

Hearing date: February 12, 2021
Hearing time: 9:00 a.m.
Judge/Calendar: Hon. Chris Lanese

**STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT**

CLINT DIDIER, et al.,

Plaintiffs,

v.

JAY INSLEE, individually, and in his
capacity as Governor of the State of
Washington; et al.,

Defendants.

NO. 20-2-01662-34

DEFENDANTS' CROSS-MOTION FOR
SUMMARY JUDGMENT

AND

OPPOSITION TO PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The continuing global COVID-19 coronavirus pandemic has caused the deaths of over 337,419¹ Americans and 3,420² Washingtonians, and disrupted social interaction and economic activity nationwide. A widely predicted fall/winter “surge” is underway, with record daily case numbers reported.³ There is now near-universal consensus among public health officials and experts that the use of face coverings (masks) is an easy, low-cost, highly efficient means of controlling the respiratory spread of the virus while permitting social and economic activity to continue as much as possible. As Robert Redfield, Director of the Centers for Disease Control and Prevention (CDC), has stated: “Cloth face coverings are one of the most powerful weapons we have to slow and stop the spread of the virus – particularly when used universally within a community setting.”⁴ Last month the CDC published a detailed scientific bulletin that leaves no doubt as to the “community benefit of masking for [COVID-19] control.”⁵

Having had most of its claims dismissed, Plaintiffs’ sole remaining challenge is to the emergency proclamations of Governor Jay Inslee and emergency orders of Secretary of Health John Wiesman requiring (with some exceptions) the use of masks in public settings. Plaintiffs’ Motion for Summary Judgment (Motion) argues that these laws are *ultra vires*, violate free speech rights, and violate substantive due process. Plaintiffs cannot prevail on this claim. First,

¹Centers for Disease Control and Prevention, *CDC COVID Data Tracker* (updated Dec. 30, 2020, 5:09 PM), https://covid.cdc.gov/covid-data-tracker/#cases_casesinlast7days.

²Wash. State Dep’t of Health, COVID-19 Data Dashboard, (Cases, Hospitalizations and Deaths by County) (data as of Dec. 29, 2020, 11:59 PM), <https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard>.

³See, e.g., German Lopez, *America’s third Covid-19 surge, explained*, Vox.com (updated Nov. 9, 2020, 10:40 AM), <https://www.vox.com/21523039/covid-coronavirus-third-wave-fall-winter-surge>.

⁴Centers for Disease Control and Prevention, *CDC calls on Americans to wear masks to prevent COVID-19 spread* (July 14, 2020), <https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html>.

⁵Centers for Disease Control and Prevention, *Scientific Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2* (updated Nov. 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/more/masking-science-sars-cov2.html>.

1 for reasons already accepted by this Court, the mask requirements are a lawful exercise of
2 delegated authority and do not run afoul of the express limitations of the Washington
3 Constitution. Second, the requirements do not implicate “speech” at all, and even if they did,
4 they would be amply justified as a time, place, or manner restriction. Third, the requirements
5 implicate no fundamental rights and satisfy rational basis review. Therefore, Defendants
6 respectfully request the Court to grant summary judgment in their favor on Plaintiffs’ remaining
7 claim.
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9 II. FACTUAL BACKGROUND

10 A. COVID-19 and the Mask Requirements

11 The SARS-CoV-2 virus, which causes COVID-19, is highly contagious and potentially
12 fatal. Declaration of Brendan Selby in Support of Defendants’ Cross-Motion for Summary
13 Judgment and Opposition to Plaintiffs’ Motion for Summary Judgment (Selby Decl.), Exhibit A
14 (Lofy Decl.) ¶¶ 6–7. It spreads primarily through close person-to-person contact via respiratory
15 droplets or aerosols produced when an infected person coughs, sneezes, or talks. *Id.* ¶ 6. There
16 is a lag of at least several days from when a person contracts the virus and the onset of
17 symptoms.⁶ In many cases, persons with COVID-19 never experience symptoms and may spread
18 it unknowingly (i.e., asymptomatic transmission). *Id.*
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20 Because of the uniquely high risk of pre-symptomatic and asymptomatic transmission of
21 COVID-19, consensus has emerged among leading experts and public health officials that face
22 masks are an effective means of slowing the transmission of the virus while permitting some
23 interpersonal contact and business activity in public settings. *See, e.g.,* Selby Decl., Ex. A ¶¶ 30–
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26 ⁶*See, e.g.,* Monica Gandhi, et al., *Asymptomatic Transmission, the Achilles’ Heel of Current Strategies to Control Covid-19*, N.E. J. of Med. (Apr. 24, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMe2009758>.

1 32. The CDC recommends that people “wear masks in public settings and when around people
2 who don’t live in [the same] household[.]”⁷ In a recent scientific bulletin with 45 citations, the
3 CDC concluded that “[e]xperimental and epidemiological data support community masking to
4 reduce the spread of [COVID],” and that this “benefit increases with increasing numbers of
5 people using masks consistently and correctly.” Selby Decl., Ex. A, Ex. 8. In accord with these
6 findings, governors around the country and from different political parties have imposed mask
7 requirements.⁸

9 Studies from around the world support the efficacy of masks. One study showed that
10 mandating mask use was associated with a decline in daily COVID-19 growth rates across
11 numerous states. *See* Selby Decl., Ex. A, Ex. 3. Similar results have been found at a country-by-
12 country level. *See id.*, Ex. 6. A German study showed that face masks reduced daily transmission
13 rates by around 40%. *See id.*, Ex. 1. Another study showed that in Canada, mask mandates were
14 associated with at least a 25% reduction in weekly new cases. *See id.*, Ex. 2. Mask requirements
15 are correlated with fewer reported COVID-19 symptoms.⁹ The University of Washington’s
16 Institute for Health Metrics and Evaluation—a leading public health data organization—predicts
17 that universal mask use would result in more than 40,000 fewer American deaths between now
18 and April 2021, nearly equivalent to the efficacy of a rapid vaccine rollout.¹⁰

22 ⁷Centers for Disease Control and Prevention, *Considerations for Wearing Masks* (updated Dec. 18, 2020),
23 <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html>.

24 ⁸*See, e.g.,* Andrea Salcedo, *Utah governor declares emergency, issues mask mandate: ‘We cannot afford to debate this issue’*, Wash. Post (Nov. 9, 2020, 4:30 AM),
<https://www.washingtonpost.com/nation/2020/11/09/utah-emergency-masks-mandate-covid/>.

25 ⁹Christopher Ingraham, *A powerful argument for wearing a mask, in visual form*, Wash. Post
(Oct. 23, 2020, 3:00 AM), <https://www.washingtonpost.com/business/2020/10/23/pandemic-data-chart-masks/>.

26 ¹⁰The Institute for Health Metrics and Evaluation, *COVID-19 Projections* (updated Dec. 23, 2020),
<https://covid19.healthdata.org/united-states-of-america?view=daily-deaths&tab=trend>.

1 Relying on recommendations from the Department of Health, the CDC, and the World
2 Health Organization (WHO), Secretary of Health John Wiesman issued Order 20-03 on
3 June 24, 2020. *See* Selby Decl., Ex. B (Wiesman Decl.), Ex. 1 at 1, 3. The Order required mask
4 use in public settings, with numerous exceptions and accommodations. *See generally id.* The
5 same day, Governor Inslee issued Proclamation 20-60, prohibiting public activities in Yakima
6 County without the use of masks. *See* Selby Decl., Ex. D (Postman Decl.), Ex. 22. The
7 Proclamation incorporated Secretary Wiesman’s Order 20-03 by reference. *Id.* at 3. On July 7,
8 2020, Governor Inslee issued Proclamation 20-25.6, which included prohibitions relating to
9 business activity conducted without taking COVID-19-related precautions, including the use of
10 face masks. *See id.*, Ex. 25 at 4.

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12 On July 24, 2020, Secretary Wiesman issued Order 20-03.1 (the Order), now the
13 operative order on face coverings. *See* Selby Decl., Ex. B, Ex. 2. The Order was issued because,
14 in the Secretary’s professional opinion, it was necessary to control and prevent the spread of
15 COVID-19. *Id.* ¶ 7. It is based on current standards of practice and the best available medical
16 and scientific information. *Id.* To encourage and enable Washingtonians to wear face coverings
17 when outside the home, according to Washington State Department of Enterprise Services (DES)
18 data, the State has distributed 13,512,915 cloth face coverings and 33,392,800 surgical masks
19 statewide since March 16, 2020. *See* Selby Decl., Ex. A ¶ 32, Ex. 9. The Governor’s current
20 operative Proclamation 20-25.10, issued on December 21, 2020, incorporates Secretary
21 Wiesman’s Order 20-03.1 by reference.¹¹ *See* Selby Decl., Ex. 3 at 5. This Cross-Motion for
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25 ¹¹Wash. State Office of the Governor, *Proclamation by the Governor Amending Proclamations 20-05 and*
26 *20-25, et seq.*, at 5, https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-25.10.pdf (last visited
Dec. 31, 2020); Selby Decl., Ex. 3 at 5.

1 Summary Judgment will refer to the operative requirements concerning masks, Order 20-03.1
2 and Proclamation 20-25.10, collectively, as “the Mask Requirements.”

3 **B. COVID-19’s Continuing Threat to Washington**

4 Although Washington has made progress in combatting COVID-19, an emergency
5 continues to exist for the entire state. Selby Decl., Ex. A ¶ 41. As the State’s Chief Science
6 Officer, Dr. Kathy Lofy, has testified, COVID-19 can be spread by asymptomatic people and is
7 easily transmitted and lethal. *Id.* After an initial dip in the late summer and early fall, cases are
8 once again peaking nationwide.¹² *See* Selby Decl., Ex. A ¶ 33–34. Leading health organizations
9 predicted¹³ a fall and winter “surge” of the virus that is now underway.¹⁴ *See id.* Cold weather
10 and increased interactions indoors may be driving the surge. *Id.* ¶ 35.

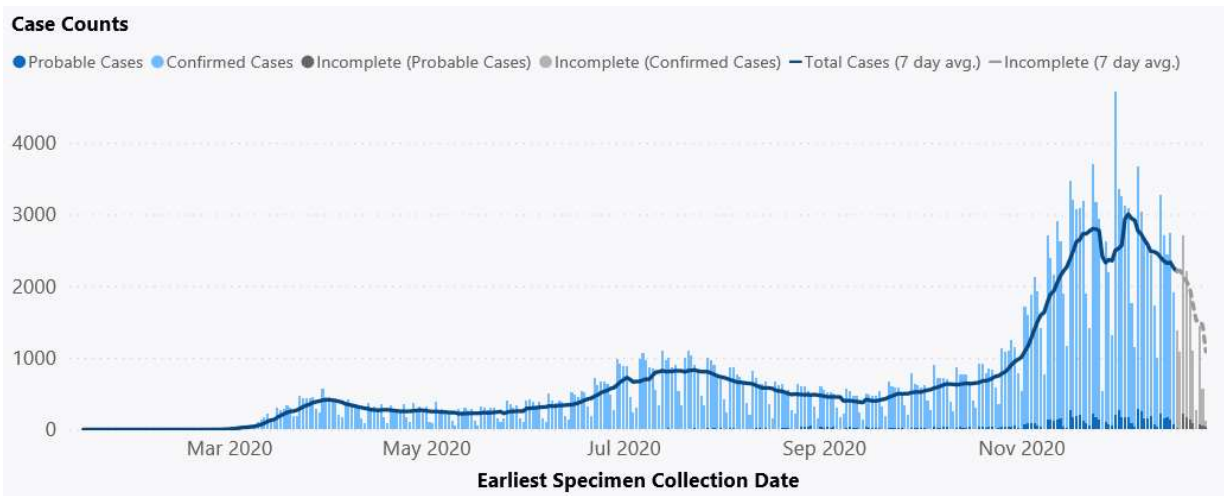
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12 In Washington, the seven-day average for new cases reached an all-time high of 3,000—
13 more than three times the pre-autumn high, as Figure 1 illustrates below. A dangerous rise in
14 hospitalizations followed, as shown in Figure 2.
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23 ¹²Centers for Disease Control and Prevention, *CDC COVID Data Tracker* (updated Dec. 30, 2020,
5:09 PM), https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases.

24 ¹³*See, e.g.,* David H. Freedman, *Winter will make the pandemic worse. Here’s what you need to know*, MIT
Technology Review (Oct. 8, 2020), <https://www.technologyreview.com/2020/10/08/1009650/winter-will-make-the-pandemic-worse/>.

25 ¹⁴Institute for Health Metrics and Evaluation, *Model updates for October 9, 2020*,
26 http://www.healthdata.org/sites/default/files/files/Projects/COVID/briefing_US_10092020.pdf (last visited Dec. 31, 2020).

1 **Fig. 1: Wash. COVID-19 Epidemiological Curve (Cases)**¹⁵



11 **Fig. 2: Wash. COVID Epidemiological Curve (Hospitalizations)**¹⁶



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20 Due to the rapid rise in documented cases, the Governor was forced to partially and

21 temporarily roll back the State's phased county-by-county reopening plan.¹⁷

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23 ¹⁵Wash. State Dep't of Health, COVID-19 Data Dashboard, Epidemiologic Curves (data as of Dec. 29, 2020, 11:59 PM), www.doh.wa.gov/Emergencies/COVID19/DataDashboard.

24 ¹⁶Wash. State Dep't of Health, COVID-19 Data Dashboard, Epidemiologic Curves (data as of Dec. 29, 2020, 11:59 PM), www.doh.wa.gov/Emergencies/COVID19/DataDashboard.

25 ¹⁷Wash. State Office of the Governor, *Proclamation by the Governor Amending Proclamations 20-05 and 20-25, et seq.*, https://www.governor.wa.gov/sites/default/files/proclamations/proc_20-25.10.pdf (last visited Dec. 31, 2020); Selby Decl., Ex. C at 6.

1 Finally, a new and more contagious strain of the virus recently entered the United
2 States.¹⁸ According to the U.S. government’s top infectious disease expert, to prevent the new
3 strain from spreading further, Americans should adhere to “public health measures that we talk
4 about all the time,” including “[t]he wearing of masks.”¹⁹

5 **C. Plaintiffs’ Lawsuit**

6 Plaintiffs filed this lawsuit on June 29, 2020, and filed their amended complaint on
7 July 6, 2020. On October 16, 2020, after a hearing, the Court issued an oral ruling granting
8 Defendants’ Motion for Summary Judgment with respect to all claims except Plaintiffs’
9 challenge to the Mask Requirements, which the Court concluded had not been adequately
10 briefed. The parties have agreed to file cross-motions for summary judgment on that claim.
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12 Some of the issues in this case are similar to those raised in another pending case in
13 Thurston County, *Sehmel v. Wiesman*, No. 20-2-01780-34, for which Defendant John
14 Wiesman’s Summary Judgment motion is scheduled for hearing on February 5, 2021.
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16 **III. LEGAL STANDARD**

17 Summary judgment is appropriate if the record on file demonstrates that “there is no
18 genuine issue as to any material fact” and “the moving party is entitled to a judgment as a matter
19 of law.” CR 56(c). The “moving party” must “raise in its summary judgment motion all of the
20 issues on which it believes it is entitled to summary judgment.” *White v. Kent Med. Ctr., Inc.*,
21 *P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991). A party seeking to avoid summary judgment
22 must present more than “mere allegations” but rather “specific facts” showing an issue for trial.
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25 ¹⁸Alexandra Kelley, “‘Science has and will come to the rescue!’ Fauci says vaccines likely to protect
26 against new COVID-19 strain,” *The Hill* (Dec. 31, 2020), <https://thehill.com/changing-america/well-being/prevention-cures/532210-science-has-and-will-come-to-the-rescue-fauci>.

¹⁹*Id.*

1 CR 56(e). Inferences are drawn in favor of the non-moving party. *White*, 61 Wn. App. at 171.
2 “[A] plaintiff abandons a claim asserted in a complaint by failing to address the claim in
3 opposition pleadings, present evidence to support the claim, or argue the claim in response to a
4 summary judgment motion seeking dismissal of the entire complaint.” *West v. Gregoire*,
5 184 Wn. App. 164, 171, 336 P.3d 110, 113 (2014), *as amended* (Nov. 4, 2014).
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7 IV. ARGUMENT

8 A. Plaintiffs Lack Standing and Their Claims Are Not Justiciable

9 For reasons explained in Defendants’ briefing for the first set of Cross-Motions for
10 Summary Judgment (Defendants’ Cross-Motion for Summary Judgment and Opposition to
11 Plaintiffs’ Motion for Summary Judgment (Defs.’ Cross-Mot.) and Reply in Support of
12 Defendants’ Cross-Motion for Summary Judgment), Plaintiffs lack standing to challenge the
13 Mask Requirements, and their claim is not otherwise justiciable. The inclination to lower the
14 traditional jurisdictional bar under these circumstances is understandable, but incorrect. As
15 noted, no Plaintiff even mentioned masks in their initial declarations. Defs.’ Cross-Mot. at 25.
16 In her most recent declaration, Plaintiff Thomas merely offers purported expert testimony
17 regarding masks and does not assert any personalized harm. *See* Second Declaration of Lisa
18 Thomas; *cf. Parker v. Wolf*, No. 20-CV-1601, 2020 WL 7295831, at *12, *14-15 (M.D. Pa.
19 Dec. 11, 2020) (concluding that challenge to mask mandate was a generalized grievance and
20 citing similar federal cases). Plaintiffs preserve this argument in the event of appeal.
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23 B. Plaintiffs’ New Theories of Liability Are Waived

24 “A party who does not plead a cause of action or theory of recovery cannot finesse the
25 issue by later inserting the theory into trial briefs and contending it was in the case all along.”
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1 *Kirby v. City of Tacoma*, 124 Wn. App. 454, 472, 98 P.3d 827 (2004) (quoting *Dewey v. Tacoma*
2 *Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999)); *see Molloy v. City of Bellevue*,
3 71 Wn. App. 382, 385, 859 P.2d 613 (1993) (rejecting “veiled attempt” to amend complaint in
4 summary judgment proceedings).

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6 Plaintiffs once again raise new theories at the summary judgment stage, including that
7 Defendants have violated 18 U.S.C. § 241 and customary international law. *See, e.g.*, Mot. at 2,
8 11. Plaintiffs’ Complaint cannot be reasonably read to include such claims, which are therefore
9 waived. Plaintiffs’ customary international law argument is addressed below, *infra* at 16-17.
10 Plaintiffs’ briefly-mentioned Section 241 argument is incorrect, among other reasons, because
11 this criminal statute provides no basis for civil liability. *See, e.g., Aldabe v. Aldabe*, 616 F.2d
12 1089, 1092 (9th Cir. 1980); *Battle v. Travel Lodge Motel*, 474 F. App’x 654, 655 (9th Cir. 2012).

13 14 **C. The Governor’s Mask Orders Fall Within His Delegated Police Powers**

15 Plaintiffs suggest in passing that the Governor’s mask-related Proclamations “exceed[]
16 the authority granted to the governor under Washington’s Constitution and the Constitution of
17 the United States.” Mot. at 2. To the extent Plaintiffs are gesturing toward a general *ultra vires*
18 argument beyond the specific constitutional claims they raise in their Motion, such argument is
19 waived for failure to develop it or to provide any relevant authority. *Citizens All. for Prop. Rights*
20 *Legal Fund v. San Juan County*, 181 Wn. App. 538, 545, 326 P.3d 730, 734 (2014), *aff’d*,
21 184 Wn. 2d 428, 359 P.3d 753 (2015) (citing *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d
22 193 (1990)). Moreover, the federal Constitution does not “grant” authority to the Governor.
23 Rather, it acts as a federal limit on the Governor’s authority. Finally, Plaintiffs’ argument that
24 the Governor’s COVID-19-related Proclamations exceeded his authority under the Washington
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1 Constitution has already been briefed by the parties and rejected by the Court. Defendants
2 incorporate their prior arguments by reference. *See* Defs.’ Cross-Mot. at 13-14. It is
3 well-established that the Governor may exercise delegated authority, including legislative
4 authority. *See, e.g., Fischer-McReynolds v. Quasim*, 101 Wn. App. 801, 813, 6 P.3d 30, 37
5 (2000), *as amended* (Aug. 11, 2000) (citing *Young v. State*, 19 Wash. 634, 636, 54 P. 36, 37
6 (1898)). The Proclamations are a valid exercise of delegated police power under
7 RCW 43.06.220. *See Cougar Bus. Owners Ass’n, et al. v. State, et al.*, 97 Wn.2d 466, 476,
8 647 P.2d 481 (1982).

10 **D. The Mask Requirements Do Not Violate Plaintiffs’ Rights of Free Speech and**
11 **Expression**

12 **1. The Mask Requirements do not compel or otherwise implicate speech**

13 Plaintiffs argue that whether one wears a mask in the present political climate is protected
14 “speech” under the First Amendment of the U.S. Constitution and Article I, Section 5 of the
15 Washington Constitution. They claim that the mask requirements are compelled speech because
16 wearing a mask expresses agreement with the State’s entire response to the coronavirus
17 pandemic. *See* Mot. at 4-6. This argument is incorrect and has already been rejected by at least
18 two federal courts. *See Stewart v. Justice*, No. CV 3:20-0611, 2020 WL 6937725, at *5 (S.D.W.
19 Va. Nov. 24, 2020) (speech element of not wearing a mask was not sufficiently apparent); *Minn.*
20 *Voters All. v. Walz*, No. 20-CV-1688 (PJS/ECW), 2020 WL 5869425, at *11 (D. Minn.
21 Oct. 2, 2020) (mask requirement did not curtail speech).

22 The Washington Supreme Court relies on the federal standard to determine whether
23 nonverbal conduct amounts to “speech”:
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1 “Speech” includes nonverbal conduct if the conduct is “sufficiently imbued with
2 elements of communication”. *Spence v. State*, 418 U.S. 405, 409 (1974). Whether
3 conduct constitutes speech depends on the nature of the activity, combined with
4 the factual context and environment in which the activity is undertaken. *Spence*
5 *v. State, supra*. There must be “[an] intent to convey a particularized message”
6 and a great “likelihood . . . that the message would be understood by those who
7 view it’ ”. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

8 *First Covenant Church of Seattle v. City of Seattle*, 120 Wn.2d 203, 216-17, 840 P.2d 174 (1992).

9 As the U.S. Supreme Court has stated, “[w]e cannot accept the view that an apparently limitless
10 variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends
11 thereby to express an idea.” *United States v. O’Brien*, 391 U.S. 367, 376 (1968). Therefore, this
12 Court must determine whether refusing to wear a mask, even if done for the purpose of
13 expressing political disagreement, merits any protection as “expressive conduct.” If not, then
14 rational basis review applies. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058
15 (9th Cir. 2010).

16 Contrary to Plaintiffs’ argument, compliance with a content-neutral law regulating
17 conduct does not mean that a person necessarily agrees with that law, let alone with an entire
18 category of related laws. In a democratic society, every citizen must inevitably follow a law with
19 which he or she does not agree. Therefore, there is no “great . . . likelihood” that eschewing a
20 mask would be understood to express a specific message of political dissent. *See Spence*,
21 418 U.S. at 410–11. “First Amendment protection is only granted to the act of wearing particular
22 clothing or insignias where circumstances establish that an *unmistakable* communication is being
23 made.” *Edge v. City of Everett*, 929 F.3d 657, 668 (9th Cir. 2019) (emphasis added); *see, e.g.*,
24 *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 66 (2006). Not
25 wearing a mask in public does not convey an unmistakable political message and, as discussed
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1 below, could be interpreted in various ways. Finally, broad disagreement with the political
2 response to the pandemic does not constitute a sufficiently particularized message. *See, e.g.,*
3 *Zalewska v. County of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003) (intent to communicate “a
4 broad statement of cultural values” did not qualify as a “specific, particularized message”).

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6 The Washington Supreme Court rejected a similar type of claim in *State v. Arlene’s*
7 *Flowers, Inc.*, 193 Wn.2d 469, 511, 441 P.3d 1203 (2019). There, the Court considered whether
8 declining to sell floral wedding arrangements for a same-sex wedding was protected expression.
9 After quoting the standard for determining expressive conduct, the Court clarified that “[r]ecent
10 cases have characterized this as an inquiry into whether the conduct at issue was ‘inherently
11 expressive.’ ” *Id.* at 512 (quoting *FAIR*, 547 U.S. at 64) (emphasis added); *see also Anderson*,
12 621 F.3d at 1055 (distinguishing “purely expressive” activities like tattooing and participating
13 in a parade from conduct that, “on its face, does not necessarily convey a message,” such as
14 wearing a black armband) (quoting *Cohen v. California*, 403 U.S. 15, 18 (1971)). The Court held
15 that refusing to sell arrangements for a same-sex wedding is not “inherently expressive” because
16 more speech would be required to understand the message. For example, the refusal could have
17 been due to either “a religious objection, insufficient staff, or insufficient stock.” *Arlene’s*
18 *Flowers, Inc.*, 193 Wn.2d at 513.

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20 Similarly, not wearing a mask may signal many things about a person unrelated to
21 political dissent, including a “medical condition . . . that prevents wearing a face covering,”
22 Selby Decl., Ex. B, Ex. 2 at 3 (which is exempted), that the person expects to remain outdoors
23 and at least six feet away from others (also exempted), forgetfulness, or simple unawareness of
24 the requirement. *See, e.g., FAIR*, 547 U.S. at 66. Nor does the decision to comply with the law
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1 by wearing a mask communicate unmistakable agreement with the Mask Requirements or any
2 other aspect of the State’s response to the pandemic. It could also express the widely-held belief
3 that one should follow a valid public health law whether or not one agrees with it.

4 Finally, the expressive dimension of conduct becomes largely irrelevant so long as other,
5 similar options for expressing the same view at the same time remain available. *See Church of*
6 *Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 206 (2d Cir. 2004) (in challenge to
7 neutral anti-mask law, message conveyed by Ku Klux Klansmen’s mask added “no expressive
8 force to the message portrayed by the rest of the [KKK] outfit”). Some of the many options that
9 remain available to Plaintiffs to express their views in spite of the Mask Requirements include:
10 (a) Wearing a mask while also wearing a t-shirt, button, or hat that expresses disagreement with
11 the Mask Requirements; (b) Wearing a mask that expressly conveys an anti-mask message, such
12 as “This Mask Is USELESS”²⁰; (c) Posting a sign in one’s business that states that, despite being
13 required to comply with Mask Requirements, the business strongly disagrees with such
14 requirements and is only doing so under compulsion; or (d) Coordinating a campaign to wear
15 armbands to protest the Mask Requirements. All of these would be lawful—and much clearer—
16 means of “dissent.”
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19 In sum, Plaintiffs seek to evade compliance with a neutral public health law of generally
20 applicability, on the ground that they disagree with the factual basis for the law. The tautology
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23 ²⁰See Amazon, *This Mask is Useless reusable mask*, https://www.amazon.com/Reusable-Face_mask-Protection-Breathable-Face_cover/dp/B08HVGZ4L2/ref=asc_df_B08HVGZ4L2/?tag=hyprod-20&linkCode=df0&hvadid=475864413482&hvpos=&hvnetw=g&hvrnd=6466619685792919976&hvpon=&hvptwo=&hvqmt=&hvdev=c&hvdvcmid=&hvlocint=&hvlocphy=9033317&hvtargid=pla-1006206296116&pvc=1
24 (last visited Nov. 13, 2020); see also Neringa Utaraitė, *20 Face Masks For Anti-Maskers As Sold By One Etsy Store*,
25 Bored Panda, https://www.boredpanda.com/etsy-store-face-masks-for-antimaskers-freedomunmasked/?utm_source=google&utm_medium=organic&utm_campaign=organic (last visited Nov. 4, 2020) (“What’s the best way
26 to let the world know that you’re anti-mask? By wearing an anti-mask face mask, of course!”).

1 of Plaintiffs’ argument would support breaking any law on the ground that doing so expresses
2 disagreement with the same. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986) (noting
3 “the fallacy of seeking to use the First Amendment as a cloak for obviously unlawful . . . conduct
4 by the diaphanous device of attributing protected expressive attributes to that conduct.”); *Talk*
5 *of the Town v. Dep’t of Fin. & Bus. Servs. ex rel. City of Las Vegas*, 343 F.3d 1063, 1069–70
6 (9th Cir. 2003) (“a sanction imposed pursuant to a generally applicable law does not trigger First
7 Amendment scrutiny, even where the sanction results in a burden on expression”); *cf. FAIR*,
8 547 U.S. at 66 (no First Amendment protection would apply “if an individual announces that he
9 intends to express his disapproval of the Internal Revenue Service by refusing to pay his income
10 taxes”). The Court should reject Plaintiffs’ novel and radical free speech argument. *Jacobson v.*
11 *Massachusetts*, 197 U.S. 11, 26 (1905) (“Society based on the rule that each one is a law unto
12 himself would soon be confronted with disorder and anarchy”).
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15 **2. Even if the Mask Requirements affect “speech,” they are valid**

16 If the Mask Requirements restrict speech at all (which they do not) they would be, at
17 most, a content-neutral time, place, or manner restriction on expressive conduct. *See Stewart*,
18 2020 WL 6937725, at *6 (applying this standard and describing argument that similar mask
19 requirements were invalid as “wholly without merit”); *Minn. Voters*, 2020 WL 586425, at *11.
20 The requirements pass muster under the time, place, or manner standard.
21

22 The Washington Supreme Court has held, with respect to time, place, and manner
23 restrictions on expressive conduct, that the standard applied under the federal First Amendment
24 also applies to a challenge under the Washington Constitution, Article I, Section 5. *Ino Ino, Inc.*
25 *v. City of Bellevue*, 132 Wn.2d 103, 122, 127-28, 937 P.2d 154 (1997), *amended*, 943 P.2d 1358
26

1 (Wash. 1997). This standard requires the Court to consider if: “the restrictions are:
2 (1) content-neutral; (2) narrowly tailored to serve a significant government interest; and (3) leave
3 open ample alternative channels for communication of the information.” *Colacurcio v. City of*
4 *Kent*, 163 F.3d 545, 551 (9th Cir. 1998) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791
5 (1989)).
6

7 First, the Mask Requirements are content neutral. They “serve purposes unrelated to the
8 content of expression,” *i.e.*, to combat a pandemic. *Ward*, 491 U.S. at 791. There is no evidence
9 they were adopted because of any “disagreement with” a political message. *Id.*; *see also, e.g.*,
10 *Robinson v. Murphy*, No. CV 20-5420, 2020 WL 5884801, at *8 (D.N.J. Oct. 2, 2020).
11

12 Second, the Mask Requirements serve a “substantial government interest that would be
13 achieved less effectively absent the regulation.” *Id.* at 799 (internal quotation marks omitted).
14 Protecting public health and slowing the spread of a highly contagious virus is not only a
15 “substantial” governmental interest, but a compelling one. *See Roman Catholic Diocese of*
16 *Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020); *accord, Legacy Church, Inc. v. Kunkel*, 455 F.
17 Supp. 3d 1100, 1158 (D.N.M. 2020); *Givens v. Newsom*, 459 F. Supp. 3d 1302, 1314 (E.D. Cal.
18 2020). Studies and recommendations of public officials confirm that mask requirements serve
19 this interest, as numerous courts have already recognized. *See, e.g., Stewart*, 2020 WL 6937725,
20 at *6; *Young v. James*, No. 20 CIV. 8252 (PAE), 2020 WL 6572798, at *3 (S.D.N.Y. Oct. 26,
21 2020); *Robinson*, 2020 WL 5884801, at *8; *Minn. Voters*, 2020 WL 5869425, at *11.
22

23 To be narrowly tailored to achieve a legitimate state interest, a regulation “need not be
24 the least restrictive or least intrusive means of doing so.” *Ward*, 491 U.S. at 798. Rather, a law
25 is narrowly tailored “[s]o long as the means chosen are not substantially broader than necessary
26

1 to achieve the government’s interest.” *Id.* at 800. COVID-19 spreads easily through the air, and
2 because asymptomatic individuals may unknowingly have the virus, gatherings of people
3 without masks, particularly strangers, pose a risk of community transmission. *See Antietam*
4 *Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214, 234 (D. Md. 2020). Because slowing the spread
5 of the virus would be achieved less effectively without the use of face masks in public settings,
6 the Mask Requirements are narrowly tailored.
7

8 Third, as discussed above, Mask Requirements do not prevent Washingtonians from
9 expressing their disagreement and dissent to policies related to masks or any other emergency
10 public health measure. *See, e.g., Geller v. de Blasio*, No. 20CV3566 (DLC), 2020 WL 2520711,
11 at *4 (S.D.N.Y. May 18, 2020) (ability to express discontent online, through media, and
12 protesting on her own were acceptable alternatives to group protests); *Givens*, 459 F. Supp. 3d
13 at 1313 (same). If Plaintiffs want to speak, protest, or otherwise dissent to wearing masks, they
14 can avail themselves of an entire universe of lawful speech.
15

16 **E. The Mask Requirements Do Not Implicate Any Right to Bodily Autonomy**

17 Plaintiffs incorrectly argue – without relevant citation – that the Mask Requirements
18 violate their right to bodily autonomy or otherwise violate a fundamental right implicit in the
19 concept of ordered liberty based on customary international law. *See Mot.* at 9-13.
20

21 The Washington Supreme Court has held that, “[u]nless and until this court adopts
22 heightened protections as a matter of independent state law, state substantive due process claims
23 are subject to the same standards as federal substantive due process claims.” *Yim*, 194 Wn.2d at
24 686, *as amended* (Jan. 9, 2020); *see also Slidewaters LLC v. Dep’t of Labor & Indus.*,
25 No. 2:20-CV-0210-TOR, 2020 WL 3979661, at *4 (E.D. Wash. July 14, 2020).
26

1 Aside from being waived, *see supra* at 8-9, Plaintiffs’ reliance on customary international
2 law is incorrect for at least *four* reasons. *First*, under federal law, “customary international law
3 is not a source of judicially enforceable private rights in the absence of a statute conferring
4 jurisdiction over such claims.” *Serra v. Lappin*, 600 F.3d 1191, 1197 (9th Cir. 2010). *Second*,
5 customary international law may not be invoked to challenge a legislative act. *See, e.g.*,
6 *Martinez-Lopez v. Gonzales*, 454 F.3d 500, 502 (5th Cir. 2006) (citing *Sosa v. Alvarez–Machain*,
7 542 U.S. 692, 731 (2004)); *Bradvisa v. INS*, 128 F.3d 1009, 1014 n.5 (7th Cir. 1997). *Third*,
8 Plaintiffs cite no authority for the claim that customary international law may form the basis of
9 a federal substantive due process claim. Customary international law is, at most, part of federal
10 common law. *See Sosa*, 542 U.S. at 672. *Fourth*, Plaintiffs cannot demonstrate that Mask
11 Requirements violate any “specific, universal, and obligatory” international norm.²¹ *See id.*
12 (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).
13 Such a showing is impossible because many of the United States’ closest allies have also
14 implemented mask requirements.²²

17 Turning to Plaintiffs’ indistinctly alleged interest in bodily autonomy, the Washington
18 Supreme Court has stated that “[t]he limits of the autonomy interest are circumscribed by the
19 [U.S.] Supreme Court’s fundamental rights jurisprudence.” There is no established fundamental
20 right to autonomy with respect to bodily coverings, particularly where such coverings do not
21

23 ²¹Skirting their obligation of candor to the Court, Plaintiff interpolates the parenthetical “(such as masks
24 or vaccines)” into a quotation of the Universal Declaration of Bioethics and Human Rights. Mot. at 10. The
25 Declaration contains no such language. *See* United Nations Educ., Sci. & Cultural Org., *Universal Declaration on
26 Bioethics and Human Rights*, available at <https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights> (last visited Dec. 31, 2020).

²²*See, e.g.*, Council on Foreign Relations, *Which Countries Are Requiring Face Masks?* (Aug. 4, 2020),
<https://www.cfr.org/in-brief/which-countries-are-requiring-face-masks>.

1 amount to “bodily invasion.” *See, e.g., McNabb v. Dep’t of Corr.*, 163 Wn.2d 393, 401, 180 P.3d
2 1257 (2008). To the contrary, federal cases widely hold that the right to choose clothing is not
3 fundamental. *See, e.g., Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 289 (5th Cir. 2001)
4 (declining to find “fundamental right for parents to control the clothing their children wear to
5 public schools” and applying rational basis); *DeWeese v. Town of Palm Beach*, 812 F.2d 1365,
6 1366 n.4 (11th Cir. 1987) (applying rational basis review); *see also Hodge v. Lynd*, 88 F.Supp. 2d
7 1234, 1242 (D.N.M. 2000) (“Courts recognizing the liberty interest in personal dress and
8 appearance have almost uniformly applied the rational-basis test”); *Zalewska v. County of*
9 *Sullivan, New York*, 180 F. Supp. 2d 486, 489 (S.D.N.Y. 2002), *aff’d*, 316 F.3d 314 (2d Cir.
10 2003). Thus, as Division II recently stated, “No court has held that personal appearance is a
11 fundamental right.” *Hired Hands, LLC v. Dep’t of Labor & Indus.*, No. 53450-9-II, 2020 WL
12 5797899, at *4 (Wash. Ct. App. Sept. 29, 2020) (unpublished). Therefore, “[p]ersonal
13 appearance is subject to reasonable regulation and is evaluated under a rational basis standard.”
14 *Id.*

15
16
17 While a very limited subset of health and medical decisions are protected as fundamental
18 rights, these tend to “involve the most intimate and personal choices a person may make in a
19 lifetime.” *Washington v. Glucksberg*, 521 U.S. 702, 726 (1997). Whether one must temporarily
20 wear a mask in public in a time pandemic is not in the same ballpark. Contrary to Plaintiffs’
21 implication, the Mask Requirements are not a form of medical intervention or invasive scientific
22 research. *See Mot.* at 10-11. In fact, the United States and Washington Supreme Courts have
23 each applied a standard akin to rational basis to much more invasive public health interventions,
24 such as compulsory vaccination and involuntary quarantine. *See Jacobson*, 197 U.S. at 30–31
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26

1 (compulsory vaccination); *Zucht v. King*, 260 U.S. 174, 176 (1922); *see also State v. Superior*
2 *Court for King Cnty.*, 103 Wn. 409, 428, 174 P. 973 (1918) (involuntary quarantine); *see also*
3 *Backlund v. Bd. of Comm'rs of King Cnty. Hosp. Dist. 2*, 106 Wn.2d 632, 642, 724 P.2d 981
4 (1986) (“In the area of health and safety, governmental interests often override individual
5 objections to regulations relating thereto.”). Rational basis applies here, too.
6

7 **F. The Mask Requirements Pass Rational Basis Scrutiny**

8 If Defendants are correct that the Mask Requirements do not implicate Plaintiffs’ speech
9 rights or other fundamental rights, then rational basis review applies. *See Arlene’s Flowers, Inc.*,
10 193 Wn.2d at 519 (rational basis applies to neutral, generally-applicable laws not implicating
11 heightened scrutiny).

12 The Washington Supreme Court has upheld the reasonable exercise of police power in
13 an emergency pursuant to legislative delegation. *See Cougar Bus. Owners Ass’n*, 97 Wn.2d at
14 474, *abrogated in part on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 694, 451 P.3d
15 694 (2019). An exercise of emergency power may be preventative and is presumed to be
16 constitutionally valid. *Cougar Bus. Owners Ass’n*, 97 Wn.2d at 475, 478. Under the current
17 formulation of rational basis review, such exercise is reasonable if it is “rationally related to a
18 legitimate state interest.” *See Yim*, 194 Wn.2d at 689. Applying this test, the Court “may assume
19 the existence of any necessary state of facts which it can reasonably conceive in determining
20 whether a rational relationship exists between the challenged law and a legitimate state interest.”
21 *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 222, 143 P.3d 571 (2006), *abrogated in part on*
22 *other grounds by Yim*, 194 Wn.2d 682. Thus, “courts will not examine the motives of the
23 legislative body; they will not require factual justification for the legislation if it can reasonably
24
25
26

1 be presumed; and the courts will not weigh the wisdom of the particular legislation enacted.”
2 *Cougar Bus. Owners Ass’n*, 97 Wn.2d at 478 (quoting *Petstel, Inc. v. King County*, 77 Wn.2d
3 144, 154-55, 459 P.2d 937 (1969)). Executive discretion is even stronger in the public health
4 arena, and “the legislatively delegated power to [health officials] to control contagious diseases
5 gives them extraordinary power which might be unreasonable in another context.” *Spokane Cnty.*
6 *Health Dist. v. Brockett*, 120 Wn.2d 140, 149, 839 P.2d 324 (1992).

8 The Mask Requirements easily pass rational basis review. First, there exists a reasonably
9 conceivable state of facts creating a public need for regulation, *Amunrud*, 158 Wn.2d at 222.
10 Washington is in the midst of a global pandemic emergency that has caused massive loss of life
11 and economic dislocation. Measures to control the pandemic are reasonably necessary in the
12 interest of public health and the general welfare.

13
14 Second, the Mask Requirements are rationally related to the State’s public health and
15 welfare interests in preventing the transmission of COVID-19. Masks are an effective alternative
16 to quarantine, allowing mobility and business activity to continue. It cannot be reasonably
17 disputed that mask requirements are a rational response to the pandemic, given that the nation’s
18 leading authority on infectious disease, the CDC, has endorsed community masking to control
19 transmission. While Plaintiffs may idiosyncratically question the science of masks, they cannot
20 genuinely dispute that an overwhelming consensus prevails among public health experts that
21 cloth face coverings help prevent the spread of COVID-19. That is more than sufficient to justify
22 the Mask Requirements under rational basis review. *See Fields v. Dep’t of Early Learning*,
23 193 Wn.2d 36, 66, 434 P.3d 999 (2019); Selby Decl., Ex. 2 at 45 (upholding COVID-related
24 emergency actions in Washington under rational basis review); *see also, e.g., Minn. Voters All.*
25
26

1 v. *Walz*, No. 20-CV-1688 (PJS/ECW), 2020 WL 5869425, at *11 (D. Minn. Oct. 2, 2020);
2 *Murphy v. Lamont*, No. 3:20-CV-0694 (JCH), 2020 WL 4435167, at *10 (D. Conn. Aug. 3,
3 2020).

4 In mounting their cursory argument against masks, Plaintiffs rely on isolated,
5 cherry-picked statements that are either far out of date (*see* Mot. at 8-9: alleged statements of
6 Surgeon General and Dr. Brousseau)²³, irrelevant (*see* Mot. at 9: discussing Canadian
7 government statement that homemade masks are not regulated medical devices in that country),
8 or both. Defendants will not attempt a point-by-point rebuttal of the Second Declaration of Lisa
9 Thomas.²⁴ For one thing, Ms. Thomas, while claiming to be a registered nurse, does not
10 demonstrate specific expertise on either this pandemic or epidemiology more generally. And
11 under rational basis review, Defendants are not required to engage in a battle of experts with
12 Plaintiffs as to the reasonableness of Mask Requirements (though Defendants have cited some
13 of the overwhelming evidence in support of those requirements above). *See Amunrud*,
14 158 Wn.2d at 222. That an issue is “debatable” does not render Defendants’ actions either
15 irrational or arbitrary. *See State v. Manussier*, 129 Wn.2d 652, 674, 921 P.2d 473 (1996);
16 *Emerson v. Island County*, 194 Wn. App. 1, 14, 371 P.3d 93 (2016); *see Halverson v. Skagit*
17 *County*, 42 F.3d 1257, 1262 (9th Cir. 1994) (quoting *Kawaoka v. City of Arroyo Grande*, 17 F.3d
18 1227, 1234 (9th Cir. 1994)).
19
20
21

22
23 ²³Compounding Plaintiffs’ problems, these statements are not even included in either of the Declarations
24 Plaintiff Lisa Thomas filed in this case, and no citation is otherwise provided.

25 ²⁴Plaintiffs also submit what they bill as “The Great Barrington Declaration,” which they claim is
26 admissible under Washington Rule of Evidence 803(a)(8), the hearsay exception for public records. This exception
does not apply because the Declaration, which appears to have been copied and pasted into a pleading, is, on its
face, not a public record. It is not “a report or document prepared by a public official must contain facts and not
conclusions involving the exercise of judgment or discretion or the expression of opinion.” *State v. Monson*, 113
Wn.2d 833, 839, 784 P.2d 485 (1989) (citation and internal quotation marks omitted). It should not be considered.

1 Third, there is a reasonable relation between the scope of the Mask Requirements and
2 the goal of preventing transmission of the virus. For example, the laws require mask use only
3 outside one's home and includes numerous carefully-drawn exceptions, including, for example,
4 for children under five years of age, people with medical conditions or disabilities that prevent
5 the wearing of a mask, or while eating or drinking or present in outdoor areas while maintaining
6 six feet of physical distancing. *See* Selby Decl., Ex. B, Ex. 2 at 2–3; Selby Decl., Ex. C at 6. The
7 requirements draw reasonable lines aimed at preventing person-to-person transmission while
8 allowing social and economic activity to continue to the extent possible.
9

10 Plaintiffs cannot overcome the strong presumption that the Mask Requirements are a
11 reasonable exercise of delegated police power.
12

13 V. CONCLUSION

14 Defendants respectfully request the Court to grant them summary judgment on Plaintiffs'
15 remaining challenge to the Mask Requirements.
16

17 DATED this 31st day of December, 2020.

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1 **DECLARATION OF SERVICE**

2 I hereby declare that on this day I caused the foregoing document to be electronically
3 served, per the Electronic Service Agreement between parties, on the following:

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