

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

KIMBERLY PLETCHER,)	
)	Case No. 2:20-cv-00754-NBF
Plaintiff,)	
)	
And)	
)	
JUDITH MARCH, JOSIAH KOSTEK,)	
GRAYDON GRAHAM, RONNIE)	
STURCHIO, NICHOLAS CONLEY,)	
SHARON BURTON, DEBBIE)	
VIDOVICH, PAUL SHEPHERD,)	
GERALD THOMCHICK, CONNIE)	
WINNER, JOHN DURSO, TRACY)	
O’CONNOR, DOUGLAS JANASZEK,)	
OWEN BURK, BEN ZYTNICK,)	
GREGORY MANDICH, JOHN)	
BLACKSTONE, JAMES LEONARD,)	
KATHLEEN CUNNINGHAM, JAMIE)	
MARKS-BORICHEVSKY, POLLY)	
QUINTILIANI, CAROLYN L.)	
STEWART, TOMMY WYNKOOP,)	
TAMMIE AIKEN, STEVEN PARSONS,)	
JEFFREY COULSON, KATHERINE)	
DUCKSTEIN, NATHANAEL DOLLAR,)	
THOMAS BENSOR, VICKI PARKER,)	
STEPHEN MCRAE, KRISTIE HARNISH,)	
MOLLY SHIRK, MICHAEL HAMMERS,)	
)	
Consolidated Plaintiffs,)	
)	
v.)	
)	
GIANT EAGLE, INC.,)	
)	
Defendant.)	

**OPPOSITION TO PLAINTIFF JOSIAH KOSTEK’S
MOTION FOR PRELIMINARY INJUNCTION**

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The premise of this consolidated action is all wrong. Plaintiffs, including Mr. Kostek, claim that Giant Eagle reacted to the coronavirus pandemic by singling them out for poor treatment, when, in fact, Giant Eagle took every reasonable step to protect and accommodate all of its customers and employees (Team Members) from a direct and ongoing threat. We are in the midst of a public health crisis. Mounting evidence indicates face coverings protect others from the transmission of COVID-19, particularly indoors.¹ Faced with these facts, Giant Eagle dramatically enhanced its curbside service, invested millions to increase sanitation and other protective measures, and enacted a policy requiring all employees and customers in the stores to wear face coverings.² For customers, like Kostek, who either cannot or do not want to wear a face covering in the store, Giant Eagle offers alternative means to shop for food and supplies, including curbside pickup, home delivery, and, in many cases, on-the-spot personal shopping by a Giant Eagle Team Member.

Kostek, rather than tolerate any purported personal inconvenience, sued over it. In fact, Kostek now seeks the extraordinary remedy of a preliminary injunction to force Giant Eagle to allow him and others to enter its stores without a face covering—and without regard for Giant Eagle’s other customers’ and Team Members’ ability to safely shop and work in its stores. ECF

¹ See, e.g., Pa. Dept. of Health Universal Face Coverings Order FAQ, 7/3/2020, attached as Exhibit 1, pg. 7 (“The wearing of face coverings, such as a mask, ensures that we as a society can limit the spread of COVID-19 and successfully combat this pandemic; therefore, it is in **everyone’s** best interest that all Pennsylvanians comply with this Order.”); Apoorva Mandavilli, *239 Experts With One Big Claim: The Coronavirus Is Airborne*, THE NEW YORK TIMES, July 4, 2020, <https://www.nytimes.com/2020/07/04/health/239-experts-with-one-big-claim-the-coronavirus-is-airborne.html>

² Giant Eagle’s Policy allows not only cloth, surgical, and N-95 masks, but also t-shirts or bandanas wrapped around the face, face shields, scarves, neck gaiters, etc. The Pennsylvania Department of Health specifically recognizes face shields as an alternative for those individuals who cannot wear a mask due to a disability. See Ex. 1, pg. 3 (“If an individual cannot wear a face covering due to a medical or mental health condition or disability, the individual should consider wearing a face shield.”).

No. 19 (Am. Mot. for Preliminary Injunction) at 28-29. For Kostek in particular, this takes some nerve. A recent Facebook post shows that his grievance arises not under the Americans with Disabilities Act as he claims, but from a radical and incorrect theory, circulated on the Internet, that face covering requirements violate his Constitutional rights.³ According to Kostek, “I don’t mind wearing a mask if someone asks me polite. I’m in excellent health ... [but] I have a right to refuse wearing a mask.” See Exhibit 2, “PA Small Business Against Gov Wolf” Public Group Facebook Post by Josiah Kostek, 5/16/2020 at pg. 13. Neither Kostek nor the other Plaintiffs have that right in a Giant Eagle supermarket during the COVID-19 pandemic.

Kostek’s request for a preliminary injunction should be denied. *First*, Kostek is unlikely to succeed on his claim under the ADA. Not only has Kostek publicly admitted that no disability prevents him from wearing a face covering, the ADA specifically permits legitimate safety requirements and rejects proposed modifications that pose a direct threat to the health or safety of others or create an undue burden. *Second*, Kostek cannot show irreparable harm—he can use Giant Eagle’s curbside pickup or home delivery without wearing a face covering, or shop elsewhere during the pendency of the litigation. *Third*, the immediate health risks to Giant Eagle’s other customers, Team Members and the general public far outweigh any alleged inconvenience to Kostek.

Kostek’s Motion comes as Allegheny County sees a spike in COVID-19 infections and as governments and businesses nationwide move overwhelmingly toward mandating face coverings. Indulging his claims, which have no legitimate basis, would risk the increased spread

³ Anna Medaris Miller, ‘Anti-maskers’ say medical conditions prevent them from wearing masks, but doctors say that’s not a legitimate excuse, BUSINESS INSIDER, July 2, 2020, <https://www.businessinsider.com/anti-maskers-say-they-cant-wear-masks-because-medical-conditions-2020-5>

of COVID-19, put lives at risk, and interfere with Giant Eagle’s ability to provide essential services to its tens of thousands of daily customers in Pennsylvania.

I. BACKGROUND

“The world is currently facing a major global pandemic – one of the most significant challenges our society has faced in a century.” *Republican Party v. Pritzker*, No. 20 C 3489, 2020 U.S. Dist. LEXIS 116383, *2 (N.D. Ill. July 2, 2020); *see also Friends of Devito v. Wolf*, 227 A.3d 872, 890 (Pa. 2020) (finding that “any location (including Petitioners’ businesses) where two or more people can congregate is within the disaster area” in Pennsylvania due to “the nature of [COVID-19] and the manner in which it is transmitted”). “There is no cure, vaccine, or effective treatment for COVID-19.” *Id.* By March, if not before, COVID-19 spread to Pennsylvania. To date, we have 93,900 confirmed cases and more than 6,900 deaths from COVID-19 in Pennsylvania—more deaths than surrounding states Indiana, Ohio, and West Virginia combined.⁴ On March 19, 2020, Pennsylvania Governor Tom Wolf ordered a statewide lockdown of all “non-life sustaining businesses,” with enforcement beginning March 21, 2020.

In a matter of weeks, Giant Eagle took substantial steps to increase the capacity of its stores to operate safely in the midst of the pandemic. For example:

- **Giant Eagle tripled its curbside service capabilities.** Giant Eagle repurposed three stores for curbside service only, and dramatically enhanced the service at other locations. These efforts enable customers to access Giant Eagle’s goods and services without person-to-person contact.
- **Giant Eagle hired thousands of additional Team Members.** Hundreds of them are devoted to curbside service. In addition, Giant Eagle recommitted corporate Team Members to support both curbside service and in-store customer care.
- **Giant Eagle increased sanitation and protective measures.** Giant Eagle invested approximately \$3 million in protective health and safety equipment. Stores installed Plexiglas barriers to protect cashiers and customers. Team Members continually sanitize shopping carts, and, where possible, clean stores

⁴ <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>

hourly. On top of these steps, Giant Eagle expanded corporate store hours to exclusively and more safely accommodate older and immunocompromised customers.

Declaration of William Artman, attached as Exhibit 3.

On April 15, 2020, Pennsylvania’s Secretary of the Department of Health, Dr. Rachel Levine, issued an order setting forth minimum protections for critical workers like Giant Eagle’s Team Members (the “April 15 Order” or “Order”). The Order recognizes that COVID-19 “is a contagious disease that is rapidly spreading from person to person in the Commonwealth of Pennsylvania ... [and] can be transmitted from people who are infected with the virus even if they are asymptomatic or their symptoms are mild, such as a cough.” The Order then states “that certain life-sustaining businesses in the Commonwealth must remain open ... [and] [s]pecial consideration is required to protect not only customers, but the workers needed to run and operate these establishments.”

To enhance protection, the Order sets forth a list of general requirements that essential businesses, including grocery stores, must meet in order to conduct in-person business. Governor Wolf warned that “[f]ailure to comply with these requirements will result in enforcement action that could include citations, fines, or license suspensions.” Critical here, all customers must wear masks while on the stores’ premises, and businesses must “deny entry to individuals not wearing masks.” Though the Order excuses businesses from enforcing the face covering requirement for customers who cannot wear one due to a medical condition, it provides no means for businesses to determine whether or not customers have such a medical condition.⁵

⁵ Kostek asserts that the April 15 Order forbids Giant Eagle and other businesses from requiring face coverings for all customers. (Mot. for PI at 9). In fact, the Order sets forth *minimum* requirements for essential business to remain open during the pandemic; it does not limit them from imposing greater safety requirements. The Pennsylvania Department of Health’s July 3 face covering requirement FAQ makes this clear—“The Order does not *require* a customer to be turned away if the customer fits within an exception to the Order.”

Intent on doing everything it reasonably can to protect its Team Members and customers, Giant Eagle requires everyone in its Pennsylvania stores to wear some type of face covering at all times. Giant Eagle cannot ask its Team Members—who already stand on the front lines of the pandemic—or its customers to accept the increased risk of infection that comes with allowing exceptions to that rule. Nor would it make sense for Giant Eagle to ask Team Members to enforce a policy that requires exceptions, with no ability to confirm if an exception applies. Instead, Giant Eagle provides face coverings to any customer who needs one and offers home delivery or curbside service to any customer who either cannot or does not want to wear one. For customers who walk into a store but decline to wear a face covering, Giant Eagle offers to shop for them while they wait outside.⁶

An overwhelming majority of customers and Team Members applaud Giant Eagle's efforts to keep its stores as safe as possible during the COVID-19 pandemic. But a small minority object, and some have acted violently toward or sought to intimidate Giant Eagle's Team Members who are merely doing their jobs. For example, a customer at the New Kensington store punched a Team Member who asked him to wear a face covering. A customer at the Franklin store flashed a gun at a Team Member. And one of the Plaintiffs in this action *returned* to the Leechburg store after filing suit and shouted profanities at the Team Members

Ex. 1 (emphasis added). Nor would the Secretary of Health have the ability to prohibit businesses from requiring face coverings. As the Order itself states, Dr. Levine issued the Order pursuant to her “authority to take any disease control measure appropriate to protect the public from the spread of infectious disease.” April 15 Order at pg. 1 (unnumbered) (ECF No. 19-6). Prohibiting businesses from requiring all of their customers to wear face coverings would hardly protect the public from the spread of COVID-19. It would increase the risk of spread.

⁶ In his Motion, Kostek incorrectly asserts that Giant Eagle allows Team Members to work inside its stores without a face covering if they provide a medical note. (Am. Mot. for Preliminary Injunction at 14). In fact, if a Team Member provides a medical note indicating that he or she cannot wear a face covering for a medical reason, Giant Eagle places that Team Member on a leave of absence. Ex. 3. at ¶ 9.

there. Ex. 3 at ¶ 12. Giant Eagle is apparently far from alone among retailers facing this sort of misdirected outrage.⁷

The aggression by certain customers causes Team Members enormous stress. Ex. 3 at ¶ 13. For that reason, Giant Eagle carefully weighed the option of removing the Team Members' burden of enforcing the customer face covering policy. The local labor union representing Giant Eagle's front line Team Members opposed any change, demanded that Giant Eagle continue to require face coverings in stores without exception, and promised to remind its members that the "Labor Management Relations Acts protects the rights of workers to refrain from rendering labor or services because of abnormally danger conditions at work." Ex. 3. at ¶ 13. Ultimately, Giant Eagle determined that the safest course—and the only course that ensures its ability to continue to provide essential services to the community—is to maintain the face covering requirement in its stores (the "Policy") (ECF No. 19-5); *see also* Ex. 3-A, Giant Eagle's Maryland and Pennsylvania Mask Guidelines Update, May 4, 2020.

Josiah Kostek

On May 16, 2020, Kostek attempted to enter Giant Eagle's Oil City store without a face covering. Declaration of Diana Mancini Liebmann, attached as Exhibit 4, at ¶ 4. The store greeter reminded Kostek of the Policy. *Id.* Without allowing the greeter to offer any assistance, Kostek began yelling "My body, my choice" and refused to stop walking into the store. *Id.* ¶¶ 4-6. The greeter called acting Store Leaders Diana Mancini Liebmann and Greg Felmlee to address the situation. *Id.* at ¶ 4. Liebmann and Felmlee arrived to find Kostek walking down the aisles, belligerent and yelling. *Id.* at ¶¶ 5-7. Liebmann told Kostek he would need to leave if he

⁷ *See, e.g.,* Kate Taylor, *Anti-mask shoppers at Costco and Target throw tantrums and tear down mask displays, revealing a growing crisis for retail workers*, BUSINESS INSIDER, July 6, 2020, <https://www.businessinsider.com/anti-mask-costco-and-target-shoppers-throw-tantrums-viral-videos-2020-7>

would not wear a mask or she would call the police. *Id.* at ¶ 8. Kostek told Liebmann to call the police, so she did. *Id.* Meanwhile, Kostek went to the service desk and asked to purchase tobacco. *Id.* at ¶ 9. Felmlee instructed the Team Member working at the tobacco service desk not to wait on Kostek. *Id.* Kostek moved close to Felmlee and berated him. Eventually, the police arrived and arrested Kostek. *Id.* at ¶ 10. Kostek yelled at another customer in the parking lot even as police led him away in handcuffs. *Id.* at ¶ 11.

After Kostek's arrest, Liebmann spoke to the police. *Id.* at ¶ 12. The police advised her that Kostek has a history of causing scenes in retail stores and then threatening litigation. *Id.* The police also directed Liebmann to send a "no-trespass" letter to Kostek. *Id.* at ¶ 13. Liebmann prepared the letter advising Kostek not to return to the Oil City Giant Eagle, and another Team Member, James Dailey, signed it. *Id.* On May 30, 2020, Liebmann sent the letter to Kostek. *Id.* That same day, Kostek returned to the Oil City Giant Eagle and again entered the store without a mask. He was turned away.⁸ On June 3, 2020, Kostek filed his original complaint in this action.

II. LEGAL STANDARD

"The grant of a preliminary injunction by this Court is an extraordinary remedy." *Tegg Corp. v. Beckstrom Elec. Co.*, Civil Action No. 08-435, 2008 U.S. Dist. LEXIS 52184, at *28-36 (W.D. Pa. July 1, 2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Ferring Pharm., Inc. v. Watson Pharm., Inc.*, 765 F.3d 205, 210 (3d Cir. 2014). "The failure to establish any element ... renders a preliminary injunction inappropriate." *Id.*

⁸ Kostek acknowledges this attempt to return to the Oil City Giant Eagle in his Motion. (Am. Mot. for Preliminary Injunction at 9.)

(quoting *NutraSweet Co. v. Vit-Mar Enters., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999)). Where the moving parties are seeking a mandatory injunction requiring performance of certain acts, “the burden on the moving party is particularly heavy.” *Trinity Indus. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 139 (3d Cir. 2013) (quoting *Punnett v. Carter*, 621 F.2d 578, 582 (3d Cir. 1980)).

III. ARGUMENT

A. **Kostek is Not Likely to Succeed on the Merits**

To succeed on a claim under Title III of the American with Disabilities Act, a plaintiff must prove “(1) discrimination on the basis of a disability; (2) in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation; (3) by the public accommodation’s owner, lessor or operator.” *Anderson v. Kohl’s Corp.*, Civil Action No. 2:12-cv-00822, 2013 U.S. Dist. LEXIS, *22 (W.D. Pa. May 3, 2013) (internal quotation marks and citation omitted). Kostek cannot show discrimination on the basis of a disability. In fact, he admits that he can wear a face covering. Even if Kostek could show otherwise, the ADA does not require a public accommodation to (i) modify a legitimate safety requirement; (ii) allow a direct threat to the health or safety of others; or (iii) make modifications that would create an undue burden. 28 C.F.R. § 36.301(b) (legitimate safety requirement); 42 U.S.C. § 12182(b)(3) (direct threat); 42 U.S.C. § 12182(b)(2)(A)(iii) (undue burden). Kostek’s proposed modification—enjoining Giant Eagle from enforcing its Policy—would improperly force Giant Eagle to do all three of these things.

1. *Kostek can wear a face covering*

While Kostek submits five-year old medical records indicating that he suffers from certain conditions, he relies entirely on his own self-serving declaration that those conditions prevent him from wearing a mask. (Mot. for Preliminary Injunction at 9). In the declaration, he asserts that “[he] cannot wear masks or cloth face coverings without experiencing severe anxiety,

difficulty breathing.” But in a public statement on Facebook, Kostek said something very different: “I don’t mind wearing a mask, if someone asks me polite. ... I’m in excellent health.” See Ex. 2, pg. 13. Kostek has not shown and cannot show that Giant Eagle’s face covering requirement affects him at all, let alone discriminates against him based on a disability.

Even if Kostek were not in “excellent health” as he admits on Facebook, the Order does not require Giant Eagle to let him into its stores without a face covering. On July 3, the Department of Health made clear that Giant Eagle is doing the right thing by offering “home delivery or contactless curbside pick-up” as an acceptable alternative “means for the customer to purchase goods if the customer is unable to wear a face covering, such as a mask.” Ex. 1, pg. 8. The ADA also supports this concept.

2. *Giant Eagle’s Policy is a legitimate safety requirement*

The eligibility regulation for Title III public accommodations states that a “public accommodation may impose legitimate safety requirements that are necessary for safe operation.” 28 C.F.R. § 36.301(b). Those safety requirements “must be based on actual risks and not mere speculation, stereotypes, or generalizations about individuals with disabilities.” *Id.* Here, the actual risk dominates the national conversation. COVID-19 has already infected more than 93,000 people in Pennsylvania and killed nearly 7,000 of them.⁹ It “spreads mainly from person to person through respiratory droplets produced when an infected person coughs, sneezes, or talks.”¹⁰ “Medical experts agree that to stop the spread of COVID-19, people should practice social distancing and wear face coverings when near other people outside their homes.” *Pritzker*, 2020 U.S. Dist. LEXIS 116383, at *3. Face coverings are universally important because, as the CDC advises, “COVID-19 can be spread by people who do not have symptoms and do not know

⁹ <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx>

¹⁰ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html>

that they are infected.”¹¹ The risk of spread increases where groups of people share space indoors, like in a supermarket. *See* Mandavilli, *supra* fn. 1. Governor Wolf addressed this risk—recently extending the face covering mandate to all public places—and Giant Eagle did, too.¹²

In this context, Kostek has no basis to claim that Giant Eagle’s Policy relies on speculation, stereotypes, or generalizations about individuals with disabilities. The opposite is true. Giant Eagle’s Policy applies to *all* customers, as any customer not wearing a face covering poses a heightened risk of COVID-19 transmission. The CDC estimates that approximately 35% of people infected with COVID-19 are asymptomatic, and 40% of virus transmission occurs *before* infected individuals display symptoms.¹³ Even a single visit by an asymptomatic or pre-symptomatic customer without a face covering could expose hundreds of customers and Team Members to the virus, and those individuals could in turn expose many others when they return home to their families. The law does not require Giant Eagle to take that risk.

Indeed, the United States Department of Justice identified similarly neutral safety requirements as justifiable. *See* 56 Fed. Reg. 35544-01 (noting the legitimacy of “height requirements for certain amusement park rides or a requirement that all participants in a recreational rafting expedition be able to meet a necessary level of swimming proficiency”). Like those requirements, Giant Eagle’s face covering requirement is a “neutral rule[] ...

¹¹ <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html>

¹² Requiring face coverings may be the single most important prophylactic measure to prevent the spread of COVID-19. In one study on the infections in Italy and New York City, Texas A&M University researchers concluded that the mandate to wear face coverings “significantly reduced the number of infections, that is, by over 78,000 in Italy from April 6 to May 9 and over 66,000 in New York City from April 17 to May 9.” Wei Lyu and George L. Wehby, *Community Use of Face Masks and COVID-19: Evidence From a Natural Experiment of State Mandates in the US*, HEALTH AFFAIRS 39, No. 8 (2020): 1-7.

¹³ <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html>

necessary for the safe operation of the public accommodation,” even if it tends to screen out individuals with a disability (as Kostek dubiously claims). *Id.* Thus, the ADA imposes no requirement that Giant Eagle exempt certain customers from its Policy. *See Holmes v. Gen. Dynamics Mission Sys.*, 382 F. Supp. 3d 529, 532 (W.D. Pa. 2019) (holding that the ADA does not “exempt an employee from a requirement to wear safety equipment that is intended to protect her from serious injury, and to protect the company from financial harm, because she has a physical condition that prevents her from wearing the safety equipment”); *Mattair v. Pilgrim*, Case No. 3:17-cv-211, 2019 U.S. Dist. LEXIS 51147, *7 (M.D. Fla. March 27, 2019) (“Even drawing all inferences in [the plaintiff’s] favor, the record readily supports that wearing a bump cap is an essential safety requirement for being on the production floor at [the defendant’s business].”).

3. *COVID-19 poses a direct threat to health and safety of others*

The ADA also permits public accommodations to refrain from making modifications that would pose a “direct threat.” 42 U.S.C. § 12182(b)(3). Even before Congress codified this exception in Title III of the ADA, the United States Supreme Court, in *School Board of Nassau County v. Arline*, held that the disability laws do not require modifications that would allow a direct threat to the health and safety of others, *specifically with respect to infectious diseases*.¹⁴ 480 U.S. 273 (1987).

In *Arline*, the Supreme Court addressed a “direct threat” under the Rehabilitation Act,¹⁵ when a teacher with tuberculosis challenged her dismissal on the basis of that disease. The Court

¹⁴ After *Arline*, Congress amended both the ADA and Rehabilitation Act to include the “direct threat” exclusion. 42 U.S.C. § 12182(b)(3); 29 U.S.C. § 705(20)(D).

¹⁵ The Third Circuit Court of Appeals has noted, “as the ADA simply expands the Rehabilitation Act’s prohibitions against discrimination into the private sector, Congress has directed that the two acts’ judicial and agency standards be harmonized.” *New Directions Treatment Servs. v.*

found that the teacher was disabled, but held that “[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk.” *Id.* at 287 n.16. The Court next identified four factors courts should consider in determining whether a direct threat to health and safety exists: (1) the nature of the risk; (2) the duration of the risk; (3) the severity of the risk; and (4) the probabilities the disease will be transmitted and will cause varying degrees of harm. *Id.* at 288; *accord Haas v. Wyo. Valley Health Care Sys.*, 553 F. Supp. 2d 390, 399 (M.D. Pa. 2008) (applying the *Arline* factors).

Allowing Kostek, and other customers, to shop in Giant Eagle’s stores without a face covering qualifies under *Arline*. First, it would risk the health—and the lives—of Giant Eagle’s customers and Team Members, to say nothing of the potential health, financial, and social impact caused by any resulting increased spread of the virus. Second, the risk remains until we find an effective treatment or vaccine for COVID-19.¹⁶ Third, the risk is severe—thousands in Pennsylvania have already died from COVID-19. Fourth, though we do not know precisely the probability that a customer without a face covering would transmit COVID-19 in a Giant Eagle store, that uncertainty is part of the risk. COVID-19 is particularly dangerous *because* it spreads so easily and even before its host shows any signs of infection.¹⁷ Recognizing this risk, on March 21, 2020, the Equal Employment Opportunity Commission declared that “the COVID-19 pandemic meets the direct threat standard [under the ADA].”¹⁸ *See also Donahue v. CONRAIL*,

City of Reading, 490 F.3d 293, 302 (3d Cir. 2007) (internal quotation marks and modification marks omitted).

¹⁶ *See Pritzker*, 2020 U.S. Dist. LEXIS 116383, at *2 (recognizing there is no effective treatment or vaccine).

¹⁷ <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html>

224 F.3d 226, 231 (3d Cir. 2000) (“If the threatened harm is grievous, even a small risk may be ‘significant.’”).

4. *Modifying the Policy would place an undue burden on Giant Eagle*

The ADA also exempts Giant Eagle from abandoning its Policy because doing so would result in an “undue burden.” 42 U.S.C. § 12182(b)(2)(A)(iii). Not only does the Policy mitigate the risk of virus transmission, it also reduces Giant Eagle’s burden of cleaning and sanitizing its stores.¹⁹ Modifying the Policy would potentially subject Giant Eagle to an even more substantial burden—it could force stores to shut down. Giant Eagle’s ability to operate would certainly be threatened by an outbreak of COVID-19 among Team Members and, perhaps more immediately, the possibility that Team Members will stop reporting to work.

At least in Pennsylvania, that possibility is real. When Giant Eagle briefly considered a modification to prevent Team Members from confronting customers who refused to wear a face covering, the local union demanded that Giant Eagle maintain the Policy. The Union noted that it could file a Charge of Unfair Practices to address any change to the Policy, that it would remind its members that the “Labor Management Relations Acts protects the rights of workers to refrain from rendering labor or services because of abnormally dangerous conditions at work,” and that it would “hold Giant Eagle accountable for the foreseeable consequences of [modifying the Policy].” *See* Ex. 3-B (Email from Wendell Young IV to Dan Shapira, 5/27/2020). Forcing

¹⁸ <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

¹⁹ In one Pennsylvania grocery store, a customer without a face covering coughed over groceries, requiring the store to destroy \$35,000 worth of food. Alexis Johnson, *Police pursuing charges against woman who intentionally coughed on \$35,000 worth of food at grocery store*, PITTSBURGH POST-GAZETTE, Mar. 26, 2020, <https://www.post-gazette.com/news/crime-courts/2020/03/26/Pa-grocery-store-dumps-35-000-worth-of-food-after-woman-purposely-coughs-on-produce-meat-and-more/stories/202003260112>

Giant Eagle to put its Team Members at greater risk of COVID-19 infection *could* mean that Giant Eagle has no Team Members to operate certain stores.

Even if Giant Eagle could still operate, changing or relaxing the Policy would subject it to liability. Other businesses already face lawsuits alleging a failure to impose stringent enough safety requirements in the face of COVID-19. *See, e.g.,* 2:20-CV-01221, Dkt. 1, *Local Joint Executive Board of Las Vegas v. Harrah's Las Vegas LLC, et al.* Complaint (D. Nev. June 29, 2020) (lawsuit against several casinos for policies that do not mandate that guests wear masks). Nothing in the ADA imposes this Hobson's choice between this litigation and potential lawsuits by Giant Eagle's other customers and Team Members. *See Brickers v. Cleveland Bd. of Educ.*, 145 F.3d 846, 850 (6th Cir. 1998) (holding employer could not be forced to choose between "potential ADA liability for refusing to hire those who cannot lift, or to subject itself to potential penalties from the state for failing to adhere to state law, to say nothing of the possible tort liability [the defendant] might face should a child suffer an injury as a result of an attendant's inability to lift."); *Murphy v. United Parcel Serv., Inc.*, 946 F. Supp. 872, 882-83 (D. Kan. 1996), *aff'd*, 141 F.3d 1185 (10th Cir. 1998) ("[T]he ADA does not require an employer to accommodate a person's disability by ignoring other duties imposed by law.").

Kostek's emphasis on Giant Eagle's policies in West Virginia, Ohio, and Indiana is a red herring. Deaths from COVID-19 in Pennsylvania exceed the COVID-related deaths in those three states combined, and the virus-related government orders in those states differ from the April 15 Order in Pennsylvania. Giant Eagle assessed the risks and circumstances related to its stores in each state and shaped its safety policies and procedures, which all recognize the importance of wearing a face covering in the stores, accordingly. Kostek only takes issue with a state-by-state approach to the extent it cuts against his desire to shop without a face covering—

he argues that Giant Eagle must apply the same, more lenient policy in all of its stores regardless of geography. Then, in the next breath, he demands an “individual direct threat analysis” in lieu of the existing Policy.²⁰ (Am. Mot. for Preliminary Injunction at 24).

Putting aside his contradictory arguments, neither Kostek nor the other Plaintiffs can dictate a change to the Policy. There should be no real question that, in midst of a highly contagious pandemic, Giant Eagle can require its customers to wear face coverings while shopping in its stores. The ADA does not demand otherwise. *See, e.g., Haas*, 553 F. Supp. 2d at 402 (“[T]here are those rare occasion where legal principles – here patient safety and reasonable accommodation – are clear as matters lacking in the ingredient of differences among reasonable people and are so clear that the Court must intervene and say so.”).

B. Kostek Will Not be Irreparably Harmed During the Pendency of the Litigation

Nothing prohibits Kostek, or any other customers who do not wear face coverings, from obtaining goods and services from Giant Eagle or, alternatively, a different retailer.²¹ Kostek’s purported harm is merely the inability to walk into Giant Eagle’s stores without a face covering. Rather than make a federal case of it, he could opt for curbside service or home-delivery. He also could allow a Giant Eagle Team Member to shop for him. And, of course, Giant Eagle does not force anyone to shop at its stores—customers are free to shop at any store of their choosing. Any inconvenience to Kostek of having to forfeit his preferred method of shopping at Giant

²⁰ In fact, Giant Eagle did do an “individual direct threat analysis,” which explains why its COVID-19-related policies may differ from state to state.

²¹ Kostek has options. His residence in Oil City is approximately 12 miles from the Giant Eagle in Tionesta, which offers curbside pickup, and less than two miles from at least one other grocery store. *See* <https://curbsideexpress.gianteagle.com/store/89EB1312#/locator?queries=%3D1594391461972%26skip%3D0%26coordinates%3D41.4350579%2C-79.67266320000002%26radius%3D30%26unitOfMeasure%3Dmi%26take%3D999>

Eagle simply does not constitute irreparable harm. *See Moteles v. Univ. of Penn.*, 730 F.2d 913, 919 (3d Cir. 1984) (“[I]t is obvious that the involuntary transfer to another shift amounts to nothing more than inconvenience—not enough to warrant the issuance of a preliminary injunction.”).

C. The Balance of the Equities Favors Giant Eagle

This, also, is not close. *See Pritzker*, 2020 U.S. Dist. LEXIS 116383, at *26-*27 (“The scales weigh significantly against Plaintiffs. The number of COVID-19 infections continues to rise across the United States, which has led some states to recently impose greater restriction of gatherings and activities.”). On the one hand, we have some purported inconvenience to Kostek, and, on the other hand, we have the increased risk of sickness, even death, for thousands of Pennsylvanians. *See id.* (“Granting Plaintiffs the relief they seek would pose serious risks to public health.”). Denying Kostek’s preliminary injunction would mean only that Kostek will either have to wear a face covering to shop in a Giant Eagle store (which he admits he can do) or face the “inconvenience” of obtaining his groceries through delivery, curbside pickup, or from some other store. But granting Kostek’s preliminary injunction would mean subjecting Giant Eagle’s Team Members and customers to increased risk of COVID-19 infection and jeopardizing Giant Eagle’s ability to provide essential services during this challenging time.

D. An Injunction is Not in the Public Interest

Plaintiffs’ claims will be adjudicated in due course. The public interest will not be served by immediately enjoining Giant Eagle from requiring face coverings for its customers, some of whom, like Kostek, appear primarily motivated by ideology. Allowing customers—including but in no apparent way limited to those with actual relevant disabilities—to shop without a face covering risks the increase spread of the virus. That risk is particularly unnecessary given the accommodations Giant Eagle already makes for customers who cannot or do not want to enter its

stores with a face covering. We all want to go back to normal, but “the current state of our nation demands that we sacrifice the benefits of in-person interactions for the greater good.” *Pritzker*, 2020 U.S. Dist. LEXIS 116383, at *27.

The greater good is surely not front of mind for any plaintiff who pushes an “anti-mask” agenda under the guise of having a disability. In fact, anti-mask protestors have already widely disseminated information about how to misuse the ADA to attempt to enter stores without a face covering.²² The United States Department of Justice even issued a fraud alert disclaiming “postings or flyers on the internet regarding the [ADA] and the use of face masks due to the COVID-19 pandemic, many of which include the Department of Justice’s seal.”²³

Giant Eagle is not the only business that would have to contend with the fallout of a preliminary injunction in this case. Newly emboldened anti-mask activists may walk into any store or building without wearing a face covering, from small coffee shops to large offices to nursing homes. Retailers and other businesses would likely face an even greater challenge to keep themselves and other customers safe, with no ability to turn away individuals who refuse to wear a face covering. The mask-related misbehavior on display around the country would only be encouraged.²⁴ As businesses decide how to operate safely based on rapidly changing guidance and state-specific regulations, and as the community contends with hardships brought on by the pandemic, no preliminary injunction should operate to make the public less safe.

²² See Bill Bostock, *Anti-mask protesters are trying to commandeer US disability laws to get into stores without face coverings*, BUSINESS INSIDER, May 9, 2020, <https://www.insider.com/anti-mask-protesters-cite-ada-disability-law-dodge-mask-requirement-2020-5>; accord Kelly Weill, *The Hot New Far-Right Trend: Claiming a Disability to Avoid Wearing a Mask*, THE DAILY BEAST, May 20, 2020, <https://www.thedailybeast.com/the-hot-new-far-right-coronavirus-trend-is-claiming-a-disability-to-avoid-wearing-a-mask?ref=scroll>

²³ https://www.ada.gov/covid-19_flyer_alert.html

²⁴ See Taylor, *supra* fn. 7.

IV. CONCLUSION

Kostek seeks a sweeping preliminary injunction to advance his apparent ideological view that no one should be required to wear a face covering. The fact that Kostek, who has publicly stated that he can wear a mask but chooses not to do so, is the face of this lawsuit underscores its deficiencies. His misuse of the ADA undermines people with actual disabilities—the people who the ADA was designed to protect. Even Plaintiffs who may have a disability miss the mark in attacking Giant Eagle’s Policy, which does not discriminate and reflects a legitimate safety requirement. The preliminary injunction should be denied.

Dated: July 15, 2020

Respectfully submitted,

/s/ Jonathan D. Marcus
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed and served via operation of the Court's CM/ECF system on July 15, 2020, which will automatically send e-mail notification of such filing to all attorneys of record.

/s/ Jonathan D. Marcus
Jonathan D. Marcus

EXHIBIT 1

Universal Face Coverings Order FAQ

Why did the Secretary issue this Order?

The Secretary issued this Order to continue to protect all in the Commonwealth from the spread of COVID-19, mindful of the need to slow the increase in the number of cases as the Commonwealth reopens and in order to avoid the resurgence that is overwhelming the health care systems and public health systems in other states who have been less successful in reopening than the Commonwealth.

What type of mask complies with this Order?

The Order requires individuals to wear a "face covering." "Face covering" means a covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears or is wrapped around the lower face. A "face covering" can be made of a variety of synthetic or natural fabrics, including cotton, silk, or linen, and, for the purposes of the order, can include a plastic face shield that covers the nose and mouth. "Face coverings" may be factory-made, sewn by hand, or improvised from household items, including but not limited to, scarves, bandanas, t-shirts, sweatshirts, or towels. While procedural and surgical masks intended for health care providers and first responders, such as N95 respirators, would meet these requirements, these specialized masks should be reserved for appropriate occupational and health care settings.

If I'm inside a public place and can maintain social distancing, do I need to wear a mask?

Yes, unless you fit one of the exceptions included in Section 3 of the Order.

Do I have to wear a mask both inside and outside?

The Secretary's Order requires individuals to wear a face covering, in both indoor public places and in the outdoors when they are not able to consistently maintain social distancing from individuals who are not members of their household, such as on a busy sidewalk, waiting in line to enter a place, or near others at any place people are congregating. Whether inside in a public place or outside, and when wearing a face covering or not, everyone should socially distance at least 6 feet apart from others who are not part of your household.

Do I need to wear a mask when around my family members?

A face covering is not necessary when inside the household with only individuals who are part of the same household as you, or when outdoors and able to consistently maintain social distancing from those who are not part of your household. If you and the individuals who live in your household are around others from outside of your household such as extended family members who do not live in the same household, a face covering is needed. If you and the members of your household are outdoors and 6 feet or further from other individuals such as extended family members, a face covering is not needed. Even if outdoors, exercise caution about situations that could result in closer contact when a face covering would be needed. You should also consider whether other individuals have underlying conditions that might make COVID-19 more serious to them than to others, and under those circumstances be sure to wear a face covering and social distance to protect them.

Does the Order apply to individuals within local government facilities, including court houses and government buildings?

Yes. The Order does apply to individuals inside and outside of local government facilities, court houses, and other government buildings.

Is it acceptable to remove face coverings when high temperatures and humidity may create unsafe conditions, or simply if the weather is very warm?

Individuals must wear face coverings unless wearing a face covering would create an unsafe condition in which to operate equipment or execute a task. In general, though, face coverings must be worn, even on warm days, if they do not pose a risk to an individual's health or safety. Mere discomfort is not considered a risk to an individual's health or safety.

Face shields are an acceptable alternative to face masks when high temperatures and humidity create unsafe conditions.

I have asthma or another medical condition. Do I have to wear a mask?

Individuals must wear a face covering unless the mask impedes their vision, they have a medical or mental health condition or disability that impedes their ability to wearing of a face covering, particularly one that creates respiratory problems for the individual, or if wearing a face covering would create an unsafe condition in which to operate equipment or execute a task. A list of the exceptions can be found in

(<https://www.governor.pa.gov/wp-content/uploads/2020/07/20200701-SOH-Universa>

Section 3 of the Order ([I-Face-Coverings-Order.pdf](#))

. If an individual cannot wear a face covering due to a medical or mental health condition or disability, the individual should consider wearing a face shield.

Persons, including children, with other sensory sensitivities may have challenges wearing a cloth face covering. They should consult with their health care provider for advice about wearing cloth face coverings and may consider wearing a face shield.

An individual does not need to provide documentation that the individual fits within an exception to the Order.

Wearing my mask makes my skin break out. Do I have to wear a mask?

Acne is a medical condition that, in some instances, can be serious. Anyone who has only a mild or moderate reaction must continue to wear a face covering and these persons may consider wearing a face shield. Individuals should consult with their health care provider for advice about wearing face coverings if their acne is considered a serious medical condition.

When does my child have to wear a mask?

Children 2 years old and older are required to wear a face covering as described in the Order, unless you fit one of the exceptions included in Section 3 of the Order.

If a child is outdoors and able to consistently maintain a social distance of at least 6 feet from individuals who are not a part of their household, they do not need to wear a mask.

If a parent, guardian, or responsible person has been unable to place a face covering safely on the child's face, they should not do so.

If a child 2 years old or older is unable to remove a face covering without assistance, the child is not required to wear one.

The Department recognizes that getting younger children to be comfortable wearing face coverings and to keep them on may create some difficulties. Under these circumstances, parents, guardians, licensed child care providers in community-based and school settings or responsible persons may consider prioritizing the wearing of face coverings to times when it is difficult for the child to maintain a social distance of at least 6 feet from others who are not a part of their household (e.g., during carpool drop off or pick up, or when standing in line at school). Ensuring proper face covering size and fit and providing children with frequent reminders and education on the importance and proper wearing of cloth face coverings may help address these issues.

Do staff and children in child care facilities need to wear face coverings?

All staff must wear face coverings during child care operations.

The Department recognizes that getting younger children to be comfortable wearing face coverings and to keep them on may create some difficulties. Under these circumstances, parents, guardians, licensed child care providers in community-based and school settings or responsible persons may consider prioritizing the wearing of face coverings to times when it is difficult for the child to maintain a social distance of at least 6 feet from others who are not a part of their household (e.g., during carpool drop off or pick up, or when standing in line at school). Ensuring proper face covering size and fit and providing children with frequent reminders and education on the importance and proper wearing of cloth face coverings may help address these issues.

Any child who cannot wear a face covering due to a medical condition, including those with respiratory issues that impede breathing, a mental health condition, or disability, and children who would be unable to remove a face covering without assistance, are not required to wear face coverings. Individuals who are communicating or seeking to communicate with someone who is hearing impaired or who has another disability, where the ability to see the mouth is essential to communication, also are not required to wear a mask. Other face coverings, such as plastic face shields, may also accommodate such disabilities.

Children do not need to wear face coverings if they are outdoors and able to maintain a distance of 6 feet from individuals who are not members of their household.

Does the Order of the Secretary of the PA Department of Health Requiring Universal Face Coverings apply to children and adults while in schools?

Yes, this order applies to all individuals while in school entities, including public K-12 schools, brick and mortar and cyber charter schools, private and parochial schools, career and technical centers (CTCs), intermediate units (IUs); educational programming for students in non-educational placements such as residential settings (boarding schools), residential facilities, detention centers, and hospital settings; PA Pre-K Counts, Head Start Programs and Preschool Early Intervention programs; and Private Academic Nursery Schools and locally funded prekindergarten activities.

For the safety of students, staff and families and to avoid community spread of COVID-19, students and staff are considered to be members of the public who are congregating in indoor locations. As such, they are required to adhere to this Order.

The order is effective immediately and applies to all children aged two and older.

Under what circumstances are students permitted to remove their face coverings (e.g. masks and face shields)?

Schools may allow students to remove their face coverings when students are:

1. Eating or drinking when spaced at least 6 feet apart;
2. Seated at desks or assigned work spaces at least 6 feet apart; or
3. Engaged in any activity at least 6 feet apart (e.g. face covering breaks, recess, etc.).

Do students with disabilities need to wear face coverings?

Any student who cannot wear a mask or face shield due to a medical condition, including those with respiratory issues that impede breathing, a mental health condition, or disability, and students who would be unable to remove a mask without assistance are not required to wear face coverings. Individuals who are communicating or seeking to communicate with someone who is hearing impaired or who has another disability, where the ability to see the mouth is essential to communication, are not required to wear a mask; however, individuals should consider using another type of face covering such as a plastic face shield.

Do I need to wear a mask while walking my dog? Going for a run in the park?

If doing a solitary activity outside that is not likely to result in being within 6 feet of another person, you are not required to wear a face covering. Individuals should consider carrying a face covering in case they unexpectedly come in close contact with others.

Do I need to wear my mask at the pool?

People should not wear cloth face coverings while engaged in activities that may cause the cloth face covering to become wet, like when

swimming at the beach or pool (<https://www.cdc.gov/coronavirus/2019-ncov/community/parks-rec/public-beache> . A
s.html)

wet cloth face covering may make it difficult to breathe. For activities like swimming, it is particularly important to maintain physical distance from others when in the water. People must wear face coverings while out of the water and maintain social distancing of at least 6 feet from others who are not a part of their household.

Does the Order apply to athletes and sports activities?

Yes. Everyone must wear a face covering, such as a mask, unless they fall under an exception listed in Section 3 of the Order. Coaches, athletes and spectators must wear face coverings, unless they are outdoors and can consistently maintain social distancing of at least 6 feet. Athletes are not required to wear face coverings while actively engaged in workouts and competition that prevent the wearing of face coverings, but must wear face coverings when on the sidelines, in the dugout, etc. and anytime 6 feet of social distancing is not possible.

Does the Order require individuals to wear masks when they are exercising indoors at a health club?

Yes, everyone must wear a face covering unless they fall under an exception listed in Section 3 of the Order.

Do I have to wear a mask if alone in my workplace or office?

Individuals engaged in work, whether at the workplace or performing work off-site, when interacting in-person with any member of the public, working in any space visited by members of the public, working in any space where food is prepared or packaged for sale or distribution to others, working in or walking through common areas, or in any room or enclosed area where other people, except for members of the person's own household, are present must wear a face covering when unable to physically distance. However, employees isolated in their personal office space, which is not shared with any other individual and at least 6 feet apart from another person do not need to wear a face covering. Additionally, a face covering is not required while eating or drinking. While eating or drinking, social distancing techniques and other public health best practices such as hand hygiene should be applied.

I see the people remove their masks while making public speeches. Isn't that a violation of the Order?

Individuals speaking for a broadcast or to an audience may remove their face coverings while speaking, so long as they are social distancing during the speech or broadcast. Those persons in attendance, including employees of the venue, and any person speaking must social distance during, before and after the speech or broadcast.

Do I have to wear a mask at a restaurant, bar, or private club?

Yes, individuals who are seated at a restaurant or other establishment that offers food or beverage service need to wear a mask face covering until such time as they are eating or drinking.

Do I have to wear a mask at the dentist? At a medical appointment related to my nose?

Individuals obtaining a service – medical or otherwise – involving the nose or face for which temporary removal of the face covering is necessary to perform the service are allowed to temporarily remove their face covering to obtain the service.

Does my ride-share vehicle driver and non-household ride-share vehicle passenger need to wear a mask?

Yes.

What happens if I don't wear a mask?

The wearing of face coverings, such as a mask, ensures that we as a society can limit the spread of COVID-19 and successfully combat this pandemic; therefore, it is in **everyone's** best interest that all Pennsylvanians comply with this Order. As this is a legal order under the Disease Prevention and Control Law, law enforcement officers are authorized to issue warnings or citations for those not complying with the Order.

Your mask protects others around you and their masks protect you. By wearing a face covering such as a mask, you are protecting those closest to you.

Should I report someone not wearing a mask? If so, how do I report them?

Individuals should be cautious reporting individuals who are not wearing a face covering, such as a mask, as individuals may fall under one of the exemptions (including having a medical condition that would preclude them from having to wear a face covering). However, if there is a legitimate concern about a situation of non-compliance with the Order, local law enforcement agencies can be contacted through their non-emergency phone numbers to investigate issues of compliance. Individuals should not confront those who are not wearing face coverings, take enforcement matters into their own hands or put themselves in a dangerous situation.

What if I can't afford a mask?

Face coverings, including masks do not need to be purchased. They may be made with readily available items. See

[here](https://www.health.pa.gov/topics/Documents/Diseases%20and%20Condi%20tions/Homemade%20Mask%20Guidance.pdf) <https://www.health.pa.gov/topics/Documents/Diseases%20and%20Condi%20tions/Homemade%20Mask%20Guidance.pdf> for directions on how to make a homemade mask. There are types of "face coverings" other than a mask that may be worn to comply with the Order. Face coverings may be factory-made, sewn by hand, or improvised from household items, including but not limited to, scarves, bandanas, t-shirts, sweatshirts, or towels.

Do individuals experiencing homelessness need to wear a face covering?

Persons experiencing homelessness should, to the greatest extent practicable, practice social distancing, wear face coverings, if possible, and seek community services where available.

Does this apply to residents in Long-Term Care Facilities or other congregate care settings?

Residents of long-term care facilities, hospitals, correctional settings or other congregate care settings should follow any guidance specifically issued by the department or agency that regulates them for specific masking guidance.

Do businesses need to deny entry to those not wearing a face covering such as a mask?

Yes, however, if a business provides medication, medical supplies, or food, that business must offer another means for the customer to purchase goods if the customer is unable to wear a face covering, such as a mask. Those means could include home delivery or contactless curbside pick-up. Other businesses besides those that provide medication, medical supplies, or food should consider providing services through home delivery or contactless curbside pick-up where possible. The Order does not require a customer to be turned away if the customer fits within an exception to the Order. The Order states that an individual is not required to show documentation that an exception applies.

If the customer is refused service, and if the business is not able to provide a face covering, the business should consider providing information on mask making, distributing "how to" flyers, or sharing information about where masks can be purchased. If a customer is belligerent or aggressive in refusing to wear a mask or other face covering, there is no expectation that an employee should force a customer to comply or put themselves in a potentially dangerous situation.

The Department wants to emphasize that it does not expect businesses to put employees in harm's way. Again, in making a determination about whether or not to comply with the Order, an individual should consider not only his or her right to make that decision, but his or her responsibility to family, friends, and other persons with whom they may contact, and to whom they may spread disease.

Do I have to wear a mask at a house of worship such as a church, synagogue or mosque?

Yes, individuals must wear a face covering in any public place as well as outdoors when they are in a place where people are congregating and they cannot remain 6 feet apart from persons who are not a part of their household. Individuals should consider carrying a face covering in case they unexpectedly come in close contact with others.

Does a disposable face shield suffice in lieu of a mask?

Yes, a disposable face shield that covers the nose and mouth will suffice in lieu of a mask.

How should a manager respond to an employee refusing to wear a mask? Does the masking requirement mean I can refuse them entry?

All employees must wear a face covering, such as a mask in the workplace unless they fall under an exception listed in Section 3 of the Order. The administration does not dictate to employers how they should manage their workforce if an employee refuses to comply with the requirement to wear a face covering.

Are masks required for operations where it would be unsafe to keep masks in place, or if an employee says they have anxiety and any mouth or nose covering can lead to panic attacks or other medical conditions?

Individuals must wear a face covering, such as a mask, unless the face covering impedes their vision, they have a medical or health condition or disability that impedes the wearing of a mask, particularly one that creates respiratory problems for the individual, or if wearing a face covering would create an unsafe condition in which to operate equipment or execute a task. A list of the exceptions can be found in Section 3 of the Order.

Are masks required while driving for work?

If the person is driving alone throughout the trip, no face covering, such as a mask, is needed in the vehicle; however, should they need to travel through a tollbooth or other drive thru where other persons are present and social distancing of at least 6 feet cannot be accomplished, they must be wearing a face covering.

Does the masking requirement apply to workers who are outdoors, and who engage in heavy physical activity, such as employees of solid waste companies and landscapers?

Yes. Individuals who may come within 6 feet of others who are not a part of their household must wear a face covering, such as a mask unless the face covering impedes their vision, they have a medical or mental health condition or disability that impedes the wearing of a mask, particularly one that creates respiratory problems for the individual, or if wearing a mask would create an unsafe condition in which to operate equipment or execute a task. A list of the exceptions can be found in Section 3 of the Order.

Do banks and financial institutions need to comply with the masking requirement if there are associated security concerns with face coverings?

Yes, bank employees must wear face coverings at all times. Customers can be asked to remove their face coverings to reveal their face and then recover their face after the bank employee has identified the customer. This should take place at a social distancing space of at least 6 feet.

Date created: July 3, 2020

EXHIBIT 2



**AFFIDAVIT Declaration of
Preservation for Social Media
Information, LLC**

SMI Aware states and declares as follows:

1. SMI Aware is responsible for the capture and preservation of source code and metadata related to social media and web presence on the requested Export. SMI Aware has the knowledge of the matters and facts declared herein, and is competent to testify.

Export Reports are generated by capturing and preserving the social media information such as websites, pictures, and content from web pages, on an SMI Aware secure server, that preserves the HTML, source code and metadata that generates the website's content at a specific point in time. The chain of custody is established at time of access and maintained throughout the preservation process.

As part of this report a full Facebook profile as well as the source code was captured. This source code file is located in the zip file that is referenced as part of the export.



2. At the request of Jonathan D. Marcus at The Law Office of Marcus & Shapira LLP, SMI Aware preserved the following URL: <https://www.facebook.com/JosiahKostek>, (E-11924) on June 08, 2020, captured at 18:03:55 UTC, consisting of 1,855 pages . The Operating System used by SMI Aware was Windows 10 64-bit, and the web browser SMI Aware used was Firefox 77.0

3. We affirm that the contents of the discovery described in this affidavit are true and correct captures of data pertaining to the subject of this report on the stated date and time.



WE DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED this 9th day of July, 2020 at Pittsburgh,

Pennsylvania.

By: [Signature]
Jacob Petti, Export Analyst

STATE OF Pennsylvania
COUNTY OF Allegheny

On this 9th day of July, 2020, before me personally appeared Jacob Petti, to me known to be the declarant described herein, and who executed the foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

SUBSCRIBED AND SWORN to before me this 9th day of July, 2020.

Signature: [Signature]

Printed Name: Sara Schindler

Notary Public in and for the State of Pennsylvania

Residing at: Pittsburgh, PA

My commission expires: 3/27/2023

Seal:

Commonwealth of Pennsylvania - Notary Seal Sara Schindler, Notary Public Allegheny County My commission expires March 27, 2023 Commission number 1345885 Member, Pennsylvania Association of Notaries
--



Export E-11924

Matter/Claim Number: Anti-Mask Lawsuit
URL: <https://www.facebook.com/JosiahKostek>
Capture Start: 2020-06-08 18:03:55 (UTC)
Operating System: Windows 10 64-bit
Browser Engine: Firefox 77.0

A large blue graphic occupies the bottom half of the page. It features a repeating circuit board pattern. In the center, there is a faint, semi-transparent image of a person's face wearing a mask. At the bottom of this graphic, the word 'EXPORT' is written in large, white, bold, uppercase letters.

EXPORT

DO YOU KNOW JOSIAH?

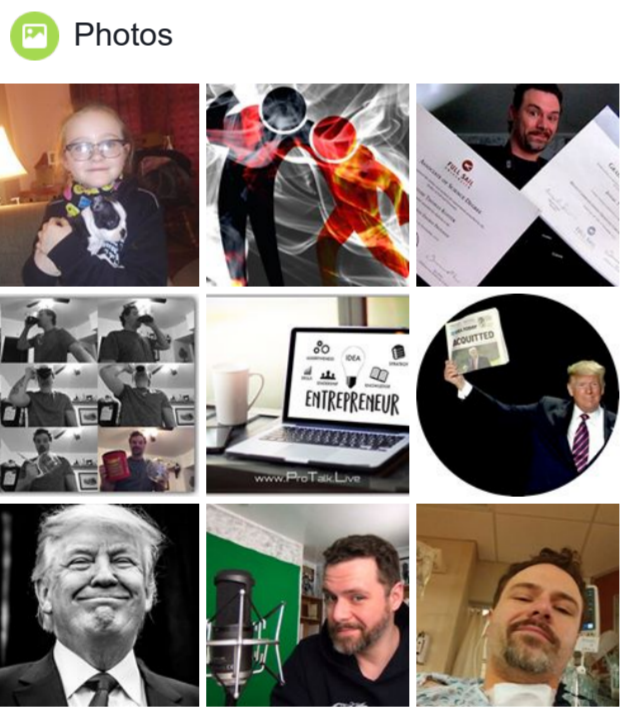
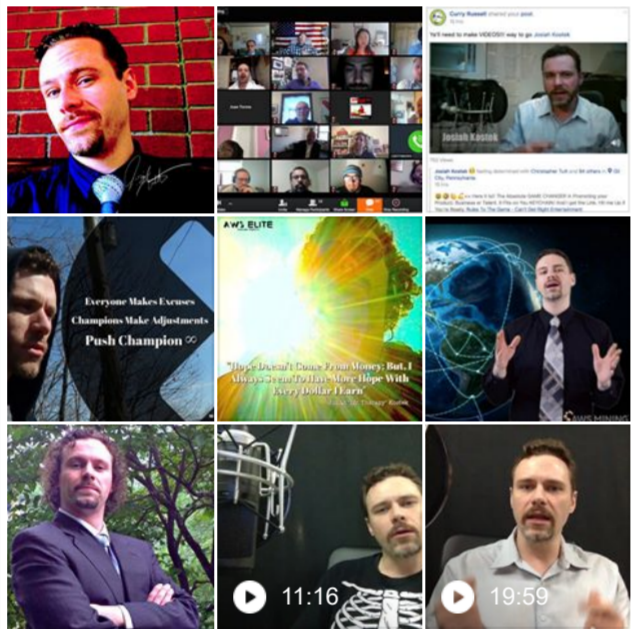
To see what he shares with friends, send him a friend request.

Add Friend

Intro

If you Only KNEW How easy being your own Boss could Be!
www.MakeMeElite.com
 Let's Get Started

- Marketing Coordinator at Mister Therapy
- Studied Music Business at Full Sail University
- Separated
- Joined January 2010
- Followed by 381 people
- AutomationAnswer.com
- MisterTherapy.com



Friends

Life Events

Started New Job at Mister Therapy
January 1, 2019

Started New Job at Rules To The Game
November 11, 2015

English (US) · Español · Português (Brasil) · Français (France) · Deutsch

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Facebook © 2020

Josiah Kostek
12 hrs ·



30 reactions · 14 Comments · 1 Share

Like

Share

Josiah Kostek That came Straight From The Heart, So, For Once, I'ma Like MY OWN Damn Post! Imao - #LoveOneAnother

Like · 12h

Damien Olsen

Like · 12h

Josiah Kostek Thank you Brother! I don't even think this one came from me. I think The Spirit was Talking Through me. I'm just a Mouthpiece.

Like · 11h

Barbie Figueroa Amen 🙏 Your discernment is on point! ❤️❤️❤️

Like · 7h

Josiah Kostek Because of Great leaders like you Ma'am 😊 Thank you Barbie.

Like · 7h

Barbie Figueroa You are too kind! 😊

Like · 7h

Josiah Kostek And 1 day, I'll be even better Barbie 😊

Like · 7h

Andy Boucher 100% correct. People can't change their DNA, only their heart.

Like · 5h

Sam Jackson Thank you for that information

Like · 5h

Larry Wilson

🙏🙏🙏

Like · 4h

Bre Holt Something I can agree with.

Like · 2h

Josiah Kostek Bre Holt you might be surprised how much we agree on as we get to know one another ma'am.

Like · 2h

Ina Wishnia #ALL LIVES MATTER!

Like · 2h

Export Details



Requestor

Jonathan D. Marcus (Marcus & Shapira LLP)

Billing Number

Not Provided

Matter Number

Anti-Mask Lawsuit

Export Type

facebook

Export URL

<https://www.facebook.com/JosiahKostek>

Additional Instruction

Not Provided

Timeframe Start Date

Not Provided

Timeframe End Date

Not Provided

Source Code Url

https://smi-v3-production.s3.amazonaws.com/export_attachments/JosiahKostek_11924_Facebook.zip

Source Code SHA-256 Hash

4c2c1d88513e1accd30528eb5b94b79343c568d9340a218f63841f76cbae74fe

Source Code MD5 Hash

853c8f24898fa2d0dcf539606bdc3c0a



AFFIDAVIT Declaration of Preservation for Social Media Information, LLC

SMI Aware states and declares as follows:

1. SMI Aware is responsible for the capture and preservation of source code and metadata related to social media and web presence on the requested Export. SMI Aware has the knowledge of the matters and facts declared herein, and is competent to testify.

Export Reports are generated by capturing and preserving the social media information such as websites, pictures, and content from web pages, on an SMI Aware secure server, that preserves the HTML, source code and metadata that generates the website's content at a specific point in time. The chain of custody is established at time of access and maintained throughout the preservation process.

As part of this report a Facebook post and brief member list from a specific Facebook group page was captured, as well as the source code. This source code file is located in the zip file that is referenced as part of the export.



2. At the request of Jonathan D. Marcus at The Law Office of Marcus & Shapira LLP, SMI Aware preserved the following URLs: <https://www.facebook.com/groups/684807552061585/permalink/705036173372056/> and <https://www.facebook.com/groups/684807552061585/members/>, (E-11925) on June 04, 2020, captured at 19:12:22 UTC, consisting of eight pages . The Operating System used by SMI Aware was Windows 10 64-bit, and the web browser SMI Aware used was Google Chrome 83.0.4103.61.

3. We affirm that the contents of the discovery described in this affidavit are true and correct captures of data pertaining to the subject of this report on the stated date and time.



WE DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE
COMMONWEALTH OF PENNSYLVANIA, THAT THE FOREGOING IS
TRUE AND CORRECT. EXECUTED this 9th day of July, 2020 at Pittsburgh,

Pennsylvania. By: Cameron Reese
Cameron Reese, Export Analyst

STATE OF Pennsylvania
COUNTY OF Washington

On this 9 day of July, 2020, before me personally appeared Cameron Reese, to me known to be the declarant described herein, and who executed the foregoing instrument, and acknowledged that she signed the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

SUBSCRIBED AND SWORN to before me this 9 day of July, 2020.

Signature: Patricia D Robbins

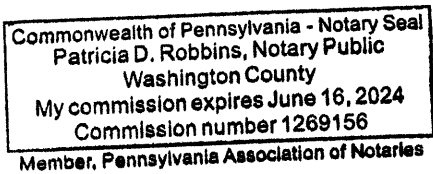
Printed Name: Patricia D Robbins

Notary Public in and for the State of Pennsylvania

Residing at: 4017 Washington Rd
McMurray Pa 15317

My commission expires: June 16, 2024

Seal:





Export E-11925

Matter/Claim Number: Anti-Mask Lawsuit

URL: <https://www.facebook.com/groups/684807552061585/permalink/705036173372056/>

Capture Start: 2020-06-04 19:12:22 (UTC)

Operating System: Windows 10 64-bit

Browser Engine: Chrome 83.0.4103.61

A large blue graphic with a circuit board pattern occupies the lower half of the page. In the center, there is a faint, semi-transparent image of a person's face wearing a mask. At the bottom of this graphic, the word 'EXPORT' is written in large, white, bold, uppercase letters.

EXPORT

PA Small Business against Gov Wolf

Public group

- About
- Discussion
- Members**
- Events
- Videos
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Search this group



Members 2,460

Search Results 1



Josiah Kostek

Joined about a month ago
Marketing Coordinator at Mister Therapy

[Add Friend](#)

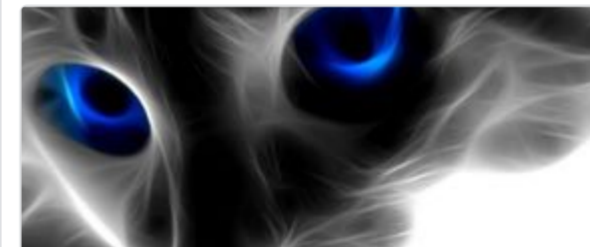
SUGGESTED GROUPS

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Cats and Kittens
1,886 members

[+ Join](#)



THE CAT BOOK
132,253 members

[+ Join](#)



Nothing But Kool Cats
141,559 members

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Chad Gray
May 16 at 7:47 PM

Any lawyers in here wanna handle a big injustice? Josiah Kostek was arrested today for not wearing a mask then assaulted by the police.

57 61 Comments 10 Shares

Like Share

Stephanie Frantz Mays What town?

Like · 2w

Chad Gray oil city i believe

Like · 2w

Sandy Wright The McShane Firm, LLC

Like · 2w

Sandy Wright <https://www.facebook.com/TheMcShaneFirm>

The McShane Firm, LLC

Like · 2w

Josiah Kostek Chad Gray yes sir. Oil City, Pa. 16301

Like · 2w

Rich Ardillo Video?

Like · 2w

Chad Gray It can probably get pulled from cameras. We have audio. He called me during the incident and I recorded the audio.

Like · 2w

Sheila Yvette Wtf

Like · 2w

Lauren Christine Wtf?! No way!

Like · 2w

Lauren Christine In his stories he's in a hospital gown

Like · 2w

Chad Gray He went to get his neck checked. He has a bad neck injury from his military days.

Like · 2w

Lauren Christine Chad Gray oh ok. This is awful. Did he say no, and then start a fight about it? I'm just trying to see if I understand. I haven't had issues to this extent, yet! Yet, being the key word

Like · 2w

Chad Gray Lauren Christine He is waiting to be added to the group he can tell you in more detail

Like · 2w

Lauren Christine Chad Gray got it!

Like · 2w

Tonia Wilczewski Chad Gray he has game.. I do the same thing..

Like · 2w

Josiah Kostek Not game Tonia lol. Herniated disk. I'm in the process of a 2nd spinal fusion. I should've had it months ago but, the government put the fear of God in these people so, a NECK SURGERY isn't essential. (i guess). But, I do thank you and everyone for your support. I'm just a guy that wants to take care of his family, earn a living and be left alone. I help everyone I can, don't hurt anyone and deserve the same rights as all Americans. If it takes a beating and being drug through court to make that point, I gladly will: pain and all.

Like · 2w

DESCRIPTION

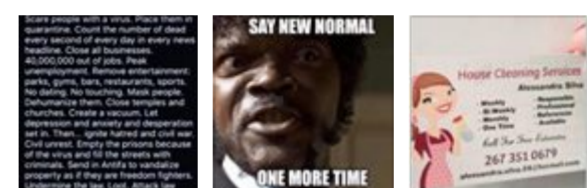
Suffering thru the draconian authoritarianism of a runaway Governor. Small business is not represented in Harrisburg currently and we intend to do something about it.

GROUP TYPE

General

RECENT GROUP PHOTOS

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Suggested Groups

See All



Pennsylvania Patriots for Freedom

1,158 members

+ Join Group



Friends Who Like PA State Police

4,470 members

+ Join Group



Property Tax Elimination in PA

1,003 members

+ Join Group



We The People Of PA

7,327 members

+ Join Group



Exploring Abandoned (Pennsylvania)

22,335 members

+ Join Group

English (US) · Español · Português (Brasil) · Français (France) · Deutsch

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Tonia Wilczewski Josiah Kostek I have to go for 3 surgeries 2 on the neck one more on the back... I still work everyday .. dude has what I need
Like · 2w

Josiah Kostek I know your pain Tonia. If there's anything I can help with, please feel free to reach out to me.
Like · 2w

Christian Edward Stepien Josiah Kostek That makes me so angry! Joshua Prince isn't local to you but he is a good civil rights lawyer.
Like · 2w

Ken McElroy Should have had a mask on
Like · 2w

Jay Eckman Ken McElroy if you aren't joking, no even if you are, you are as big a douche bag as Wolf.
Like · 2w

Brian Koehle Ken McElroy the mask is not a requirement by the government only a recommendation, it's only required by the government if the person enters a store but then it has to be enforced by the store. Not mention a law has not been broken only a so called order which is not a Law!
Like · 2w · Edited

MJ Farina Ken McElroy...you are an idiot.
Like · 2w

Cindy Reckhart Ken McElroy no one has the right to ask or force someone to wear one. He has no reason to explain himself either. It's called freedom.
Like · 2w

Renata Bidness Troll
Like · 2w

Carol Sojda Ken McElroy no he shouldn't have troll
Like · 2w

Katie Papilon Jay Eckman you're right, HE deserves an ass kickin'!
Like · 2w

Mandy Jean Ken McElroy



Like · 2w

Johnny Mike Ill never wear a
Like · 2w

Allene Gagliano Ken McElroy
Like · 2w

Rich Kessler Governors cannot write legislature into law... they can only request... Wolfe is going to be largely regretful on his decision making.
Like · 2w

Robert James Langan Rich Kessler I doubt he will regret he is a lame duck, taxpayers will pay to defend lawsuits against him not him personally he is on an ego trip and loves it and ya he is an asshole
Like · 2w

Rich Kessler Robert James Langan he is... my daughter is in a rural town... meadville... they by no means need the same measures as Philly.. it's ludicrous
Like · 2w

Josiah Kostek Thank you all for the support. I don't mind wearing a mask, if someone asks me polite. I'm in excellent health with the exception of a herniated disk in my neck. I don't cause problems and don't even leave my house unless necessary. I have a right to refuse wearing a mask. No one can legally make me "Buy" masks. if the store Giant Eagle want to demand their customers wear them, they should provide them. I broke NO laws and was arrested, man handled and sent to the ER. This will NOT Stand.
Like · 2w

Hide 15 Replies

Lauren Christine Josiah Kostek this is absolutely unacceptable! I hope there are lawyers on here that can represent you.
Like · 2w

Cindy Reckhart Josiah Kostek hang in there.
Like · 2w

Josiah Kostek Lauren Christine I as well. I may sound like a jerk right now, but this is the 4th or 5th time I've been arrested by these cops. I've won in court every time. They have a target on me. they have for years. I speak my mind and defend liberty. They don't like it, but that ain't illegal and they can't stop it.
Like · 2w

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Josiah Kostek Thank you **Cindy**. I'm really Really touched by all of your support. Might be the shot they gave me at the ER, but, it's all making me a bit emotional. It's beautiful .Thank you all again ❤️

Like · 2w 1

Lauren Christine **Josiah Kostek** oh I'm the same way. I've told my husband, my dad, and my sister, that they might as well start getting bail money ready. I've never been in trouble with the law, ever, but i know my rights. And this isn't a law, it's a recommendation

Like · 2w 3

Ilka Bobin **Josiah Kostek**



Like · 2w 2

Ilka Bobin **Josiah Kostek** don't said mandatory said encourage, I bring both of this in my phone picture in case someone give me trouble.



Like · 2w 1

Josiah Kostek Just downloaded them **Ilka**. I'll be keeping them on my phone from now on as well. Thank you. You're Wonderful 😊

Like · 2w

Ilka Bobin **Josiah Kostek** the welcome sorry did you have to go through this. I recommend to people's to do the same keep this laws in information with them, a lot people's should research the gov.com. Site. Health site.

Like · 2w · Edited 1

Josiah Kostek I just made a BRAND NEW Folder on my Desktop and Folder in my Bookmarks bar on my browser **Ilka**. I mine Information. When I go to court, the lawyers go on vacation. I do the research and data gathering and they do the talking. that's all I need them for. Like I said: I'm a law abiding citizen, I'm a veteran, I help my neighbors and community, I am An American. I won't lose.

Like · 2w 2

Tina Herman Reese I'm sorry what you went through. Apparently, Giant Eagle is as bad as Wolf himself. I heard they made a mother put a mask on her 2-month old baby. A blanket over the carrier was not even acceptable. There should be a boycott of Giant Eagle

Like · 2w 6

Ilka Bobin **Josiah Kostek** wish you the best. ❤️

Like · 2w 1

Josiah Kostek I guess this is the peek at which change comes about **Tina**. I've never been so close to the tip of the spear so to speak, but, I see now that the new weapons of war are waged with legal pads and ink, with soldiers armed with wits and a double Windsor.

I'm not a perfect man, but I'm a good man. I care about the well-being and the rights of others and I think that should serve as enough. I don't wish ill will on our misguided leaders. I have faith that a very small portion of them are truly corrupt or malevolent: the rest, only disassociated with the needs in the will of the people they govern.

I wish all of these absent minded politicians, autocrats and peace officers goodwill and Godspeed, but first, they need to remove themselves from their position, and let a true representatives of common citizen take their place.

I want prosperity. I want the right to pursue my goals and dreams, and so long as I'm not hurting another living creature, I want to be left alone to pursue that which that God and Constitution granted me: which no man shall deprive me or any one I know of.

I support and trust our military, our law-enforcement & governing bodies: but that doesn't mean there aren't cancerous cells lurking within it. America IS great, but we're not perfect. We are the ones doing the final cleansing, and I'm honored to be one of your ranks.

Like · 2w 1

Sherri Starr **Josiah Kostek** I am sorry this happened. Contact your State Representative and report it. They are going to try to have him impeached and have many other people with stories like yours violating our Constitutional Rights. Best of luck to you.

Like · 2w 2

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Josiah Kostek Thank you Sherri. I don't need luck. All I need is to wake up each morning and remember what happened to me, and other law abiding citizens and turn on my computer. Chad understands, but you guys don't understand. They opened the box. I have no other goal. I have no other purpose. I will unite. People Like Us and we will make a sound that no one will ignore.

In proof reading this: I sound like a complete psycho. I'm not. I am someone that achieves goals, and protecting the rights of my neighbors and fellow Americans just rose to the top of the list.

I just graduated college recently and this pesky Herniated disc has prevented me from any type of physical labor, but that hasn't slowed my effort to seek employment. But it seems as though destiny has granted me Grace, because my daddy uncle mommy Government decided they were going to help me pay my bills. Even though I'm not getting any kind of assistance from the military service I provided, years I have worked with a medical condition I'm currently in: Despite my efforts to seek gainful employment and start my business.

I have time. I have the motivation and if I'm correct in ascertaining, the majority of people here have the same goals. Other than that, the officer that put me in the Hospital and the memory of it will be all I need.

Like · 2w

Dave Magda What business does this guy own that was injured

Like · 2w

Josiah Kostek I believe the consensus is more along the lines of "citizens" against Governor Wolf. I am an Entrepreneur, but I don't exactly have my LLC registered if you could forgive me. Hopefully that's OK with you. I should Hope the overwhelming majority of people simply want their fellow citizens to prosper and not be impeded by an overbearing government.

Like · 2w

Dave Magda **Josiah Kostek** it's very unfortunate what happened to you. Please understand that every time an incident like this happens it sets struggling mom and pops on the verge of closing for good a lesser chance of survival. Tom wolf believes that all residents are uneducated and the driving force to keep us shut down is based on this assumption. Therefore although you did nothing wrong this had set us back further in the fight for survival

Like · 2w

Josiah Kostek **Dave Magda** I appreciate your feedback. Thank you

Like · 2w

Sara Bange



Like · 2w

Jared Daub Prince Law Offices, P.C.

Please contact Josh Prince.

Like · 2w

Judi Kunkle Please do not berate me, I have a serious question. Why are people refusing to wear masks? As a small business owner I just want to reopen, I'll wear a mask if it helps ease my customers mind.

Like · 2w

Lauren Christine **Judi Kunkle** because they cause more health issues

Like · 2w · Edited

Josiah Kostek It makes it hard to breath for many people. Imagine having PTSD or claustrophobia **Judi**. It's hell for people just going out in public for basic needs. People are not the same. Masks are good for people that need them. That doesn't give anyone the right to mass order everyone, including people that don't need them AND the people they Harm to wear them.

That's the problem. People that have no problem with masks, especially those who are susceptible to the fear mongering are not considering the needs of those of us don't want to, or can't wear a mask.

What if the government came up with a reason to make you wear gloves, hair coverings, cuffs identifying your religion, medical conditions, or other personal information? Sounds insane right? Kinda like making healthy people wear masks or bandanas that don't protect anyone from anything, including flatulence, or they will arrest them, right?

All that aside, there are no laws stating I must wear a mask, so, it can rest entirely on my Constitutional right to refuse. I'm an adult. I know how to wash my hands and not breath in peoples faces. I was pretty versed in such practices the 35 years I've been alive prior to the hysteria. I don't need daddy government to decide if I need a mask. I'm sure each and every American and their primary care physician can make that decision.

I hope you don't feel as though I'm berating you. I have absolutely no intention ma'am. Just truth and a hint of sarcasm which I hope you can forgive me for, as the events of yesterday are still fresh in my mind, and my neck. I thank you contributing to the conversation. It is greatly appreciated.

Like · 2w

Ruth E. Brown My business is open. Masks are voluntary as far as I'm concerned.

Like · 2w

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Shannon Mays That's terrible. I think the citizens as a whole should file a civil lawsuit against our tyrant governor. He is the biggest factor in this injustice. Especially when a citizen is assaulted by police over a freaking mask.

Like · 2w



1



Dave Magda Seriously, what business were you in, what police department and where's the video that someone has?

Like · 2w

Export Details



Requestor

Jonathan D. Marcus (Marcus & Shapira LLP)

Billing Number

Not Provided

Matter Number

Anti-Mask Lawsuit

Export Type

facebook

Export URL

<https://www.facebook.com/groups/684807552061585/permalink/705036173372056/>

Additional Instruction

Not Provided

Timeframe Start Date

Not Provided

Timeframe End Date

Not Provided

Source Code Url

https://smi-v3-production.s3.amazonaws.com/export_attachments/PASmallBusiness_11925_Facebook.zip

Source Code SHA-256 Hash

c2b73d91ccd5cc742eb013d28ebd20570ce5f0976b4d13e62cc2cf74b4400d81

Source Code MD5 Hash

2305430194f137347b3ea2c26dfef2ca

EXHIBIT 3

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

KIMBERLY PLETCHER,)	
)	Case No. 2:20-cv-00754-NBF
Plaintiff,)	
)	
And)	
)	
JUDITH MARCH, JOSIAH KOSTEK,)	
GRAYDON GRAHAM, RONNIE)	
STURCHIO, NICHOLAS CONLEY,)	
SHARON BURTON, DEBBIE)	
VIDOVICH, PAUL SHEPHERD,)	
GERALD THOMCHICK, CONNIE)	
WINNER, JOHN DURSO, TRACY)	
O'CONNOR, DOUGLAS JANASZEK,)	
OWEN BURK, BEN ZYTNICK,)	
GREGORY MANDICH, JOHN)	
BLACKSTONE, JAMES LEONARD,)	
KATHLEEN CUNNINGHAM, JAMIE)	
MARKS-BORICHEVSKY, POLLY)	
QUINTILIANI, CAROLYN L.)	
STEWART, TOMMY WYNKOOP,)	
TAMMIE AIKEN, STEVEN PARSONS,)	
JEFFREY COULSON, KATHERINE)	
DUCKSTEIN, NATHANAEL DOLLAR,)	
THOMAS BENSOR, VICKI PARKER,)	
STEPHEN MCRAE, KRISTIE)	
HARNISH, MOLLY SHIRK, MICHAEL)	
HAMMERS,)	
)	
Consolidated Plaintiffs,)	
)	
v.)	
)	
GIANT EAGLE, INC. and C&J)	
GROCERY CO., LLC,)	
)	
Defendants.)	

DECLARATION OF WILLIAM ARTMAN

I, William Artman, submit this declaration in connect with the above-captioned case.

1. My name is William Artman. I am the Senior Vice President, Retail Operations at Giant Eagle, Inc. (“Giant Eagle”).

2. In my role, I am familiar with and personally involved in the overall operations of both corporate and independently-owned Giant Eagle retail stores, including those named in the above-captioned litigation. In addition, I am familiar with and have been personally involved with the extensive efforts that Giant Eagle has undertaken to ensure the continuous and safe operation of all supermarkets—both independent and corporate-owned—during the COVID-19 pandemic.

3. In March 2020, COVID-19 became a pandemic, and Giant Eagle became aware of reports that the virus had already spread to Pennsylvania. Corporate executives, including me, assessed the circumstances and immediately developed plans for Giant Eagle to operate its stores, which provide an essential service, as safely as possible under the circumstances.

4. Giant Eagle quickly implemented its plans, sparing no expense. In a matter of weeks, Giant Eagle tripled its curbside service capabilities. Giant Eagle repurposed three stores for curbside service only, and adjusted service at three other locations to enhance its capabilities. We expanded the available days and hours for taking curbside orders over the phone. Giant Eagle hired thousands of additional Team Members, with hundreds of them devoted to curbside service. In addition, we recommitted corporate Team Members to support curbside service and in-store customer care. With these efforts, Giant Eagle dramatically increased its ability to provide its goods and services to its customers without person-to-person contact.

5. Giant Eagle also greatly increased sanitation and protective measures. The Company invested approximately \$3 million in protective health and safety equipment. Stores installed Plexiglas barriers to protect cashiers and customers. Team Members continually sanitize shopping carts, and, where possible, clean stores hourly. We also expanded corporate store hours to provide a window to exclusively and more safely accommodate older and immunocompromised customers.

6. Giant Eagle has always made the health and safety of its customers and Team Members its priority. Health and safety remain the priority now. The Company provides independent store owners and corporate Store Leaders with enough masks for both customers and Team Members who do not have a face covering; ensures priority sanitizer delivery for our stores; provides or reimburses expenses for cashier protection kits (such as plastic dividers and sneeze guards); creates, distributes, and pays for new signage to inform customers and Team Members of updated safety measures; and hosts regular calls and provides regular email updates responding to questions regarding safety.

7. Since the start of the pandemic, guidance from federal, state, and local governments and experts changes on a rapid basis. In the face of changing guidance, state and municipality-specific orders, and new information about how COVID-19 spreads, Giant Eagle continually monitors the guidance and updates and revises its procedures based on its determination about how to most safely operate. Giant Eagle regularly provides updates to its Store Leaders and Team Members about its COVID-19 related policies and enforcement of those policies.

8. On April 15, 2020, Pennsylvania's Secretary of the Department of Health, Dr. Rachel Levine, issued an order setting forth minimum protections for critical workers who are employed at businesses that are authorized to maintain in-person operations during the COVID-19 emergency. The April 15 Order sets forth a list of general requirements that essential businesses, including grocery stores, must meet in order to conduct in-person business. Governor Wolf warned that "[f]ailure to comply with these requirements will result in enforcement action that could include citations, fines, or license suspensions." The Order requires that all customers must wear masks while on the stores' premises, and that businesses must "deny entry to individuals not wearing masks." The Order excuses businesses from enforcing the face covering requirement for customers who cannot wear a face covering due to a medical condition, but provides no means for businesses to determine whether or not customers have such a medical condition.

9. Giant Eagle determined that allowing any Pennsylvania customers to shop without wearing a face covering would potentially violate the Order and directly threaten the health and safety of other customers and Team Members. Giant Eagle instituted a policy in Pennsylvania requiring the use of face coverings in its stores and offering anyone who declines to wear a face covering access to its goods and services through curbside, home delivery or in-person shopping assistance. For Team Members who cannot wear a face covering due to a medical condition, Giant Eagle places those Team Members on a leave of absence. Giant Eagle made the same decision and instituted the same face covering requirement for its Maryland stores. Based on different government requirements and lower incidences of COVID-19 infections and related deaths in other states, Giant Eagle decided to, for the time being, strongly recommend but not require customers to wear face coverings in its West Virginia, Ohio, and Indiana stores.

10. To help Team Members communicate and enforce the face covering requirement, Giant Eagle provided talking points to inform discussions with customers. A copy of the talking points is attached as Exhibit A. Those talking points emphasize Giant Eagle's commitment to accommodating customers who will not or cannot wear a face covering by offering curbside, home delivery or personal shopping services.

11. An overwhelming majority of customers and Team Members applaud Giant Eagle's efforts to keep its stores as safe as possible during the COVID-19 pandemic. But a small minority object, and some have acted violently toward or sought to intimidate Giant Eagle's Team Members who are doing their jobs.

12. I have received numerous reports from stores describing such altercations. For example, a customer at the New Kensington store yelled profanities at and physically attacked a Team Member by punching him in the head, after refusing the Team Member's request that he wear a face covering. A customer at the Franklin store flashed a gun at a Team Member after a Team Member asked him to wear a face covering. And at the Leechburg location, one of the Plaintiffs in this lawsuit, Paul Shepard, returned to that store after the lawsuit was filed and shouted profanities at the Team Members about Giant Eagle's face covering requirement. When, in response, Team Members called police to the Leechburg store, Mr. Shepherd shouted at the police officers, who then removed him from the store.

13. Giant Eagle does not take lightly the enormous stress these confrontations cause our Team Members. In fact, Giant Eagle briefly considered removing Team Members' obligation


to remind customers who enter its Pennsylvania stores without wearing a face covering of our requirement. On May 27, the President of the United Food and Commercial Workers Union Local 1776, Wendell Young, announced the Union's strong opposition to that proposed change. In an email to Giant Eagle's counsel, Mr. Young noted that in response to less strict enforcement of the Order the Union could file a Charge of Unfair Practices. Mr. Young also stated that the Union would remind its members that the "Labor Management Relations Acts protects the rights of workers to refrain from rendering labor or services because of abnormally danger conditions at work" (i.e. that they do not have to report to work), and it would "hold Giant Eagle accountable for the foreseeable consequences of this decision." A copy of the email is attached as Exhibit B. After assessing this input from the local Union, the relative prevalence of the virus in Pennsylvania, and a growing body of evidence indicating that face coverings are critical to preventing the spread of COVID-19, Giant Eagle decided to maintain its Policy.

14. Recent guidance reaffirmed Giant Eagle's decision to require face coverings for all customers in Pennsylvania. For example, I learned that the World Health Organization now recognizes that COVID-19 spreads indoors through the air, after hundreds of experts sent a letter to the organization warning it of the danger.

[REMAINDER OF PAGE INTENTIONALLY BLANK]

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 13 day of July 2020.



William Artman

EXHIBIT A



Maryland and Pennsylvania Mask Guidelines Update May 4, 2020

Update

Thank you for continuing to protect the well-being of fellow Team Members and guests. While most of our Maryland and Pennsylvania guests have appreciated the safety-first reasoning behind our policy requiring everyone to wear a mask or other face covering while in our stores, we also realize that some guests have been vocal against our stance.

We have updated the following protocols to help Team Members who encounter upset guests. Please share them with your management team, any Team Member that will be assigned to the front door mask detail, and the guard on site should you have one assigned in your building.

Suggested talking points

- The safety and well-being of our Team Members and guests is always our top priority.
- To keep in compliance with the State's mandate requiring all people – including employees and customers – entering an essential business to wear a face mask, we must ask that you please put on a mask or other face covering before entering our store.
- *(IF YOUR STORE HAS FACEMASKS FOR GUESTS)*: If you do not have a face mask with you, we will provide a one-time complimentary face mask. In the future, please know that we will be unable to provide you with a face mask.
- *(IF YOUR STORE DOES NOT HAVE FACEMASKS FOR GUESTS, OR YOU ENCOUNTER A GUEST WHO MAY BE ABUSING THE ONE-TIME GESTURE OR OTHERWISE REFUSES TO WEAR A FACEMASK)*: We apologize, but you are not permitted to enter our store without a mask or other face covering. Should you not have a mask, we would be happy to shop for you, and also encourage you to take advantage of our Giant Eagle pickup and delivery service.
- *(IF THE GUEST STATES THAT THEY HAVE A MEDICAL CONDITION THAT PREVENTS THEM FROM WEARING A MASK)*: We appreciate you sharing this important information with us, but you will not be permitted to shop in our store without wearing a mask or other face covering. We would be happy to shop for you, and also encourage you to take advantage of our Giant Eagle pickup and delivery service.

In all circumstances where a guest (1) refuses to wear a mask or other face covering, (2) refuses to accept one of our options to get their grocery order and (3) continues entering the store after being asked not to, management should call the police.

Key Points to follow once all attempts to help the guest have been refused

- The Guard or Team Member assigned to the door contacts management. Management responds and handles the situation.
- DO NOT block the guest's way or attempt to physically stop them. The manager in charge should call the police.
- DO NOT confront or follow the individual with a large group of Team Members or management. The manager and one witness are all that are necessary during these conversations. Stay calm and understand that the individual's objective is often to create a scene in-store and potentially to capture the incident on video.

EXHIBIT B

From: Dan H. Shapira
Sent: Wednesday, May 27, 2020 6:11 PM
To: Bill.Artman@gianteagle.com; Stephanie M. Weinstein
Subject: Please see the below.

Begin forwarded message:

From: Wendell Young IV <w@ufcw1776.org>
Date: May 27, 2020 at 5:41:30 PM EDT
To: "Dan H. Shapira" <Shapira@marcus-shapira.com>

Earlier today, Giant Eagle circulated a memo to its Pennsylvania Team Members on the topic of “Update on Guest Mask/Face Covering Enforcement”. In this Memo, the Company advised that “ **Effective Thursday, May 28, the mask-related signage currently in-store will be the sole manner by which the order is enforced with guests.** Team Members and security personnel will no longer be asked to engage guests on the matter.” This change to prior guidance constitutes a direct violation of the Governor’s workplace directive requiring customer masks and constitutes a reckless disregard for the health and safety of our members and the shopping public. Accordingly, I am demanding that the Company immediately rescind the memo and restore enforcement of the Governor’s Order.

The Order could not be clearer. It directs all businesses that serve the public within a building or defined area to “require all customers to wear masks while on the premises, and deny entry to individuals not wearing masks, unless the business is providing medication, medical supplies or food, in which case the business must provide alternative methods of pick-up or delivery of such goods...” Only individuals who cannot wear a mask due to a medical condition and children under the age of 2 may enter the premises without a mask.

This Order has been in effect since April 19. It has been enforced by Giant Eagle since April 19. Your directive to our members to disregard the Order and to “assume that anyone shopping in our stores without a mask or face covering must have a medical condition that prevents them from wearing one” makes our members complicit in your reckless behavior.

So here is a preview of coming attractions. First, your decision constitutes a dramatic change to the working conditions in your stores which was unilaterally implemented without notice or consultation with the Union. Unless it is rescinded and you begin negotiations about the decision to and impact of failing to enforce a health order of the Governor, we will file a Charge of Unfair Practices.

As you are undoubtedly aware, OSHA requires that an employer ensure that its workplace be free of recognized hazards likely to cause death or serious harm. Further and consistent with that obligation, Section 502 of the Labor Management Relations Act protects the rights of workers to refrain from rendering labor or service because of abnormally dangerous conditions at

work. Local 1776 KS intends to remind its members of their rights to protect themselves and their families from the well documented consequence of exposure to COVID 19 made more likely by this reversal.

Further, we believe that the shopping public and the communities in which they live, have a right to know how the Company has diminished their safety while shopping at Giant Eagle. It is our intention to make them aware of your decision, which we assume you will have no objection since it is in writing and provided to our members as a directive. We have already advised the Governor's Office of your directive and intend to reach out to the Department of Public Health and Attorney General.

Finally, rest assured that we intend to hold Giant Eagle accountable for the foreseeable consequences of this decision. We believe that your decision constitutes reckless endangerment to the health and safety of our members and the general public. We are evaluating a number of legal options should the Company persist. Frankly, I am more that a little shocked and disappointed that you would put profits ahead of the safety of your employees and your customers. I hope that you will reconsider this strategy and rejoin the community of responsible grocers who are respecting these important regulations and the health and safety of everyone in their stores.

Wendell Young IV
UFCW Local 1776
1-866-329-1776, Ext 805

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Dan Shapira
Marcus & Shapira LLP

301 Grant Street, 35th Floor
One Oxford Centre
Pittsburgh, Pennsylvania 15219-6401
Direct Dial: 412-338-5225
Fax: 412-391-8758

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EXHIBIT 4

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

KIMBERLY PLETCHER,)	
)	Case No. 2:20-cv-00754-NBF
Plaintiff,)	
)	
And)	
)	
JUDITH MARCH, JOSIAH KOSTEK,)	
GRAYDON GRAHAM, RONNIE)	
STURCHIO, NICHOLAS CONLEY,)	
SHARON BURTON, DEBBIE)	
VIDOVICH, PAUL SHEPHERD,)	
GERALD THOMCHICK, CONNIE)	
WINNER, JOHN DURSO, TRACY)	
O’CONNOR, DOUGLAS JANASZEK,)	
OWEN BURK, BEN ZYTNICK,)	
GREGORY MANDICH, JOHN)	
BLACKSTONE, JAMES LEONARD,)	
KATHLEEN CUNNINGHAM, JAMIE)	
MARKS-BORICHEVSKY, POLLY)	
QUINTILIANI, CAROLYN L.)	
STEWART, TOMMY WYNKOOP,)	
TAMMIE AIKEN, STEVEN PARSONS,)	
JEFFREY COULSON, KATHERINE)	
DUCKSTEIN, NATHANAEL DOLLAR,)	
THOMAS BENSOR, VICKI PARKER,)	
STEPHEN MCRAE, KRISTIE)	
HARNISH, MOLLY SHIRK, MICHAEL)	
HAMMERS,)	
)	
Consolidated Plaintiffs,)	
)	
v.)	
)	
GIANT EAGLE, INC. and C&J)	
GROCERY CO., LLC,)	
)	
Defendants.)	

DECLARATION OF DIANA MANCINI LIEBMANN

I, Diana Mancini Liebmann, submit this declaration in connection with the above-captioned case.

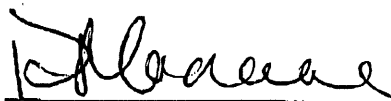
1. I am an adult female, over the age of 18.

2. I have personal knowledge of the facts set forth in this declaration.
3. I am currently employed as a Health and Beauty Care Lead at the Giant Eagle Oil City location, where I have been employed for 10 years. In my role, I also act at various times as acting Store Leader.
4. On May 16, 2020, I was working at the store as acting Store Leader. Our store greeter, who was positioned at the store entrance, called me to the front of the store because a customer, Plaintiff Josiah Kostek, refused to wear a face covering and was yelling at Team Members.
5. As I approached the front of the store I could hear and see Mr. Kostek yelling about refusing to wear a face covering. Specifically, Mr. Kostek shouted, “my body, my choice” and “I live in America.”
6. Mr. Kostek continued to walk through the store without a face covering, yelling that he did not have to wear a mask because Giant Eagle’s rules were illegal.
7. Mr. Kostek yelled over anyone’s attempts to speak with him.
8. I told Mr. Kostek that he could leave the store or we would call the police. Mr. Kostek told me to call the police, and I did.
9. While I was calling the police, Mr. Kostek approached the service desk and asked to purchase tobacco. Greg Felmlee, the Produce Manager, told the service desk cashier not to wait on Mr. Kostek because he refused to wear a face covering while in the store.
10. Mr. Kostek moved very close to Mr. Felmlee and began yelling at him.
11. The police arrived and led Mr. Kostek out of the store. I could see Mr. Kostek yelling at another customer in the parking lot of the store. A police officer placed handcuffs on Mr. Kostek, put him in the police car, and drove away.
12. Afterwards, the police officer who arrested Mr. Kostek called me and told me that Giant Eagle should send Mr. Kostek a “no trespass” letter. He told me that Mr. Kostek is known for entering retail businesses, causing a scene, and then attempting to sue the retailers.
13. Following the recommendation of the police officer, I prepared a no trespass letter to Mr. Kostek and had manager James Dailey sign it. I mailed the letter to Mr. Kostek on May 30, 2020.

[REMAINDER OF PAGE INTENTIONALLY BLANK]

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 13th day of July 2020.



Diana Mancini Liebmann