

- Expedite
- No hearing set
- Hearing is set

Date:

Time:

Judge/Calendar:

**SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SKAMANIA COUNTY**

BOB’S WELDING AND AUTO REPAIR, INC.;
TLC OPERATIONS, LLC d/b/a CROSSCUT
ESPRESSO & DELI; GATOR CREEK
GARDENS, a sole proprietorship; JOY FAMILY
HARDWARE, LLC d/b/a CARSON
HARDWARE; GALT’S GULCH, LLC d/b/a The
SKAMANIA OBSERVER; and TIMOTHY
CALLAHAN, LORRAINE CREON, ABIGALE
COATES, MATTHEW JOY, and HANNAH JOY,
as individuals,

Plaintiffs,

v.

WASHINGTON STATE DEPARTMENT OF
LABOR AND INDUSTRIES; WASHINGTON
STATE DEPARTMENT OF LABOR AND
INDUSTRIES IN CLARK COUNTY
WASHINGTON; GOVERNOR JAY INSLEE, in
his official capacity; and JOEL SACKS, in his
official capacity.

Defendants.

No.

**MOTION FOR PRELIMINARY
INJUNCTION**

I. INTRODUCTION AND REQUESTED RELIEF

“With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Justice Jackson, concurring).

1 The greatest civilizations are what they are, and were what they were, because they
2 prioritized right processes over ‘right results.’ Nowhere is the locus of tension between right
3 processes and ‘right results’ greater than in the executive, and at no time is that locus placed under
4 greater pressure than during perceived crisis. “That comprehensive and undefined [executive]
5 powers hold both practical advantages and grave dangers... will impress anyone who has served as
6 legal adviser to [an executive] in time of transition and public anxiety.... The tendency is strong to
7 emphasize transient results upon policies... and lose sight of enduring consequences upon the
8 balanced power structure of our Republic....” *Id.*, at 634.

9 The imperative for Courts to curb unprincipled use of executive power—however
10 beneficent its motives—is just as pressing now as it has been in other times of crisis in American
11 history. Seizing upon a single catchall sentence of the executive’s emergency powers under RCW
12 43.06.220(1)(h), the governor is intruding upon the personal and public affairs of private citizens
13 and business throughout Washington State based on the influenza-like illness, the Coronavirus—
14 even in sparsely populated counties such as Skamania County, which at the time of this filing has
15 suffered only one COVID-19 related death.

16 In this case, Washington Governor Jay Inslee has issued orders, Proclamations 20-25.6 and
17 20-25.7 (“Deny-Service Proclamation”), placing on business owning Plaintiffs an affirmative duty
18 to wear masks, turn away paying customers who do not, and suspend and/or terminate employees
19 who choose not to wear masks. If they do affirmatively comply, Plaintiffs risk fine, imprisonment,
20 and the potential shuttering of their businesses by the Department of Labor and Industries. It is the
21 Department of Labor and Industries that has thus far threatened enforcement of the orders.

22 The proclamations intrude upon Plaintiffs’ rights in obvious ways: their right to pursue a
23 vocation or calling, right to bodily autonomy, right to the use and enjoyment of their property, and
24 free speech and expression rights are all significantly interfered with by the proclamations.

25 What is equally clear, even at this stage before discovery, is that regardless of the greater
26 COVID 19 related issues, and regardless of whether lockdowns and masks are effective, Plaintiffs
27 will prevail on their claim for injunctive relief. This is because, as a statutory and constitutional
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1 procedural matter, regardless of whether masks and lockdowns are ‘right’ as a general matter and
2 in some counties, the executive has overstepped his boundaries. He has done so in two ways. First,
3 the Governor does not have the authority to enact sweeping, intrusive, financially devastating
4 affirmative obligations under RCW 43.06 such as he does in the Deny-Service Proclamation, based
5 on an influenza like illness. Second, on a constitutional level, no matter how compelling the
6 government’s interest is in stopping COVID-19, applying such sweeping and broad orders to violate
7 Plaintiffs’ speech and due process rights in *Skamania County*, where there has been one death and
8 only six pending cases across a population of 12,083 persons, is overbroad, not narrowly tailored.

9 Plaintiffs file this motion for a preliminary injunction with their complaint. Regardless of
10 the merits of the greater COVID-19 social debate on masks and lockdowns, the Governor’s Deny-
11 Service Proclamation, issued on July 7, 2020 (extended July 24, 2020) was passed without lawful
12 authority as a statutory matter, and is not narrowly tailored to Plaintiffs’ living and working
13 conditions in Skamania County, as a constitutional matter. Plaintiffs ask this Court to preliminarily
14 enjoin Defendants, Governor Inslee, Department of Labor and Industries (“L&I”), Department of
15 Labor and Industries Clark County (“L&I Local), and Director Joel Sacks from enforcing the
16 Governor’s Proclamation Nos. 20-25.6 and 20-25.7 until a full injunction hearing can be had.

17 II. STATEMENT OF FACTS

18 The first case of the 2019 novel coronavirus (“COVID-19”) was reported on United States
19 shores on January 21, 2020.¹ Seemingly defying the impossible, the social discourse surrounding
20 COVID-19 issues has become probably the most polarizing issue facing the modern American
21 polity since the election of Donald J. Trump in November 2016. While much of the controversy
22 has to do with observable facts, the aggregation of those facts into data, and the interpretation of
23 those data and facts, the greater weight of friction lies along the deepest fault lines of American
24 political discourse, touching upon such issues as political trust, personal autonomy, the sphere of
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27 ¹ See <https://abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165> (last visited September 28,
2020).

1 government versus the sphere of the individual, and normative questions such as how much concern
2 *should* be given to a potentially deadly virus.

3 **A. The Science on COVID-19 and the Efficacy of Masks Continues to be Contested**

4 Understandably, the science regarding the transmission of COVID-19 is in constant flux. In
5 late March, 2020, Dr. Mike Ryan, executive director of the World Health Organization (“WHO”)
6 health emergencies program, stated “[t]here is no specific evidence to suggest that the wearing of
7 masks by the mass population has any potential benefit. In fact, there’s some evidence to suggest
8 the opposite in the misuse of wearing a mask properly or fitting it properly....”²

9 Only two months later, the same WHO changed its recommendation on the use of masks by
10 the general public, focusing on “respiratory droplets” entering “inoculation portals” (mouth, nose,
11 etc.) transmitting the disease:

12 COVID-19 virus is primarily transmitted between people via respiratory droplets
13 and contact routes. Droplet transmission occurs when a person is in close contact
14 (within 1 metre) with an infected person and exposure to potentially infective
15 respiratory droplets occurs, for example, through coughing, sneezing or very close
16 personal contact resulting in the inoculation of entry portals such as the mouth, nose
17 or conjunctivae...

18 Declaration of Caleb Jon Vandebos (“Vandebos Dec.”), **Exhibit C**, pg. 1-2. The WHO
19 recommended that “governments should encourage the general public to wear masks in specific
20 situations and settings..., ” *despite* acknowledging that “the widespread use of masks by healthy
21 people in the community setting is not yet supported by high quality or direct scientific
22 evidence....” *Id.* at 6.

23 The WHO has conceded that, contrary to past statements, asymptomatic spread of COVID-
24 19 is “very rare.”³ The WHO website, as of June 11, 2020, continues to affirm the same:

25 Available evidence from contact tracing reported by countries suggests that
26 asymptotically infected individuals are much less likely to transmit the virus
27 than those who develop symptoms. A subset of studies and data shared by some
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² See <https://www.cnn.com/2020/03/30/world/coronavirus-who-masks-recommendation-trnd/index.html> (last visited September 28, 2020)

³ See <https://www.cnn.com/2020/06/08/asymptomatic-coronavirus-patients-arent-spreading-new-infections-who-says.html> (last visited September 28, 2020)

1 countries on detailed cluster investigations and contact tracing activities have
2 reported that transmission by asymptotically-infected individuals are much less
likely to transmit the virus than those who develop symptoms.⁴

3 Thus, for those that are not ill at all or are asymptomatic, it is questionable whether masks
4 serve any purpose in preventing the spread of COVID-19. A prominent epidemiologist has
5 explained that wearing a cloth mask does not protect the wearer much if he or she is in close contact
6 with someone who is COVID-19 contagious.⁵

7 Even if cloth masks were effective in preventing the spread of COVID-19, which no study
8 to date can claim, population density is relevant. In a minimally populated county (like Skamania
9 County), there is no prevalence to be protected from. With a population of approximately 12,083
10 people in 2019,⁶ and **6 current** cases of COVID-19,⁷ each resident of Skamania County would have
11 to interact closely, and for a significant period of time, with approximately 2,000 people before they
12 encountered someone with COVID-19.

13 Finally, it is questionable how severe COVID 19 is for those who contract it. COVID 19 is
14 generally only significant when it reacts with other, pre-existing conditions. According to an August
15 26, 2020 Center for Disease Control report, only 6% of mortalities involving COVID 19 involved
16 COVID 19 alone. As “[f]or deaths with conditions or causes in addition to COVID-19,” *e.g.* the
17 other 94% of deaths, “on average, there were 2.6 additional conditions or causes per death.”⁹ In
18 other words, for COVID 19 to be fatal, the victim will generally have at least two other conditions.
19 That fact makes COVID 19, generally, a mere contributing factor to many, in 94% of deaths.
20 Plaintiffs do not minimize the death of even one individual, but it is far cry to say that a contributing
21 illness affecting a miniscule portion of the population arises to the level of a state of emergency.

22 ⁴ See <http://www.emro.who.int/health-topics/corona-virus/transmission-of-covid-19-by-asymptomatic-cases.html>
23 (last visited September 28, 2020)

24 ⁵ See Interview with Michael Osterholm, PhD, MPH, an internationally known expert in infectious disease
25 epidemiology who has advised both Democratic and Republican Presidents, available at
<https://www.bluezones.com/2020/06/covid-19-straight-answers-from-top-epidemiologist-who-predicted-the-pandemic/> (last visited September 28, 2020).

26 ⁶ See <https://www.census.gov/quickfacts/fact/table/skamaniacountywashington,WA/PST045219> (last visited Sept. 28,
2020).

27 ⁷ See <https://www.skamaniacounty.org/departments-offices/community-health/public-health/covid-19> (last visited
28 Sept. 28, 2020).

⁹ See https://www.cdc.gov/nchs/nvss/vsrr/covid_weekly/index.htm#Comorbidities (last visited Sept. 28, 2020)

1 **B. Regardless of the science, COVID-19 is politically polarizing**

2 There may be no scientific consensus on the severity of COVID 19 for some time. What is
3 abundantly clear, however, is that the story of COVID-19 has been the story of further fracture and
4 rupture in American value and issue discourse, as well as political. Responses to the virus are split.
5 Many citizens distrust government competence and show support for free choice and an
6 individualized response to the perceived threat. Others urge reliance on experts, and would promote
7 government involvement to avoid further harm developing, to the point of identifying non-
8 conforming citizens to law enforcement and other authorities.

9 Whatever the proper response to COVID-19 may actually be, it cannot be denied that this
10 question touches on nearly every issue of controversy electrifying the American polity today.
11 COVID-19 issue speech tracks often along partisan lines,¹⁰ and is used by presidential nominees to
12 support their positions. ¹¹ A brief perusal of national media and internet sources makes these issues,
13 and the talking points associated with them, apparent.

14 Since the inception of the COVID 19 drama, featured and promoted on national media, there
15 has been intense disagreement regarding the extent to which COVID-19 is life threatening,¹² the
16 extent to which masks help prevent the spread of the virus,¹³ the amount of trust that citizens should

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19 ¹⁰ See, e.g., Gaia Vince, *Attitudes towards lockdown are proving divisive in countries like the US – and those divisions
20 are falling down familiar party lines. But why does partisanship shape our compliance with public health campaigns?*,
21 BBC Future, <https://www.bbc.com/future/article/20200505-why-its-so-hard-to-be-rational-about-covid-19> (last visited
22 September 28, 2020); Justin Murphy, *Why are Conservatives Less Worried About Coronavirus?*, Psychology Today,
23 <https://www.psychologytoday.com/us/blog/polarized/202003/why-are-conservatives-less-worried-about-coronavirus>
24 (last visited September 28, 2020) (“‘COVID-19’ is not perceived as a pathogen threat at all [to the Republic voter]. It’s
25 just another blip of liberal noise circulated to discredit a Republican President.... If liberals and Democratic voters
26 perceive COVID-19 as a major threat... [i]t is just because there happens to be a Republican President at the moment.”).

27 ¹¹ See <https://www.webmd.com/lung/news/20200901/what-changing-death-rates-tell-us-about-covid> (last visited
28 Sept. 28, 2020) (“[E]lection-year politics have played an enormous role in communicating the risk of COVID-19.
Democrats and Republicans alike -- including President Donald Trump and former Vice President Joe Biden, the
Democratic presidential nominee -- have cited conflicting information to bolster their campaigns.

¹² See, e.g., *Here's Why COVID-19 Is Much Worse Than the Flu*, Healthline, [https://www.healthline.com/health-
29 news/why-covid-19-isnt-the-flu](https://www.healthline.com/health-news/why-covid-19-isnt-the-flu) (last visited September 28, 2020); *compare, Bakersfield doctors dispute need for stay-
30 at-home order*, NEWS4SA, [https://news4sanantonio.com/news/coronavirus/accelerated-urgent-care-provides-
31 statistical-update-on-covid-19](https://news4sanantonio.com/news/coronavirus/accelerated-urgent-care-provides-statistical-update-on-covid-19) (last visited September 28, 2020).

¹³ *Do face masks really reduce coronavirus spread? Experts have mixed answers*, LiveScience, <https://www.livescience.com/are-face-masks-effective-reducing-coronavirus-spread.html> (last visited September 28,
32 2020).

1 give to government officials' collection and interpretation of COVID-19 data,¹⁴ the right of faith-
2 based communities to meet for religious services in the face of the danger posed by COVID-19 and
3 the implications that answer has on the relative values of the temporal and the spiritual,¹⁵ whether
4 increased suicide,¹⁶ child abuse,¹⁷ and domestic violence¹⁸ in fact make lockdowns a greater disaster
5 than the virus, or whether lockdowns are a proportional response to COVID-19.¹⁹

6 The designation of certain gatherings, businesses, and groups as 'essential' or 'non-
7 essential' has been divisive, obviously assigning value to some meetings and activities and
8 degrading others. Some may find it an affront that religious meetings are deemed "non-essential,"²⁰
9 for example, while others may find it an offensive that firearm shops are considered "essential."²¹

10 For many, underlying these issues is the question of how much autonomy a free citizen in a
11 democratic society *should* enjoy, and the role the government *should* play in preserving the health
12 of its citizens, and the enduring power of civil rights in times of crisis—all central questions of
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14 _____
15 ¹⁴ Jenny Anderson, *Trust in government now exceeds the public's faith in business*, QUARTZ,
16 <https://qz.com/1851749/covid-19-has-us-trusting-government-more-than-ceos/> (last visited September 28, 2020);
17 *compare Questions raised over accuracy of US coronavirus death toll*, Fox6,
18 <https://fox6now.com/2020/05/16/questions-raised-over-accuracy-of-us-coronavirus-death-toll/> (last visited September
19 28, 2020)

20 ¹⁵ See *Supreme Court Rejects Churches on Covid-19 Restrictions*, Bloomberg Law,
21 <https://news.bloomberglaw.com/health-law-and-business/supreme-court-rejects-illinois-churches-on-covid-19-restrictions>
22 (last visited September 28, 2020)

23 ¹⁶ *Suicides on the rise amid stay-at-home order, Bay Area medical professionals say*, ABC7 News,
24 <https://abc7news.com/suicide-covid-19-coronavirus-rates-during-pandemic-death-by/6201962/> (last visited
25 September 28, 2020).

26 ¹⁷ See Steven Reinberg, *COVID-19 Lockdown Increases Child Abuse Risk*, WebMD,
27 <https://www.webmd.com/lung/news/20200512/covid19-lockdown-increases-child-abuse-risk> (last visited September
28 28, 2020); <https://www.npr.org/sections/coronavirus-live-updates/2020/04/28/847251985/child-sexual-abuse-reports-are-on-the-rise-amid-lockdown-orders> (last visited Sept. 30, 2020).

29 ¹⁸ *6 months of coronavirus lockdown could mean 31 million more cases of domestic violence, UN says*, CBS News,
30 <https://www.cbsnews.com/news/domestic-violence-additional-31-million-cases-worldwide/> (last visited September
31 28, 2020).

32 ¹⁹ Neil Bailey, *The calculus of death shows the COVID-19 lockdown is clearly worth the cost*, Medical Xpress,
33 <https://medicalxpress.com/news/2020-05-calculus-death-covid-lockdown-worth.html> (last visited September 28,
34 2020).

35 ²⁰ *Why Are Liquor Stores & Pot Shops Allowed to Open But Not Churches?*, Daily Focus,
36 <https://jimdaily.focusonthefamily.com/why-are-liquor-stores-pot-shops-allowed-to-open-but-not-churches/> (last
37 visited September 28, 2020).

38 ²¹ Bobby Allyn, *Officials Debate Whether Gun Stores Are 'Essential' During Coronavirus Outbreak*,
[https://www.npr.org/2020/03/27/822873078/officials-debate-whether-gun-stores-are-essential-during-coronavirus-](https://www.npr.org/2020/03/27/822873078/officials-debate-whether-gun-stores-are-essential-during-coronavirus-outbreak)
outbreak (last visited September 28, 2020).

1 political theory and moral debate.²² At least one judge has said “Americans don’t get ruled.”²³
2 Some even question if some leaders and media outlets may have political motives in interpreting
3 the coronavirus related data,²⁴ and the degree to which the United States should trust and support
4 global health organizations, such as the World Health Organization.²⁵

5 With all of these issues about COVID-19, the lockdowns, and masks, there is a tremendous
6 amount of heated cultural exchange over what wearing (or not wearing) a mask *means*.²⁶ For better
7 or for worse, it cannot be denied that in the Fall of 2020 in America, wearing a mask (or not wearing
8 a mask) is a statement of support, or detraction, of the government’s response to COVID 19.

9 10 **C. The Governor’s Deny-Service Proclamation**

11 On June 24, 2020, Secretary of Health, John Weisman, issued a state-wide order requiring all
12 private citizens of the State of Washington, healthy or not, young or old, with pre-existing

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14 ²² Drew Holden, *The Lockdown Isn’t So Simple for Conservatives*, N.Y. Times, <https://www.nytimes.com/2020/04/24/opinion/coronavirus-lockdown-reopen-protests.html> (last visited September 28, 2020) (“A lockdown runs counter to the spirit of rugged individualism that takes on near-mythic proportion in America, particularly among libertarian-minded conservatives.”)

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16 ²³ See Jon Seidel, *Downstate judge blasts Pritzker’s stay-at-home-order: ‘Americans don’t get ruled,’* Chicago Sun Times, <https://chicago.suntimes.com/politics/2020/5/22/21267665/downstate-judge-blasts-illinois-governor-jb-pritzker-stay-at-home-order> (last visited September 28, 2020).

17 ²⁴ Stephen Moore, *Moore: Democrats will pay price for hurting the economy in the election*, The Hill, <https://thehill.com/opinion/finance/498291-democrats-will-pay-price-for-hurting-the-economy-in-the-election> (last visited June 8, 2020); Grace Curley, *DC Democrats OK with anything that hurts Trump, even coronavirus*, Boston Herald, <https://www.bostonherald.com/2020/02/29/dc-democrats-ok-with-anything-that-hurts-trump-even-coronavirus/> (last visited September 28, 2020);

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19 ²⁵ John Yoo, *The World Health Organization is not salvageable*, American Enterprise Institute, <https://www.aei.org/oped/the-world-health-organization-is-not-salvageable/> (last visited June 8, 2020) (“China’s capture of the WHO, and the WHO’s unfortunate turn from public health to crass politics, should prompt the U.S. and its allies to build a new international organization.... There is little benefit for the U.S. in remaining in such a corrupted and captured organization.”).

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21 ²⁶ See Michael Dougherty, *What the Masks Mean*, National Review, <https://www.nationalreview.com/magazine/2020/06/22/what-the-masks-mean/#slide-1> (last visited September 28, 2020) (“A great deal depends on how one sees the masks. Are they a further imposition on daily life by a liberal expert class, a ready symbol of that set’s contempt for the masses... ? Are they a useless piece of security theater, meant to keep us frightened?”); compare

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28 Dave Zweifel, *Plain Talk: Refusing to wear a mask isn’t patriotic, it’s just selfish*, The Cap Times, https://madison.com/ct/opinion/column/dave_zweifel/plain-talk-refusing-to-wear-a-mask-isnt-patriotic-its-just-selfish/article_8a543fe0-6e64-5108-abcb-6dc50084f8f6.html (last visited September 28, 2020) (“[W]hat I can’t understand is the absolute disregard for human life and the safety of others that so many of these self-proclaimed “patriots” proudly put on display.... There have been reports of confrontations at grocery and hardware stores.... In Flint, Michigan, a security guard at a Family Dollar Store was shot dead after he asked a woman to put on a mask and a scuffle ensued.”).

1 conditions or not, living in a county with minimal COVID-19 cases or not, to wear masks in public.
2 Out of concern that some individuals may not comply with the order voluntarily, Governor Inslee
3 then issued a Proclamation on July 7, 2020, No. 20-25.6 (the “Deny-Service Proclamation”,
4 Vandebos Dec., **Exhibit B**), deputizing (commandeering) business owners in Washington State
5 to enforce the mask order issued by Secretary Weisman, on the State’s behalf. The Deny-Service
6 Proclamation orders business owners, among other things, to deny service to customers that are not
7 wearing face coverings, and compel their employees to wear them, too.

8 The Deny-Service Proclamation states, in relevant part, as follows:

- 9 • No employee may work unless that employee wears a face covering when working, except
10 when working alone or when the job involves no in-person interaction, as detailed in the
11 Safe Start Washington Phased Reopening Plan; and, further, that employers must provide
12 cloth facial coverings to employees....
- 13 • *No business may operate, allow a customer to enter a business, or conduct business with*
14 *a customer inside any building that is open to the public or outdoors in a public place*
15 *unless the customer is wearing a face covering*, as required by Order of the Secretary of
16 Health 20-03. (emphasis added). Vandebos Dec., Exhibit A, B.

17 The Governor claimed to have power to issue the Deny-Service Proclamation under RCW
18 38.08, 38.52 and 43.06, and it is to remain in effect pursuant to RCW 43.06.220(1)(h). *Id.* Non-
19 conformers with the Deny Service Proclamation may be subject to criminal penalties, as a gross
20 misdemeanor, pursuant to RCW 43.06.220(5). Labor and Industries may also levie heavy fines
21 against non-conforming businesses under WAC 296-800-14035.

22 **D. Plaintiffs are Business Owners who Serve Customers and Have Employees**

23 Plaintiffs are five businesses and their owners located in Skamania County. Their businesses
24 are: a gardening store (Gator Creek Gardens), a coffee shop and deli (Crosscut Espresso and Deli),
25 a newspaper (Skamania Observer), hardware store and firearm shop (Joy Family Hardware), and a
26 welding and auto repair shop (Bob’s Welding and Auto Repair, Inc.). They serve customers and
27 have employees. All are affected by the Deny-Service Proclamation. Neither the owners nor any of
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1 the employees at the businesses have tested positive for COVID-19, and neither has Hannah Joy,
2 the individual plaintiff. All are required to comply with the Deny-Service Proclamation. *See,*
3 *generally,* Declaration(s) of Abigale Coates of Gator Creek Gardens, Loraine Creon of TLC
4 Operations, LLC., D/B/A Crosscut Espresso and Deli, Hannah Joy of Skamania Observer, Matthew
5 Joy of Joy Family Hardware, and Timothy Callahan of Bob’s Welding and Auto Repair
6 (collectively, the paragraphs common to all declarations are heretofore cited as “Plaintiff
7 Declarations, ¶ ___”).

8 Plaintiffs have followed the COVID-19 issues debate. They disagree with how the
9 government has responded. *See* Plaintiff Declarations, ¶ 5.

10 Wearing a mask in public is contrary to Plaintiffs’ beliefs regarding the issues surrounding
11 COVID-19. Namely, they believe that the national and state governments have overreacted to
12 COVID-19 by way of the lockdowns and that masks are ineffective, unnecessary, or
13 disproportionate to the risks associated with COVID-19. For plaintiffs, wearing a mask espouses
14 affirmation for the government’s narrative on COVID-19, and is contrary to their beliefs. Wearing
15 a mask also makes it difficult for them to communicate to people around them generally. *See*
16 Plaintiff Declarations, ¶ 5, 14. For this reason, Plaintiffs would not wear masks.

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18 **E. The Deny-Service Proclamation applies equally to Skamania County as it does to
heavily populated counties**

19 The Deny-Service Proclamation applies to all of the State of Washington. It affects the
20 12,083 residents in Skamania County, only 6 of whom currently have COVID-19 and who live in
21 a sparsely populated area,²⁷ equally to the 2,291,030 persons in King County, for example, who
22 live in closer quarters and have approximately 2,362 active cases.²⁸

23 **F. The effect of the Deny-Service Proclamation on Plaintiffs**

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26 ²⁷ *See* <https://www.skamaniacounty.org/departments-offices/community-health/public-health/covid-19> (last visited
27 Sept. 29, 2020)

²⁸ *See* <https://www.kingcounty.gov/depts/health/covid-19/data/daily-summary.aspx> (last visited Sept. 29, 2020).

1 The Deny-Service Proclamation has had its desired effect. Plaintiffs’ bodies and businesses
2 are compelled to support of the Governor’s views on COVID-19, affirming involuntarily that
3 COVID-19 is an existential threat, that the lockdowns are proportional, and that masks are
4 proportional and effective. Further, Plaintiffs must monitor and police their customers to comply
5 with the Deny-Service Proclamation on the governor’s behalf. *See* Plaintiff Declarations ¶ 14.

6 Plaintiffs have been affected by the Deny-Service Proclamation in a variety of ways. First,
7 Plaintiffs have been made to suffer fear and anxiety about the enforcement of the Deny-Service
8 Proclamation in the event they do not enforce it. *See* Plaintiffs’ Declarations, excepting Hannah
9 Joy’s, ¶ 20, 23. They are forced to choose between offending customers and employees, and losing
10 their business or positive relationships respectively, or subjecting themselves to potential fine and
11 imprisonment and at the very least the perception of being non law abiding. *Id.* at ¶16-18. Some
12 plaintiffs have been specifically harassed by customers claiming that they have not enforced the
13 orders. *See* Declaration of Matthew Joy, ¶ 25. Others have been contacted by Labor and Industries
14 (“L&I”) investigating alleged cases of non-compliance. *See* Declaration of Abigale Coates, ¶ 25,
15 Declaration of Loraine Creon, ¶ 25.

16 On September 21, 2020, Joy Family Hardware received a letter from the Department of
17 Labor and Industries. It informed Plaintiffs Matthew and Hannah Joy that the Department had
18 received a complaint that the business was operating in violation of the July 7, 2020 Deny-Service
19 Proclamation, alleging that the Plaintiffs were not forcing customers to wear masks. The letter
20 threatened that further violations could “lead to a safety and health citation and possible serious
21 violations with significant penalties....” Declaration of Matthew Joy, ¶ 25, Exhibit A.

22 Plaintiffs brought claims against Defendants for violation of their substantive due process
23 right to conduct their business free from unreasonable government interference, their right to bodily
24 autonomy as a matter of due process, their free speech rights, their right to privacy and the right to
25 free from being involuntarily deputized to violate others’ privacy, as well as their common law
26 rights to be free from nuisance and for interference with a business expectancy. They ask for
27 declaratory relief that the Deny-Service Proclamation is null and void as outside the Governor’s
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1 statutory delegation of authority or, that the legislature’s delegation of rule-making authority to the
2 governor without safeguards violated separation of powers, and that the Deny-Service Proclamation
3 violates constitutional rights without being appropriately tailored. They also ask for injunctive relief
4 enjoining Defendants from enforcing the Deny-Service Proclamation. They bring this motion for
5 preliminary injunction to enjoin Defendants from enforcing the Deny-Service Proclamation while
6 this matter is pending.

7 **III. STATEMENT OF THE ISSUE**

8 Have Plaintiffs shown a likelihood that they will prevail on the merits of their claim
9 enjoining Defendants from enforcing the Deny-Service Proclamation, where the Proclamation
10 compels Plaintiffs to:

- 11 a) refuse customers who do not wear masks, thereby suffering loss of profits;
- 12 b) terminate or suspend employees who do not wear masks, thereby losing valuable work
13 or suffering friction in the workplace;
- 14 c) violate customers’ and employees’ privacy by probing into intimate health conditions;
- 15 d) employ their bodies and the businesses in support of the Governor’s views on COVID
16 19 issues;
- 17 e) suffer the fear, anxiety, stress, moral opprobrium, lost standing in the community, and
18 other negative consequences associated with violating the law, to include the risk of jail
19 and substantial fine,

20 and the Deny-Service Proclamation:

- 21 a) is based on a single catch-all provision of the governor’s emergency powers, RCW
22 43.06.220(1), that only grants negative, proscriptive powers to the governor;
- 23 b) applies equally to all counties across Washington State, regardless of their conditions,
24 when RCW 43.06 requires the governor to identify the areas affected by emergencies;
- 25 c) is based on an a state of emergency declared based on an illness that has contributed to
26 fatalities rising to only .03% of the population in Washington State;

- 1 d) is based on an influenza like illness the severity of which has not been determined, and
2 would be very difficult to establish with certainty;
3 e) is being perpetuated based on data from February 2020?
4

5 IV. EVIDENCE RELIED UPON

6 Plaintiffs rely on the complaint, this motion, and the declarations and exhibits submitted in
7 support thereof.

8 V. ARGUMENT

9 This Court should issue a preliminary injunction prohibiting Defendants from enforcing the
10 Deny-Service Proclamation against Plaintiffs and their businesses until a complete hearing can be
11 held. The Deny-Service Proclamation was not legally enacted, and infringes upon Plaintiff's due
12 process and free speech rights without being narrowly tailored to the government's (allegedly)
13 compelling interest.

14 A. Standard for relief

15 Washington State Courts have the inherent authority to issue temporary or permanent
16 injunctions to protect the rights of parties. One who seeks a permanent injunction must show (1)
17 that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion
18 of that right, and (3) that the acts complained of are either resulting in or will result in actual and
19 substantial injury to him. *Washington Fed'n of State Employees, Council 28, AFL-CIO v. State*, 99
20 Wn.2d 878, 888, 665 P.2d 1337, 1343 (1983) (citing *Tyler Pipe Indus., Inc. v. Department of Rev.*,
21 96 Wash.2d 785, 792 638 P.2d 1213 (1982)). At a preliminary injunction hearing, the trial court
22 does not need to resolve the merits of the issues for permanent injunctive relief. It considers only
23 the likelihood that the moving party ultimately will prevail on the merits. *SEIU Healthcare 775NW*
24 *v. State, Dep't of Soc. & Health Servs.*, 193 Wash. App. 377, 392–93, 377 P.3d 214, 221 (2016).

25 Plaintiffs have shown that there is likelihood that they will prevail on the merits of their
26 claim for injunction. They enjoy clear legal and equitable rights: to be free from being forced to
27 wear masks, and to be free from coercion in compelling others to wear masks. The fear that
28

1 Defendants will violate these rights is well-grounded and immediate. Finally, the ongoing invasion
2 of rights is substantial and has harmed and is harming Plaintiffs: Defendants are injuring Plaintiffs
3 financially, as well as in the intangible and unrecoverable way that due process and free speech
4 rights violations inflict harm upon victims.

5 **B. Plaintiffs enjoy a clear legal and equitable right to conduct their business activities**
6 **without undue interference, to engage in expressive conduct, and keep their faces**
7 **free from obstruction**

8 It is clear that the Plaintiffs enjoy a due process right of conducting their own business
9 activities absent unlawful government interference under article I § 3, and enjoy free speech and
10 expression rights under article I § 5—both of which are violated by the Deny-Service Proclamation.
11 These violations are made especially egregious because not only are Plaintiffs’ rights being violated
12 in a personal and immediate way, but their businesses *and their status as business owners in the*
13 *community* are being deputized (commandeered) by the State government to enforce the Governor’s
14 orders. Plaintiffs are not government law enforcement. They deeply resent being ordered to infringe
15 on *other* people’s rights on the government’s behalf.

16 *a. Plaintiffs enjoy a due process right to pursue a calling without undue, arbitrary,*
17 *and, or unauthorized government interference*

18 Article I, § 3 of the Washington Constitution protects citizens from deprivation of life,
19 liberty, or property without due process of law. Under this section, Plaintiffs, as business owners,
20 enjoy a due process right to pursue their vocation or calling without arbitrary or undue government
21 interference. This is a “well-established” right protected by due process. *Fields v. Dep’t of Early*
22 *Learning*, 193 Wash. 2d 36, 44, 434 P.3d 999, 1003 (2019) (*citing Amunrud v. Bd. of Appeals*, 158
23 Wash. 2d 208, 219, 143 P.3d 571, 576 (2006)).²⁹ *See City of Seattle v. Ford*, 144 Wash. 107, 114,
24 257 P. 243, 245 (1927)³⁰ (construing a city ordinance forbidding hawking on private property:
25 “Everyone has a natural right to sell his own merchandise on his own private property, in his own
26 way, to all who come there to buy; and, if his manner of selling offends, those so offended may stay

26 ²⁹ The existence of the right itself was not affected by *Yim v. City of Seattle*, 194 Wash. 2d 682, 451 P.3d 694 (2019),
27 which altered the standard of review to be applied to interferences with the right to pursue a vocation or calling, in this
28 and other due process vocation and calling contexts.

³⁰ *See* fn. 29, *supra*, above.

1 away. Self-interest would seem to be the only regulation needed in such cases.”). It is axiomatic
2 that interference by government actors absent statutory authority of law is undue and arbitrary.

3 Here, each Plaintiff’s vocation or calling is to own and manage a business. Serving
4 customers is an essential part of their calling. *See generally*, Plaintiff Declarations ¶¶ 6-19. Most
5 basically, Plaintiffs want to engage customers without turning them away based on arbitrary
6 determinations *not* based on their quality of their goods and services. *Successfully* serving
7 customers requires creating an inviting atmosphere for all customers, and their beliefs. *Id.*

8 As business owners, engaging employees is an essential part of Plaintiffs’ calling or
9 vocation. *Id.* at ¶¶ 9-12, 19-20. Maintaining positive employer/employee relationships is also an
10 essential part of Plaintiffs’ businesses. Providing clear tasking and guidance, correction where
11 necessary, and encouragement is important for maintaining healthy relationships between Plaintiffs
12 and their employees. Respecting employees’ health needs and beliefs is also important to maintain
13 positive relationships. Plaintiffs must discharge these duties and responsibilities using their own
14 discernment and judgment, which is essential to day-to-day operation of a small business.

15 *b. Plaintiffs enjoy a right to be free from compelled expressive activity—wearing*
16 *masks and using their businesses to promote the same*

17 Under Article I, § 5 of the Washington State Constitution, Plaintiffs enjoy a right to free
18 speech and expression. The right to free speech includes expressive activity conveying meaning
19 and where, in the context, the activity is understood to convey meaning. Government regulations
20 burdening speech activity or government action compelling speech are particularly suspect, and
21 must be narrowly tailored to a compelling government interest.

22 “Speech” includes nonverbal conduct where the conduct is “sufficiently imbued with
23 elements of communication.” *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203,
24 216–17, 840 P.2d 174, 182 (1992) (*citing Spence v. Washington*, 418 U.S. 405, 409, 94 S.Ct. 2727,
25 2730, 41 L.Ed.2d 842 (1974)). Whether conduct constitutes speech depends on the nature of the
26 activity and “the factual context and environment in which the activity is undertaken.” *Id.* Conduct
27 qualifies as speech when the actor intends to convey meaning and there is a likelihood that the
28

1 message would be understood by those who view it. *Id.* (citing *Texas v. Johnson*, 491 U.S. 397,
2 404, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342 (1989)); see also *Masterpiece Cakeshop, Ltd. v.*
3 *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1741–42, 201 L. Ed. 2d 35 (2018) (Justices
4 Thomas and Gorsuch, concurring) (“[T]he Constitution looks beyond written or spoken words as
5 mediums of expression... symbolism is a primitive but effective way of communicating ideas....
6 Applying this principle, the Court has recognized a wide array of conduct that can qualify as
7 expressive, including nude dancing, burning the American flag, flying an upside-down
8 American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband,
9 conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag.”)(internal
10 citations and quotations omitted). A “narrow, succinctly articulable message is not a condition of
11 constitutional protection.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557,
12 569, 115 S. Ct. 2338, 2345, 132 L. Ed. 2d 487 (1995) .

13 Government regulations enforcing a particular view or compelling speech are the greatest
14 anathema to free speech rights. This is because “no official, high or petty, can prescribe what shall
15 be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess
16 by word or act their faith therein.” *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642,
17 63 S. Ct. 1178, 1187, 87 L. Ed. 1628 (1943). View-point based restrictions violate free speech rights
18 unqualifiedly, *Sprague v. Spokane Valley Fire Dep’t*, 189 Wash. 2d 858, 887, 409 P.3d 160, 177
19 (2018) (“When the government targets particular views taken by speakers on a subject, it violates
20 the First Amendment's requirement of viewpoint neutrality.”) (internal citations omitted).
21 “Compelled speech is generally unconstitutional,” *State v. K.H.-H.*, 185 Wash. 2d 745, 759, 374
22 P.3d 1141, 1147 (2016), and where a regulation compels or coerces speech, it is subject to strict
23 scrutiny whereby the regulation must be narrowly tailored to a compelling government interest. See
24 *Wooley v. Maynard*, 430 U.S. 705, 715, 97 S. Ct. 1428, 1435–36, 51 L. Ed. 2d 752 (1977) (In the
25 context of labels on license plates: “New Hampshire's statute in effect requires that appellees use
26 their private property as a “mobile billboard” for the State's ideological message or suffer a
27 penalty.... The First Amendment protects the right of individuals to... refuse to foster, in the way

1 New Hampshire commands, an idea they find morally objectionable.”); *see also, generally,*
2 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1734, 201 L. Ed.
3 2d 35 (2018) (Justices Gorsuch and Alito, concurring).

4 The freedom from compelled speech applies in equal force to compelled expressive
5 conduct, *and it is irrelevant if the expressive conduct would seem unobjectionable to most people.*
6 *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 641-42, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)
7 (compulsory salute and pledge to the national flag); *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct.
8 1428, 51 L.Ed.2d 752 (1977) (compulsory display of state motto on vehicle license plate); *Bolling*
9 *v. Superior Court*, 16 Wash.2d 373, 133 P.2d 803 (1943) (holding that children whose parents were
10 members of Jehovah’s Witnesses could not be compelled to pledge allegiance in the public
11 schools). *This is because the very purpose of the free speech is to “protect[] the right of individuals*
12 *to hold a point of view different from the majority and to refuse to foster ... an idea they find morally*
13 *objectionable.”* *Wooley*, 430 U.S. at 715, 97 S.Ct. 1428. *The State, therefore, must generally present*
14 *a compelling need before it can force a person to speak.* *State v. K.H.-H.*, 185 Wash. 2d 745, 759,
15 374 P.3d 1141, 1147–48 (2016).

16 Free speech protections exist for the very purpose of protecting dissenters. Persons who
17 wish not to wear masks in the Fall of 2020 are dissenters. *See Boy Scouts of Am. v. Dale*, 530 U.S.
18 640, 660, 120 S. Ct. 2446, 2457, 147 L. Ed. 2d 554 (2000) (“[T]he fact that an idea may be embraced
19 and advocated by increasing numbers of people is all the more reason to protect the First
20 Amendment rights of those who wish to voice a different view.”).

21 Today, in the social, political, and moral climate of Fall 2020 in Washington, the non-
22 wearing of a mask is unquestionably expressive and communicative activity. It communicates
23 dissent from the dominant narrative that the government is presenting (and now compels) regarding
24 COVID-19. Likewise, wearing a mask communicates assent to that narrative: that COVID-19 is a
25 serious problem, that masks are effective, that the illness is severe enough that obscuring
26 interpersonal contact and being uncomfortable is worth the supposed benefits.

27 Notably, the relative significance of the wearing or non-wearing of a mask has shifted. Prior
28

1 to June 2020 and the various mask orders compelling individuals to wear masks in public, *wearing*
2 of a mask was a clear affirmative statement regarding COVID-19 and its meaning. On the other
3 hand, not wearing a mask did not mean as much. Now, however, since the Governor’s conscription
4 of citizens’ bodies to convey his message about COVID-19, wearing masks is now the norm and
5 *not* wearing one sends a highly particularized message that the non-wearer dissents from the
6 government’s views on COVID 19: that masks are not effective, that the government has
7 inappropriately responded to the disease, that the risk of contracting COVID-19 is not worth the
8 loss of human dignity associated with obscuring one’s face and the increase in many other social
9 harms that the panicked response to COVID-19 has wrought, such as increased domestic violence,
10 child abuse, suicide, joblessness, and depression.

11 Here, Plaintiffs do not wish to have their bodies conscripted in the Governor’s campaign to
12 promote his narrative on COVID-19 issues. To the contrary, they strongly disagree with the
13 dominant narrative on COVID-19 issues, oppose it, and would like to express their opposition to it
14 by not wearing masks in their own establishments. Plaintiff Declarations, ¶¶ 13-14.

15 In addition to the affront that comes from having to use their bodies to speak contrary to
16 their beliefs, Plaintiffs, as business owners, also enjoy a right to be free from using their businesses
17 to promote the government’s narrative against their will. *See Citizens United v. Fed. Election*
18 *Comm’n*, 558 U.S. 310, 342–43, 130 S. Ct. 876, 900, 175 L. Ed. 2d 753 (2010) (“[P]olitical speech
19 does not lose First Amendment protection simply because its source is a corporation....
20 Corporations and other associations, like individuals, contribute to the discussion, debate, and the
21 dissemination of information and ideas that the First Amendment seeks to foster.”) (internal
22 citations and quotations omitted). Plaintiffs do not wish to prohibit customers or employees from
23 wearing masks if they wish, and they wish to reciprocate that respect by allowing customers without
24 masks to shop, and employees without masks to work. Plaintiff Declarations at ¶¶ 14-15.

25 **C. Plaintiffs have a well-grounded fear of immediate invasion of their rights**

26 The Plaintiffs are likely to show that they have a well-grounded fear of immediate invasion
27 of the rights described above, and are entitled to a preliminary injunction. This is because the
28

1 Legislature did not grant the Governor power to promulgate his Deny-Service Proclamation under
2 RCW 43.06 under the COVID 19 context, and, even if it did, the Proclamation is not narrowly
3 tailored enough to pass scrutiny as applied to the Plaintiffs in Skamania County.

4 This Court must issue a preliminary injunction now to prevent ongoing deprivation of
5 Plaintiffs' rights.

6 *a. The Deny-Service Proclamation invades Plaintiffs' due process and free speech*
7 *rights in tangible ways*

8 The Deny-Service Proclamation invades Plaintiffs' right to conduct their businesses and
9 pursue a vocation by dictating to them how they will engage customers and employees.

10 Under the Deny-Service Proclamation, Plaintiffs must turn away paying customers who do
11 not wear masks. This interferes with the Plaintiffs' right to conduct their businesses, and their
12 income. More damagingly to Plaintiffs in the long run, however, is the deterioration of customer
13 relationships. Plaintiffs have customers and clients with strong views on COVID-19. Forcing
14 Plaintiffs to choose between refusing to serve these customers or risk fine, jail, and the potential
15 shuttering of their businesses, invades their right to manage relationships with their customers. It
16 also, over the long term, will affect their profits. Plaintiff Declarations, ¶ 16.

17 In addition, forcing Plaintiffs to ask about health conditions that may prevent a customer
18 from wearing a mask is rude and invasive. This will hurt the relationship between Plaintiffs and
19 their customers, and may bar the customer from returning. Plaintiff Declarations, ¶ 17.

20 In the alternative, if Plaintiffs accept customers without masks, they are made to suffer the
21 moral opprobrium associated with not being law abiding. In other words, the Deny-Service
22 Proclamation intrudes upon Plaintiffs' client relations in a necessarily negative way because if they
23 comply with the order they will lose one set of customers, and if they disregard the order they will
24 lose another set, and risk fine and jail. Plaintiff Declarations, ¶ 18; *See* Declaration of Loraine Creon
25 at ¶ 25.b-.c ("As for one type of customers, I have observed that if I or my employees ask customers
26 who are not wearing masks why they are not wearing masks, it is offensive to them and causes them
27 to leave my shop.... As for another type of customers, on several occasions, if an employee is not

1 wearing a mask, that employee has been harassed by certain customers. This is true even though
2 several of my employees have conditions that prevent them from wearing masks.”).

3 The Deny-Service Proclamation invades Plaintiffs’ right to manage their
4 employer/employee relationships, and thereby interferes with productivity. Plaintiffs have
5 employees who do not wish to wear masks. If they allow their employees to be free, they suffer risk
6 of jail and fine, and lost profits for being seen as non-law abiding. In the alternative, if they compel
7 their employees to wear masks, they build up resentment and such resentment is undesirable for the
8 dynamic in the workplace, and also interferes with productivity. Plaintiff Declarations, ¶ 19.

9 The Deny-Service Proclamation interferes with Plaintiffs’ free speech rights by barring
10 them from engaging in expressive conduct or punishing them if they do not comply.

11 Plaintiffs would like to voice dissent from the government’s narrative on COVID-19.
12 Plaintiff Declarations, ¶ 20. If Plaintiffs wear masks, turn away customers who do not wear masks,
13 and compel their employees to wear masks, they do so only against their own will out of fear of
14 punishment. *Id.* at ¶23. In so doing, they use their bodies and their businesses to voice submission
15 to the government’s narrative on COVID-19. In the alternative, if Plaintiffs exercise their speech
16 and expressive rights by revealing their faces, receiving customers, and giving their employees
17 freedom, they do so in fear of being fined, jailed, and losing their livelihood. This is an
18 unquestionable invasion of Plaintiffs’ free speech rights.

19 Further the Deny-Service Proclamation requires Plaintiffs to police individuals while
20 individuals are in Plaintiffs’ jurisdiction – i.e. inside their businesses. Not only does the Deny-
21 Service Proclamation commandeer Plaintiffs to enforce the State’s laws, against Plaintiffs’ will and
22 without compensation, the Deny-Service Proclamation results in violations of rights to privacy.
23 Plaintiffs fear prosecution and therefore ask customers to reveal their private, confidential
24 information when those customers are not wearing face coverings. Such demands violate their
25 customers’ rights to privacy under Article 1, Section 7 of the Washington State Constitution.

26 **D. The Governor Issued the Deny-Service Proclamation Without Lawful Authority,**
27 **and its application to Skamania County is not narrowly tailored**

1 a. *The Governor issued his Deny-Service Proclamation outside of his authority*
2 *under RCW 43.06*

3 The infringement foisted upon Plaintiffs is not authorized by law. The Governor does not have
4 authority maintain his Proclamation in Skamania County.

5 “[T]he Washington court is committed to the view that the Governor lacks inherent power
6 except as delegated by the Constitution or a statute.” AGO 1991 No. 21 - Jun 11 1991.³² In the
7 absence of a “constitutional or statutory grant of authority from the Legislature,” the Governor is
8 not authorized to “create obligations, responsibilities, conditions or processes having the force and
9 effect of law merely by issuing an executive order.” *Fischer-McReynolds v. Quasim*, 101 Wash.
10 App. 801, 812, 6 P.3d 30, 36 (2000), *as amended* (Aug. 11, 2000).

11 Governor Inslee claims authority to declare a state of emergency and promulgate his Deny-
12 Service Proclamation in Skamania County under RCW 43.06.³³ RCW 43.06.010(12) defines when
13 the governor may declare a state of emergency:

14 The governor may, after finding that a public disorder, disaster, energy emergency,
15 or riot exists within this state or any part thereof which affects life, health, property,
16 or the public peace, proclaim a state of emergency in the area affected, and the
17 powers granted the governor during a state of emergency shall be effective only
18 within the area described in the proclamation;

19 RCW 43.06.220(1), in turn, delineates his powers once an emergency is declared.

20 Under § 220(1), the governor may, “in the area described by the proclamation,” issue “an
21 order prohibiting” being in public at certain times of the day ((1)(a)), congregating ((1)(b)),
22 manufacturing explosives ((1)(c), (d)), purchasing alcohol or other goods ((1)(e), (f)), or using
23 certain streets ((1)(g)). Finally, under the catchall (1)(h), the governor may issue orders
24 “prohibiting... such other activities as he or she reasonably believes should be prohibited to help
25 preserve and maintain life, health, property or the public peace.” ((1)(h)).

26 ³² Available at <https://www.atg.wa.gov/ago-opinions/authority-governor-issue-executive-order-having-force-and-effect-law> (last visited Sept. 10, 2020).

27 ³³ The Governor also references RCW 38.08 and 38.52. These involve the Governor’s powers over the militia and the
28 establishment of an emergency management plan, and do not relate to the mask orders.

1 The Governor exceeded his statutory authority when he issued his Deny-Service
2 Proclamation against Plaintiffs in Skamania County, and it is therefore *ultra vires*. The legislature
3 did not grant the Governor the authority to declare states of emergency based on influenza-like
4 illnesses, there is no emergency in Skamania County that justifies his use of emergency orders
5 there, and his prescriptive orders are themselves outside of his enumerated powers.

6 i. The Legislature did not grant the Governor the power to declare states of
7 emergency based on influenza-like illnesses.

8 RCW 43.06.010(12) gives the governor the power to declare a state of emergency in
9 response to a “public disorder, disaster, energy emergency, or riot.”

10 COVID-19 is neither a public disorder, energy emergency, or riot. Nor is COVID-19 a
11 disaster. “Disaster” is defined by the Merriam-Webster dictionary as “a sudden calamitous event
12 bringing great damage, loss, or destruction.”³⁴ While the economic and cultural fallout of the
13 government’s response to COVID-19 may be described as “calamitous” and “bringing great
14 damage” and loss, given all the collateral consequences, the actual effect of COVID-19, which is a
15 sickness that has resulted in the death of less than .03%³⁵ of the population, cannot be described as
16 calamitous such that a state of emergency is warranted. Nor has the onset of COVID-19 been
17 “sudden.” The first case was reported in January 2020. The Governor issued his Deny-Service
18 Proclamation in July of 2020. COVID-19 (as distinguished from the panic it has caused) cannot be
19 considered a disaster in the general or colloquial sense.

20 Rules of statutory interpretation support this conclusion. First, “Disaster” should be
21 interpreted harmoniously with the other items in the list justifying a state of emergency. Under the
22 principle *noscitur a sociis*, “a single word in a statute should not be read in isolation, and that the
23 meaning of words may be indicated or controlled by those with which they are associated.” *State*
24 *v. Roggenkamp*, 153 Wash. 2d 614, 623, 106 P.3d 196, 200 (2005) (internal citations and quotations
25 omitted). Single words “should not be isolated and analyzed apart from the words surrounding it....
26 [A] court should take into consideration the meaning naturally attaching [to statutory terms] from

27 ³⁴ See <https://www.merriam-webster.com/dictionary/disaster>

28 ³⁵ See <https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard> (last visited Sept. 29, 2020).

1 the context, and... adopt the sense of the words which best harmonizes with the context.” *Id.*

2 Here, disaster is featured in a list with public disorder, energy emergencies, and riots. These
3 events denote sudden, violent, obvious and cataclysmic, identifiable and clear actual or potential
4 calamities, caused either by nature or man. They have clear beginnings and more or less clear ends.
5 These are volcanic eruptions, flooding, forest fires, violent protests in condensed urban areas.

6 This is not an influenza-like illness. This is because it is not clearly ascertainable when an
7 influenza-like contagion begins and ends, how far and how fast it is spreading, and how severe it
8 is. Giving the governor power to create far reaching and intrusive inroads into citizens’ lives based
9 on an influenza like illness flirts with autocracy because it gives an executive too much undefined
10 power. As Justice Jackson stated eloquently in his concurrence in *Youngstown Sheet & Tube Co.*,
11 343 U.S. at 634, “comprehensive and undefined [executive] powers hold both practical advantages
12 and grave dangers.... [In time of transition and public anxiety] the tendency is strong to emphasize
13 transient results upon policies... and lose sight of enduring consequences upon the balanced power
14 structure of our Republic....”

15 Consistent with the Legislature’s intent regarding what constitutes an emergency, the
16 remedies authorized in § 220(1)(a)-(f) correspond neatly to clearly identifiable riots and public
17 disasters. The governor’s powers essentially authorize him to restrict mass gatherings and their
18 means to create mayhem. Even if drunkenness is associated with riots, none of these remedies
19 mitigate influenza symptoms.

20 Finding that the Legislature gave unmeasurable discretion to the executive also does not sit
21 well with RCW 43.06.210, which requires that “the governor must terminate [the] state of
22 emergency proclamation when order has been restored in the area affected.” This section would be
23 meaningless if nobody could reliably know when the emergency had ended, or if the ‘emergency’
24 were a mere matter of health preference. Indeed, this is particularly relevant here, where the CDC
25 recently published a conclusion that only 6% of COVID-19 deaths were caused by COVID-19

1 alone, the rest involving co-morbidities.³⁶ What that means, as a practical matter, is that it is unclear,
2 in 94% of the cases, whether COVID 19 was the primary cause of death, or a contributor and, if the
3 latter, how much of one?

4 The words surrounding “disaster” in the statute show that a spreading flu, no matter how
5 deadly, is not the kind of cataclysmic, spatially and chronologically identifiable cataclysmic event
6 the Legislature intended to base a declared emergency on.

7 Second, the Legislature could not have intended a spreading contagion causing a .03%
8 statewide fatality rate (three out of every ten thousand people) to qualify as a ‘disaster’ under RCW
9 43.06.010(12) because the Legislature vested the authority to respond to pandemics to other
10 portions of government: local boards of health.

11 Under RCW 43.20 and 70.05, the State Board of Health, together with the Local Boards of
12 Health, provide for the prevention and control of dangerous, contagious, or infectious diseases.
13 RCW 43.20.050(2)(f), RCW 70.05.060(4). Moreover, Local Boards of Health are specifically
14 empowered to provide these controls “within the jurisdiction of the local health department.” RCW
15 70.05.060(4). Violation of local boards of health’s’ orders are punishable as a misdemeanor. RCW
16 70.05.120(4) (“Any person... refusing or neglecting to obey any of the rules, regulations or orders
17 made for the prevention, suppression and control of dangerous contagious and infectious diseases
18 by the local board of health or local health officer or administrative officer or state board of health...
19 is guilty of a misdemeanor.”). The Legislature is clearly versed in how to provide powers to respond
20 to sicknesses. It vested the power to do so in the boards of health.

21 The Legislature’s Pandemic Influenza—Preparedness Act of 2006 shows starkly that the
22 Legislature had no intent for the Governor to take emergency powers into his own hands in response
23 to a flu-like contagions. In 2006, during the spread of the bird flu, the Legislature passed its
24 Pandemic Influenza – Preparedness Act, “an Act Relating to preparation and response to pandemic
25 influenza; and adding a new chapter to Title 70 RCW.” Laws of 2006 c 63 § 1. Under the Act, many

26
27 ³⁶ https://www.cdc.gov/nchs/nvss/vsrr/covid_weekly/index.htm (last visited on September 30, 2020)

1 of the fears the Legislature addressed are echoed today: “The current Avian or bird flu that is
2 spreading around the world has the potential to start a pandemic. There is yet no proven vaccine,
3 and antiviral medication supplies are limited and of unknown effectiveness....” RCW 70.26.010(4).
4 Yet the Legislature envisioned such an epidemic as an event involving *5000 deaths* in Washington
5 State, and 24,000 persons requiring hospital stays. RCW 70.26.010(3). Moreover, the Legislature
6 stated its preference for a local response. “An effective response to pandemic influenza in
7 Washington **must focus at the local level** and will depend on preestablished partnerships and
8 collaborative planning....” RCW 70.26.010(5) (emphasis added). “It is... the intent of the
9 legislature that adequate pandemic flu preparedness and response plans be developed and
10 implemented **by local public health jurisdictions**” RCW 70.26.010(6) (emphasis added).

11 The Legislature did not intend for the governor to issue sweeping and invasive orders based
12 on an influenza like illnesses at all, let alone for an illness as relatively mild to what the Legislature
13 considered a pandemic under the Pandemic Influenza – Preparedness Act.

14 ii. The Governor exceeded his authority by declaring a state of emergency
15 in Skamania County because there is no emergency there in particular

16 Even if COVID-19 is a disaster within the meaning of RCW 43.06 in *some* counties of
17 Washington State, it is not in Skamania County. This is fatal to the Proclamation as it applies in
18 Skamania County. The governor can “proclaim a state of emergency *in the area affected*,” and the
19 “powers granted the governor during a state of emergency shall be effective only *within the area*
20 *described* in the proclamation.” RCW 43.06.220(12) (emphasis added). Skamania County has
21 suffered one death, out of a population of 12,083. While a single death is a loss, it is not a natural
22 disaster. The Governor abused and exceeded his authority by declaring a state of emergency in
23 Skamania County because his states of emergency and orders must be directed towards the areas
24 affected by an emergency, and there is no emergency in Skamania County.

25 iii. Even If the Governor Had Authority To Issue the Deny-Service
26 Proclamation, Order Has Been Restored

27 RCW 43.06.210, requires that “the governor must terminate [the] state of emergency
28 proclamation when order has been restored in the area affected.” Even if the Governor had authority

1 to issue the Deny-Service Proclamation, the state of emergency under which the Deny-Service
2 Proclamation is authorized no longer exists. At the time the Governor issued the first emergency
3 proclamation, on February 29, 2020 (Proclamation 20-05), it was unknown how many individuals
4 in both the State of Washington, and in Skamania County, would be affected by COVID-19, and
5 how many of those affected would result in fatalities. More than six months later, as of today, the
6 known mortality rate of those infected has gone drastically down.

7 The Governor issued his Deny-Service Proclamation on July 7, 2020. For the three month
8 period approximately prior to then (March 15 to June 15) there had been 25,704 new cases and
9 1160 deaths, for a known mortality rate of those infected of 4.5%. Since then, however, from June
10 15 through September 15, 2020, the date at which reliable data is available at the time of this filing,
11 the known mortality rate has *decreased* dramatically, to 1.5%.³⁸ (The rate overall, from March
12 through September 2020, is 2.4%). This percentage will, presumably, continue to drop as more
13 persons are tested. Of course, as far as Skamania County stands, the fatalities remain at 1.

14 Nothing about the current state of COVID-19 infections and deaths in Washington describes
15 an emergency. Whatever *potential* emergency existed in February 2020, when little about the illness
16 and its spread was known, that potential no longer exists today. There is no “disorder” that needs
17 to be restored. Order is here.

18 iv. The Legislature never granted the governor general police power or the
19 power to order affirmative acts

20 RCW 43.06.220 grants the governor exclusively proscriptive, negative powers. RCW
21 43.06.220(1) “The governor after proclaiming a state of emergency and prior to terminating such,
22 may,... issue an order prohibiting...” (emphasis added). The catchall (1)(h) is also limited to
23 “prohibiting... Such other activities as he or she reasonably believes should be prohibited...” This
24 is in contrast to the catchall phrases located in the public-health statutes for boards of health in
25 RCW 43.20.050(2)(f) (“Adopt rules for the prevention...”) and 70.05.060 (“Provide for the control
26 and the prevention...”). RCW 43.06.220(1) does not grant the governor power to demand

27 ³⁸ See <https://www.doh.wa.gov/Emergencies/NovelCoronavirusOutbreak2020COVID19/DataDashboard> (last visited
28 Sept. 29, 2020).

1 affirmative conduct; it only grants him proscriptive power.

2 The Legislature’s belief that the catchall did not include such broad prescriptive powers can
3 be seen in recent amendments to the statute. In 2008 the legislature amended RCW 43.06.220 to
4 add additional powers to the governor. RCW 43.06.220(2); Laws of 2008 c 181 § 1. It would not
5 have done so if it believed that the governor could have done this before the amendment. Likewise,
6 in 2019, the Legislature again amended the statute, to its current form, to add a separate catch-all
7 under subsection 220(2). RCW 43.06.220(2)(g). The Legislature did so because, although it stated
8 that it believed the Governor had “broad authority” to proclaim a state of emergency, it nevertheless
9 believed that that amendment was necessary to allow the governor to suspend “other statutory
10 obligations,” too. Laws of 2019 c 472 § 2. Despite the commentary regarding broad powers, the
11 Legislature would not have added the power to suspend obligations in 2008, and further added a
12 catchall underneath that power in 2019, if it believed those powers were included under 220(1)(h).

13 Here, the Deny-Service Proclamation requires that no employer may “allow a customer to
14 enter a business, conduct business, or employ employees” unless they abide by the various mask
15 directives. The Proclamation requires Plaintiffs to tell a customer to leave, close a door on a
16 customer, or say “no” when a customer offers money. It also requires them to “have a talk” with
17 employees, or suspend them. This is affirmative conduct which the governor cannot compel.

18 *b. The Legislature could not have delegated the authority to declare a state of*
19 *emergency and demand affirmative conduct based on an influenza-type outbreak*
because that would violate separation of powers

20 Under the separation of powers requirement of the Washington constitution, for the
21 Legislature to delegate power to the executive, such “delegation of legislative power is justified
22 and constitutional, and the requirements of the standards doctrine are satisfied, when it can be
23 shown (1) that the legislature has provided standards or guidelines which define in general terms
24 what is to be done and the instrumentality or administrative body which is to accomplish it; and
25 (2) that procedural safeguards exist to control arbitrary administrative action and any administrative
26 abuse of discretionary power.” *Barry & Barry, Inc. v. State Dep’t of Motor Vehicles*, 81 Wn.2d 155,
27 159, 500 P.2d 540, 542–43 (1972); *see also Auto. United Trades Org. v. State*, 183 Wn.2d 842,

1 860, 357 P.3d 615, 624 (2015)).

2 Here, the only limit to the Governor’s order is his fiat, and the end to the emergency. RCW
3 43.06.210 (“The governor must terminate said state of emergency proclamation when order has
4 been restored in the area affected.”). The Legislature could not have given the governor the power
5 to declare a state of emergency based on an influenza-type breakout alone because there is no fixed
6 reference point to determine the illnesses’ severity, or when the emergency has ended or not.

7 The mere spread of the virus alone, cannot, be called an emergency. Many persons
8 experience no symptoms and many more mere mild symptoms. As to deaths, in many cases there
9 is uncertainty as to whether or not COVID-19 is the leading cause of death or a mere contributory
10 factor, and if the latter to what extent.⁴¹ Thus, the safeguards that exist under RCW 43.06 are
11 meaningless in this context. It is difficult to imagine when the Governor would be ‘required’ to
12 rescind the Deny-Service Proclamation, since influenza is not like a volcano or riot which end or
13 are quelled. Surely the governor is not telling anybody. *See* Order 20.25.7 (“This order goes into
14 effect immediately, and remains in effect until the state of emergency, issued on February 29, 2020,
15 pursuant to Proclamation 20-05, is rescinded or until this order is amended or rescinded.”).

16 Not only is the spread, significance, and lethality of an influenza-type flu difficult to track
17 and measure, but the character of the ‘emergency’ here begins to encroach dangerously close upon
18 the ever-important border between the private and the public, personal responsibility and
19 governmental intervention. If the Governor can force business owners to refuse service, terminate
20 employees, and cover their faces based merely on an influenza-like outbreak, it is not unreasonable
21 to ask how far the down the slippery slope he can go. Since the Governor can issue edicts to
22 “preserve... life, health... or the public peace,” what is the limiting factor? Obesity is an epidemic
23 in the United States.⁴² Can the Governor, to “preserve... health,” order overweight persons to jog
24 one mile every day? According to the Skin Cancer Foundation, one out of five Americans develop
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27 ⁴¹ See fn. 9, above.

⁴² See <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3228640/>

1 skin cancer and more than two people die of the disease *every hour*.⁴³ Those are not insignificant
2 numbers. To “preserve... life” can the Governor order citizens to wear sunscreen? These ‘slippery
3 slope’ rhetorical may appear hyperbolic—until it is remembered that COVID-19 has only
4 contributed to fatalities in .03% of Washington’ State’s citizens—or 1 out of approximately 3,700
5 people—and even that number is dubious on account of the uncertainty regarding comorbidity
6 factors. The more accurate description would be that COVID 19 was present in those deaths.

7 Where the existence of the emergency is subject to so much uncertainty as COVID 19, that
8 is an inadequate safeguard; allowing the governor to declare emergency for something as uncertain
9 as a flu-like illness does not provide “procedural safeguards... to control arbitrary administrative
10 action and any administrative abuse of discretionary power.” *Barry*, 81 Wn.2d at 159.

11 *c. The Deny-Service Proclamation is not narrowly tailored*

12 The State is compelling Plaintiffs to engage in expressive activity contrary to their
13 ideologies, and is also prohibiting them from expressing their dissenting message from the
14 government’s orthodoxy. This is an intrusion upon fundamental rights. When the State interferes
15 with a fundamental right, it must justify its actions under strict scrutiny, whereby the government
16 action must be based on a compelling interest, and be narrowly tailored to meet that interest. The
17 government’s action fails strict scrutiny here because at the very least it is not narrowly tailored.

18 The Deny-Service Proclamation is not narrowly tailored, first, because it is based on a
19 declaration of emergency in application to the entire state, but Skamania County has only
20 experienced one death from the illness, and has only 6 active cases. Even if stopping the spread of
21 COVID-19 is compelling, draconian restrictions are unnecessary in Skamania County.

22 Second, the Deny-Service Proclamation is not narrowly tailored because there are other
23 means by which Plaintiffs may seek to stop the spread of COVID-19 that do not involve inhibiting
24 their speech activities. Plaintiffs are willing and are engaging in additional safety measure to stop
25 the spread of COVID-19. Plaintiff Declarations, ¶ 21. Such actions allow them to contribute to the

26
27 ⁴³ See <https://www.skincancer.org/skin-cancer-information/skin-cancer-facts/>

1 slow of the spread of COVID-19, without also being prohibited from expressing their dissent.

2 **E. The interference with Plaintiffs’ rights is will continue to result in actual and**
3 **substantial injury**

4 Interference with Plaintiffs’ rights will result in actual and substantial injury. The governor
5 has ordered Plaintiffs to refuse to serve or employ non-conforming customers or employees. If
6 Plaintiffs obey, they will lose money and damage client and employee relationships, in addition to
7 productivity. If they do not obey, they will be perceived as lawless and suffer threat of punishment.

8 Plaintiffs’ fear of invasion of their rights is well-grounded because violation of the Deny-
9 Service Proclamation is a misdemeanor. RCW 43.06.220 penalizes any citizen who violates the
10 governor’s orders. Moreover, Plaintiffs fear invasion of their rights by Labor and Industries, which,
11 under newly minted WAC 296-800-14035, has explicitly required that they abide by all the
12 governor’s orders. WAC 296-800-14035(2)(“Employers must comply with all conditions for
13 operation required by emergency proclamation issued under RCW 43.06.220...”). Defendants L&I
14 has the power to fine Plaintiffs. *See generally* RCW 43.22. Plaintiffs have received phone calls
15 from L&I investigating their businesses, and Plaintiffs Matthew and Hannah Joy have received
16 notices by mail alleging non-compliance. Declaration of Matthew Joy at ¶ 25, Exhibit A.

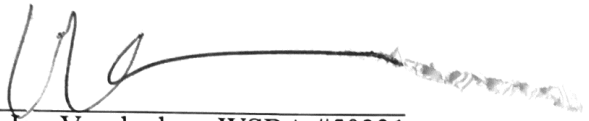
17 Finally, the loss of free speech freedoms, for even a short time, is irreparable. “The loss or
18 threatened infringement upon free speech rights ‘for even minimal periods of time[]
19 unquestionably constitutes irreparable injury.’” *Cuviello v. City of Vallejo*, 944 F. 3d 816, 832 (9th
20 Cir. 2019) (*citing Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The ability for Plaintiffs to be able to
21 voice their dissent in the ways discussed above relevant only now, during the current COVID 19
22 issues debate. Protest is only relevant when the object of protest is occurring and ongoing.

23 **VI. CONCLUSION**

24 Plaintiffs demonstrate all the necessary elements of a preliminary injunction and one should
25 be granted. They possess clear legal and equitable rights guaranteed to them by the Washington
26 State Constitution that are being violated, and will continue to be violated, unless enjoined by this
27 Court. An injunction is warranted to preserve their rights until a complete can be had.

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RESPECTFULLY SUBMITTED this 1st day of October, 2020.

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