seek a determination which would force the Authority to engage in the valid and constitutional rulemaking procedures found in ORS Chapter 183 and make accommodations to protect Oregonians free speech protections.

***(C) There is support in both fact and in law for the appeal.***

The appeal being made to this court is perfectly ripe and brought in the proper forum for an appeal of the material issues. ORS 183.400. Petitioners incorporate the arguments as to the merits of the appeal here for brevity but those same arguments go to the support in fact and law for the appeal.

***(D) The nature of the harm to the Petitioners, to other parties, to other persons and to the public that will likely result from the grant or denial of a stay.***

Petitioners' important constitutional rights are at stake. Their rights are being infringed and limited ostensibly under the motivation to protect others. However, the State, nor OHA can simply ignore the state statutes that apply to their rulemaking, nor the constitutional protections afforded to Oregonians. OHA has had nearly 5 months to issue rules properly pursuant to ORS Chapter 183, but has elected

not to do so. OHA can utilize its manpower and rulemaking authority to enact rules that accommodate protections for constitutional rights. Nothing Petitioners asks for will mandate that individuals or businesses not voluntarily wear masks. Petitioners simply demand that OHA and the State of Oregon follow the law and respect the separation of powers in any efforts the elect to employ in battling against the spread of COVID -19.

### **CONCLUSION**

Petitioners understand the ramifications of this request. Petitioners and those similarly situated are being harmed by OHA 2288K. The State will clearly argue that healthy individuals like Petitioners must wear a mask to assist in the Agency or Governor's chosen path to deal with COVID-19 in Oregon. However, the Statutory requirements and Constitutional provisions that govern OHA and the Governor cannot be so easily disposed of. Thus, as here, when circumstances so warrant, stay of a temporary administrative rule is necessary. If the court grants this stay, the court will simply force the OHA and State to follow the laws in any precautions and rules they employ as the State of Oregon moves forward in its ongoing battle against COVID -19. A stay will ensure the safety of individuals like Petitioners, who are being endangered by the rule itself, and will give the State the opportunity to follow the appropriate legal processes.

DATED this 22nd day of July, 2020

**Tyler Smith & Associates, P.C.**

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## **CERTIFICATE OF FILING AND SERVICE**

I certify that on the 22nd day of July, 2020, I caused a true copy of the EMERGENCY MOTION UNDER ORAP 7.35, the DECLARATION OF CHESTER MOONEY, the DECLARATION OF KEVIN RUBIO, the DECLARATION OF SHANNAN POZZI EXHIBITS A and B to be filed with the Appellate Court Administrator by electronic filing.

I further certify that on the 22nd day of July, 20220, I caused a true copy of the EMERGENCY MOTION UNDER ORAP 7.35 the DECLARATION OF CHESTER MOONEY, the DECLARATION OF KEVIN RUBIO, the DECLARATION OF SHANNAN POZZI and EXHIBITS A and B to be served on the following parties at the addresses set forth below:

Michael Casper  
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Of Attorneys for State of Oregon, and Oregon Health Authority

Service was made by eFiling and by e-mail

DATED this 22nd day of July, 2020

**Tyler Smith & Associates, P.C.**

/s/Tyler Smith  
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Page 21

EMERGENCY MOTION UNDER ORAP 7.35

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June 30, 2020

## Statewide Mask, Face Shield, Face Covering Guidance

**Applicability:** This guidance applies statewide to:

- All businesses, as defined below, **and** to the general public when visiting these businesses.
- The general public when visiting indoor spaces open to the public.

**Effective date:** July 1, 2020

**Requirements for other businesses and sectors:** There may be mask, face shield, and face covering requirements and recommendations that apply to other businesses or sectors not listed in this guidance. For a business or a sector that is not listed in this guidance, the other applicable [sector guidance](#) for mask, face shield, face covering requirements and recommendations should be reviewed.

**For purposes of this guidance the following definitions apply:**

- “Business” means:
  - Grocery stores
  - Fitness-related organizations
  - Pharmacies
  - Public transit agencies and providers
  - Personal services providers
  - Restaurants, bars, breweries, brewpubs, wineries, tasting room and distilleries
  - Retail stores, shopping centers and malls
  - Ride sharing services
  - Phase Two counties only:
    - » Indoor licensed swimming pool, licensed spa pool and sports court operators
    - » Indoor entertainment facility operators
    - » Indoor recreational sports operators for specified sports
    - » Indoor venue operators
- “Face covering” means a cloth, paper, or disposable face covering that covers the nose and the mouth.

- “Face shield” means a clear plastic shield that covers the forehead, extends below the chin, and wraps around the sides of the face.
- “Fitness-related organizations” include but are not limited to gyms, fitness centers, personal training, dance studios, and martial arts centers.
- “Indoor spaces open to the public” include indoor spaces, whether publicly owned or privately owned, where the public has access by right or invitation, express or implied, whether by payment of money or not. In addition to the public areas of the businesses defined above, such spaces may include, but are not limited to, building lobbies or common spaces, elevators, bathrooms, and buildings or meeting rooms outside of private homes where people gather for social, civic, cultural or religious purposes.
- “Mask” means a medical grade mask.
- “Personal services providers” means barber shops, hair salons, esthetician practices, medical spas, facial spas and day spas, non-medical massage therapy services, nail salons, tanning salons, and tattoo/piercing parlors.

## Businesses

### **A business and a person responsible for indoor spaces open to the public are required to:**

- Require employees, contractors, volunteers, customers and visitors to wear a mask, face shield, or face covering, except as follows:
  - Employees, contractors and volunteers: Masks, face coverings or face shields are not required when at or in a location where the employee, contractor or volunteer is not interacting with the public and six (6) or more feet of distance can be maintained between other people.
  - Masks, face shields or face coverings are not required while eating or drinking.
  - Customers and visitors: Masks, face shields or face coverings are not required when at a business or in an indoor space open to the public and engaged in an activity that makes wearing a mask, face shield or face covering not feasible, such as strenuous physical exercise, or performers singing or playing an instrument if at least six (6) feet of distance is maintained from others.
- Provide masks, face shields, or face coverings for employees.
- Provide for accommodations for employees, contractors, customers and visitors if such accommodations are required by:
  - State and federal disabilities laws if applicable, including the Americans with Disabilities Act (ADA) which protects people with disabilities from discrimination in employment and requires employers to engage in the interactive process for accommodations.
  - State or federal labor laws.
  - State and federal public accommodations laws that provide all persons with full and equal access to services, transportation, and facilities open to the public.
  - OHA public health guidance if applicable.
- Post clear [signs](#) about the mask, face shield, or face covering requirements.



**A business and a person responsible for indoor spaces open to the public should, but are not required to:**

- Provide, at no cost, at least disposable face coverings for customers and visitors who do not have one.
- Post signs about the mask, face shield, or face coverings requirement in languages that are commonly spoken by customers and visitors.
- Educate employees:
  - On how to safely work and communicate with people who cannot wear masks, face shield, or face coverings.
  - That they may need to remove a mask or face covering while communicating with an individual who needs to read lips or see facial expressions to communicate.

## **The Public**

**Customers and visitors of businesses and indoor spaces open to the public are required to:**

- Wear a mask, face shield, or face covering unless the individual is under 12 years of age, except as follows:
  - Masks, face shields or face coverings are not required while eating or drinking.
  - Masks, face shields or face coverings are not required when at a business or in an indoor space open to the public and engaged in an activity that makes wearing a mask, face shield or face covering not feasible, such as strenuous physical exercise, or performers singing or playing an instrument if at least six (6) feet of distance is maintained from others.

Individuals who have a medical condition that makes it hard to breathe or a disability that prevents the individual from wearing a mask, face shield or face covering can request an accommodation to enable full and equal access to services, transportation, and facilities open to the public.

**Customers and visitors of businesses and indoor spaces open to the public between the ages of 0 and 12 years old:**

- Children under the age of two (2) are not required to wear a mask, face shield, or face covering.
- It is strongly recommended that children between two (2) and 12 years of age, wear a mask, face shield, or face covering at all times in all indoor spaces open to the public, particularly in places where it is likely that physical distancing of at least six (6) feet from other individuals outside their household unit cannot be maintained, and where vulnerable people may go.
- Because children between the ages of two (2) and 12 years of age can have challenges wearing a mask, face shield, or face covering properly (e.g., excessively touching the face covering, not changing the face covering if visibly soiled, risk of strangulation or suffocation, etc.) we urge that if masks, face shields or face coverings are worn by this age group, that they be worn with the assistance and close supervision of an adult. Masks, face shields, or face coverings should never be worn by children when sleeping.

It is strongly recommended that everyone wear a mask, face shield or face covering in any setting where at least six (6) feet of physical distance from others outside of an individual's household, cannot be maintained.

## Additional Resources

- [OHA Guidance for the General Public](#)
- [OHA General Guidance for Employers](#)
- [OHA Sector-specific Guidance](#)
- [OHA Frequently Asked Questions for Statewide Mask, Face Shield, Face Covering Guidance](#)
- [Oregon OSHA COVID-19 Workplace Advisory Memo](#)
- [ADA and Face Mask Policies – Disability Issues Brief](#)

**Accessibility:** For individuals with disabilities or individuals who speak a language other than English, OHA can provide documents in alternate formats such as other languages, large print, braille or a format you prefer. Contact Mavel Morales at 1-844-882-7889, 711 TTY or [OHA.ADAModifications@dhsosha.state.or.us](mailto:OHA.ADAModifications@dhsosha.state.or.us).

# Oregon Health Authority | COVID-19 Updates

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 Public Health Indicators Dashboard



On March 8, 2020, [Gov. Kate Brown](#) declared a state of emergency to address the spread of COVID-19 in Oregon. The [Oregon Health Authority](#) (OHA) serves as the lead agency for the public health response. OHA is working with Gov. Brown and local public health officials to monitor and suppress COVID-19 infections and hospitalizations and reduce the health and economic impacts and disparities that have stemmed from the COVID-19 pandemic in Oregon.

For general information on COVID-19 in Oregon,  call 211 or visit [211info](#).

You can help stop COVID-19 from spreading. Wash your hands and cover your cough. Stay home if you are sick and avoid contact with people who are sick. If you are having a medical emergency, call 911.

 COVID-19 News

 Sign up for Updates

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 Governor's Website

 Frequently Asked Questions

 OHP Members


 Healthcare Partners

## Face Coverings Required Statewide


**Face coverings are currently required statewide for indoor public spaces** (for example, grocery stores, pharmacies, public transit, personal services providers, restaurants, bars, retail stores, and more).

**New Statewide Rule:** As of July 15, face coverings are also required in outdoor public spaces when physical distancing is not possible.

For children over the age of 2 and under the age of 12, it is recommended, but not required, that they wear a mask, face shield or face covering. People with a disability or medical condition may request accommodation from the business if they cannot wear a mask, face shield or face covering.

 Mask Guidance (all counties) ▼

 FAQs about Mask Guidance ▼

 Face Covering Facts ▼

 "Masks Required" Sign ▼

EXHIBIT B

As we face COVID-19 together, it's clear that we are strongest when we are in community, even from a distance. To help keep our communities safe and healthy, the [Safe + Strong website](#) provides updates, resources and information in multiple languages. With the right information,

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

CHESTER MOONEY, SHANNAN  
POZZI, and KEVIN RUBIO,

Petitioners,

v.

STATE OF OREGON, acting by and  
through the OREGON HEALTH  
AUTHORITY; KATE BROWN, in her  
official capacity as Governor of Oregon  
Chief Executive of the Oregon Health  
Authority; PATRICK ALLEN, in his  
official capacity as Director of the  
Oregon Health Authority,

Respondents.

Oregon Health Authority, Public  
Health Division

No. \_\_\_\_\_

CA A \_\_\_\_\_

**DECLARATION OF SHANNAN  
POZZI IN SUPPORT OF  
PETITION FOR JUDICIAL  
REVIEW**

1.

My name is Shannan Pozzi, I am over 18 years of age. I am a petitioner in this case, and a resident of Lane County, Oregon and a citizen of the United States. I am fully competent to make this Declaration and I have personal knowledge of the facts stated in this declaration. To the best of my knowledge, all of the facts stated in this declaration are true and accurate.

2.

DECLARATION OF SHANNAN POZZI IN  
SUPPORT OF PETITION FOR JUDICIAL

TYLER SMITH & ASSOCIATES, P.C.  
181 N. Grant St. STE 212, Canby, Oregon 97013  
503-266-5590; Fax 503-212-6392

I am a surviving victim of domestic abuse and attempted murder by suffocation. I have severe post-traumatic anxiety issues and other complications due to that event. I have spent many years trying to heal and recover from that attack and the traumatic experience and fears that event has caused. Due to the mask mandate and the fear of being smothered and suffocated again due to someone forcing me to wear a mask and other events related to the mandate from OHA 2288K and this statewide mask mandate I have had to start going to therapy again.

3.

I have been denied entrance to a stores to buy food and other goods due to the new Statewide Mask rule OHA 2288K. I was literally kicked out of a Subway, I have been followed and verbally assaulted and shouted at in a Bi-Mart. I now am triggered and feel the same traumatic fears when people tell me I have to put on a mask and start that suffocating feeling again.

4.

It is unhealthy for me to wear a mask, even thinking about being stifled and suffocated like that makes me start to sweat and have severe anxiety. I need to be able buy food and obtain services to eat, provide for myself and stay healthy. I do not want to have to re-live the attack and the domestic abuse every time I encounter someone asking me about why I don't want a mask on. I am not able to mentally

handle telling everyone I encounter about my past trauma and how wearing a mask and being forced and pressured into wearing a mask and depriving myself of oxygen harms me and re-triggers the violent events of my past. However, due to this mask mandate, many stores will not let me in, or confront me and the employees and other customers attack and berate me or even tell me I have to leave. I do not want to be compelled to explain my medical condition, answer questions about my health, nor ask anyone for permission or any kind of accommodation simply to walk around or go into a store. I should not be compelled to tell people about my medical conditions, nor even that I have medical conditions just to engage in commerce. However under OHA 2288 I am obligated to wear a mask or explain that I have a medical condition by asking for some kind of accommodation and engaging in a conversation about my conditions.

5.

I do not want to have to vocalize my protest against endangering myself and tell the store managers and police if they are called why I am not wearing a mask. But I don't wear a mask because of the past trauma and medical and psychological issues it creates for me. I have also seen evidence that it is simply unhealthy to deprive yourself of oxygen and suffocate yourself by wearing a fasemask.

6.

I hereby Declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED this 21st day of July, 2020.

By s/Shannon Pozzi  
Shannan Pozzi

I hereby Declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED this 21st day of July, 2020.

By Shannan Pozzi  
Shannan Pozzi

DECLARATION OF SHANNAN POZZI IN  
SUPPORT OF PETITION FOR JUDICIAL

TYLER SMITH & ASSOCIATES, P.C.  
181 N. Grant St. STE 212, Canby, Oregon 97013  
503-266-5590; Fax 503-212-6392



IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

CHESTER MOONEY, SHANNAN  
POZZI, and KEVIN RUBIO,

Petitioners,

v.

STATE OF OREGON, acting by and  
through the OREGON HEALTH  
AUTHORITY; KATE BROWN, in her  
official capacity as Governor of Oregon  
Chief Executive of the Oregon Health  
Authority; PATRICK ALLEN, in his  
official capacity as Director of the  
Oregon Health Authority,

Respondents.

Oregon Health Authority, Public  
Health Division

No. \_\_\_\_\_

CA A \_\_\_\_\_

**DECLARATION OF KEVIN  
RUBIO IN SUPPORT OF  
PETITION FOR JUDICIAL  
REVIEW**

1.

My name is Kevin Rubio, I am over 18 years of age. I am a petitioner in this case, and a resident of Lane County, Oregon and a citizen of the United States. I am fully competent to make this Declaration and I have personal knowledge of the facts stated in this declaration. To the best of my knowledge, all of the facts stated in this declaration are true and accurate.

2.

DECLARATION OF KEVIN RUBIO IN  
SUPPORT OF PETITION FOR JUDICIAL

TYLER SMITH & ASSOCIATES, P.C.  
181 N. Grant St. STE 212, Canby, Oregon 97013  
503-266-5590; Fax 503-212-6392

I have been expressing my political opinion that the governor is infringing on our rights. My political opponents and those that I disagree with use the mask as a political statement to express that they agree with the governor, believe that she is right to force us to be shut down, stay home and close our businesses. Those people have expressed to me their opinions and explained why they were a mask and how it shows support for causes and opinions that I disagree with.

3.

I refuse to show support for the mask mandates and I intentionally refrain and resist from wearing a mask to show my objections, resistance and protest what the Governor and the Oregon Health Authority have done to me, others, and this whole state with the shut down orders, mask mandates and the compelled actions of residents like me. I do not want to be forced to express approval for the governor nor wear a mask covering my face and hiding who I am when there is no need for me to contain any virus. I do not have coronavirus, COVID-19 or any related disease nor does anyone in my household or business, yet I am told I have to wear a mask to be in compliance with the “guidance” in OHA 2288K and conform my opinions to those of the governor and her agencies.

4.

I do not want to have to vocalize my protest against endangering myself, tell people that I support the face mask mandate nor that I believe this is the appropriate or effective way to deal with COVID-19.

5.

I refuse to wear a mask so that I can express my dissent, my opinion that the governor has exceeded her authority and is taking actions that I disagree with.

6.

I hereby Declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED this 20<sup>th</sup> day of July, 2020.

By 

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Kevin Rubio

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

CHESTER MOONEY, SHANNAN  
POZZI, and KEVIN RUBIO,

Petitioners,

v.

STATE OF OREGON, acting by and  
through the OREGON HEALTH  
AUTHORITY; KATE BROWN, in her  
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official capacity as Director of the  
Oregon Health Authority,

Respondents.

Oregon Health Authority, Public  
Health Division

No. \_\_\_\_\_

CA A \_\_\_\_\_

**DECLARATION OF CHESTER  
MOONEY IN SUPPORT OF  
PETITION FOR JUDICIAL  
REVIEW**

1.

My name is Chester Mooney, I am over 18 years of age. I am a petitioner in this case, and a resident of Yamhill County, Oregon and a citizen of the United States. I am fully competent to make this Declaration and I have personal knowledge of the facts stated in this declaration. To the best of my knowledge, all of the facts stated in this declaration are true and accurate.

2.

DECLARATION OF CHESTER MOONEY IN  
SUPPORT OF PETITION FOR JUDICIAL

TYLER SMITH & ASSOCIATES, P.C.  
181 N. Grant St. STE 212, Canby, Oregon 97013  
503-266-5590; Fax 503-212-6392

I am an elderly man, past the age of retirement and have medical health issues, including having previously had heart bypass surgery. It is recommended by health officials that it is unhealthy and dangerous for me to wear a facemask because it will lower my oxygen intake.

3.

I have been denied entrance to a store to buy food due to the new Statewide Mask rule. I was caught completely off guard and did not even know there was such a requirement and now understand this was due to OHA 2288k guidance from the Oregon Health Authority.

4.

It is unhealthy for me to wear a mask, but I need to buy food and obtain services to eat, provide for myself and stay healthy as well. I do not want to have to explain my medical condition, answer questions about my health, nor ask anyone for permission or any kind of accommodation simply to walk around or go into a store. I should not be compelled to tell people about my medical conditions, nor even that I have medical conditions just to engage in commerce. However under OHA 2288 I am obligated to wear a mask or explain that I have a medical condition by asking for some kind of accommodation and engaging in a conversation about my conditions.

5.

I do not want to have to vocalize my protest against endangering myself and tell the store managers and police if they are called why I am not wearing a mask. But I don't wear a mask because it is unhealthy for me. I have read studies for myself and researched them medical information and I refuse to wear a mask as a protest against the governor's attempts to force me to endanger my own health. I do not believe that the mask requirement is even based on sound science and does not prevent the spread of COVID -19 but does actually physically injure me.

6.

I hereby Declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED this 20<sup>th</sup> day of July, 2020.

By \_\_\_\_\_s/Chester Mooney\_\_\_\_\_  
Chester Mooney


5.

I do not want to have to vocalize my protest against endangering myself and tell the store managers and police if they are called why I am not wearing a mask. But I don't wear a mask because it is unhealthy for me. I have read studies for myself and researched them medical information and I refuse to wear a mask as a protest against the governor's attempts to force me to endanger my own health. I do not believe that the mask requirement is even based on sound science and does not prevent the spread of COVID -19 but does actually physically injure me.

6.

I hereby Declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

DATED this 20<sup>th</sup> day of July, 2020.

By   
Chester Mooney

DECLARATION OF CHESTER MOONEY IN  
SUPPORT OF PETITION FOR JUDICIAL

TYLER SMITH & ASSOCIATES, P.C.  
181 N. Grant St. STE 212, Canby, Oregon 97013  
503-266-5590; Fax 503-212-6392