

**DIRECTORS' ORGANIZATIONAL MEETING**  
**Monday, December 6<sup>th</sup>, 2021**  
**555 S 10<sup>th</sup> Street**  
**LUXFORD STUDIOS**

**I. MINUTES**

1. Approval of Directors' Minutes from November 22<sup>nd</sup>, 2021

**II. ADJUSTMENTS TO AGENDA**

**III. CITY CLERK**

**IV. MAYOR'S OFFICE**

**V. DIRECTORS CORRESPONDENCE**

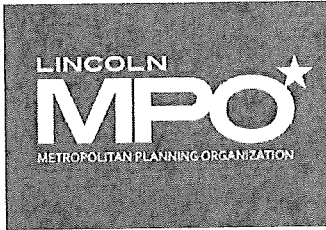
1. BP21119-1 MPO Technical Committee, Geri Rorabaugh
2. BP211130-1 Weekly Admin Approvals, Geri Rorabaugh
3. BP211201-1 Revised Weekly Admin Approvals, Geri Rorabaugh
4. BPC211201-1 Final Action Notice, Shelli Reid
5. BP211201-1 Urban Design Committee, Geri Rorabaugh

**VI. BOARDS/COMMITTEE/COMMISSION REPORTS**

**VII. CONSTITUENT CORRESPONDENCE**

1. Letter to City Council, Christine Niemann
2. Letter of support on the 2050 Comp Plan, Tim Rinne
3. We the People have the Power, Robert Borer
4. Plan Forward, Michaela Schwarten
5. Junk Cars, Debra Roberts
6. Letter of Support for Comp Plan and LRTP, Tami Frank
7. Items 21R-517, 21-154 Tabith InterGen project, Richard Bagby
8. No Masks/your choice, Bryce Gillett
9. No subject, Shelley Wallace
10. Library meet up...keep top of mind, Charyl
11. Redistricting, Elina Newman
12. Balloon release at NE game, Jeremy Swanson
13. We the People Intel Briefing, Robert Borer
14. Claim for damage to water heater and plumbing, Dave Dunning
15. Northwest 48<sup>th</sup> Street Redevelopment Area, Carla Harris
16. Question regarding submittal to the City Council, Chris Niemann
17. DHHS 'Code' and We the People, Robert Borer
18. Hesitancy is warranted!, Elina Newman
19. PFIZER is NOT interchangeable with COMIRNATY..., Elina Newman

**VIII. ADJOURNMENT**



## Lincoln Metropolitan Planning Organization

County-City Building  
555 South 10<sup>th</sup> Street - Suite 213  
Lincoln, Nebraska 68508  
(402) 441-7491

**To:** Technical Committee Members  
**From:** Elizabeth Elliot, Technical Committee Chair  
**Subject:** Technical Committee Meeting

**Date:** November 29, 2021  
**Time:** 10:30 a.m. – 11:30 a.m.  
**Place:** Council Chambers, County-City Building

### Meeting Agenda:

*Roll call and acknowledge the "Nebraska Open Meeting Act"*

1. Review and action on the draft minutes of the August 24, 2021 Technical Committee meeting
2. Review and action on MPO Targets for FHWA Safety Performance Measures
3. Review and action on revisions to the FY 2022-2025 Transportation Improvement Program
  - a. Nebraska Department of Transportation, I-80, Pleasant Dale to N.W. 56th Street – Add project and program federal funds
  - b. Lincoln Transportation & Utilities Department, Standardize Integrated e-Construction in City of Lincoln – Add project and program federal funds
  - c. Lancaster County, 148th Street and Holdrege Street intersection – Revise the programming for Preliminary Engineering phase
4. Review and action on the draft Lincoln MPO 2050 Long Range Transportation Plan
5. Other topics for discussion

### ACCOMMODATION NOTICE

The City of Lincoln complies with Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973 guidelines. Ensuring the public's access to and participating in public meetings is a priority for the City of Lincoln. In the event you are in need of a reasonable accommodation in order to attend or participate in a public meeting conducted by the City of Lincoln, please contact the Director of Equity and Diversity, Lincoln Commission on Human Rights, at 402 441-7624 as soon as possible before the scheduled meeting date in order to make your request.



# *Memorandum*

**Date:** ♦ November 30, 2021

**To:** ♦ City Clerk

**From:** ♦ Teresa McKinstry, Planning Dept.

**Re:** ♦ Administrative Approvals

**cc:** ♦ Geri Rorabaugh, Planning Dept.

This is a list of City administrative approvals by the Planning Director from November 16, 2021 through November 29, 2021:

**Administrative Approval 21055** to Special Permit 17030A, Centerpointe South Street Project, approved by the Planning Director on November 16, 2021, to adjust the footprint of the building and the parking lot configuration on property generally located at S. 11<sup>th</sup> Street and South Street.

**Administrative Approval 21054** to Change of Zone 15013A, Tower Heights Planned Unit Development, approved by the Planning Director on November 24, 2021, to clarify double frontage lots on Blocks 2, 3 and 4, and their setbacks and yard designations, including adding corner front yard designation on property generally located at S. 52<sup>nd</sup> Street and Yankee Hill Road.



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**Administrative Approval 21062** to Special Permit 20003, Garden View at Vintage Heights Community Unit Plan, approved by the Planning Director on November 29, 2021, to revise the lot setback notes to state that the single-family attached note applies to Lots 16-29 and Lots 72-79, Block 1, on property generally located at S. 98<sup>th</sup> Street and Old Cheney Rd.



## PLANNING COMMISSION FINAL ACTION NOTIFICATION

**TO:** Mayor Leirion Gaylor Baird  
Lincoln City Council

**FROM:** Geri Rorabaugh, Planning

**DATE:** December 1, 2021

**RE:** Notice of final action by Planning Commission: December 1, 2021

Please be advised that on December 1, 2021, the Lincoln City-Lancaster County Planning Commission adopted the following resolutions:

**Resolution PC-01789**, resolution of appreciation for Dennis Scheer's nearly 9 years of service as a Planning Commission member; and

**Resolution PC-01790**, approving **SPECIAL PERMIT 1791B**, to allow for the expansion of an existing residential healthcare facility to the second floor with up to 32 residents, on property legally described as Lots 5-10, Block 1, Electric Park Addition, located in the NW 1/4 of Section 36-10-6, Lincoln, Lancaster County, Nebraska, generally located at 1430 South Street.

The Planning Commission action on these items is final, unless appealed to the City Council by filing a notice of appeal with the Planning Department within 14 days of the action by the Planning Commission

The Planning Commission Resolutions may be accessed on the internet at [www.lincoln.ne.gov](http://www.lincoln.ne.gov) (search for "PATS"). Click on "Planning Application Tracking Service (PATS)" at the top of the page, click "Selection Screen" under "PATS Tools" on the right side of the screen, type in the application number (i.e. SP1791B), click on "Search", then "Select", and go to "Related Documents".

# URBAN DESIGN COMMITTEE

The City of Lincoln Urban Design Committee will have a regularly scheduled public meeting on Tuesday, **December 7, 2021**, at **3:00 p.m.** in City Council Chambers on the 1<sup>st</sup> floor, County-City Building, 555 S. 10<sup>th</sup> Street, Lincoln, Nebraska, to consider the following agenda. For more information, contact the Planning Department at (402) 441-7491.

## AGENDA

1. Approval of UDC meeting record of November 2, 2021.

\* Memo from Stacey Hageman

## DISCUSS AND ADVISE

2. Instinct Pet Foods Redevelopment Project, Phase 2 – UDR21098
3. Sidewalk Café at The Hot Mess, 408 S. 11<sup>th</sup> St. – UDR21099
4. Sidewalk Café at Gravity, 1140 O St. – UDR21100
5. Sidewalk Café at Itsumo Ramen, 1451 O St. – UDR21101

## STAFF REPORT & MISC.

6. Staff report & misc.

*Urban Design Committee's agendas may be accessed on the Internet at  
<https://www.lincoln.ne.gov/City/Departments/Planning-Department/Boards-and-Commissions/Urban-Design-Committee>*

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<https://linclanc.sharepoint.com/sites/PlanningDept-Boards/Shared Documents/Boards/UDC/Agendas/2021/ag120621.docx>

**JaMel E. Ways**

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**From:** Christine Niemann <christineniemann41@gmail.com>  
**Sent:** Thursday, November 18, 2021 12:34 PM  
**To:** Council Packet  
**Subject:** Letter to City Council  
**Attachments:** Letter to City Council.pdf

Attached is a letter and documentation for my request to be reimbursed for an expense I incurred due to city negligence that was denied by the City Attorney's Office.

Please consider this request for reimbursement during your next meeting on November 22. I am unable to attend in person.

--

Christine Niemann  
Mobile: 402-310-7036  
[christineniemann41@gmail.com](mailto:christineniemann41@gmail.com)

Christine Niemann  
3027 Ryons Street  
Lincoln, NE 68508  
402-310-7036

November 18, 2021

Lincoln City Council  
555 S 10<sup>th</sup> Street Room 112  
Lincoln, NE 68508

Members of the Lincoln City Council:

On October 6, 2021, my daughter was driving down D Street and a tree limb fell from a tree that is located in the right of way. The tree limb that fell hit a parked car that she happened to be passing at that exact moment. The limb highly damaged the parked vehicle and the portion of the limb that hit her truck, shattered the windshield. This tree, along with many others along this block are marked with spray paint for removal or trimming.

I requested that the city reimburse me for the cost of the shattered windshield and was informed by the City Attorney that the request was denied due to the city having an unreasonable amount of time to trim or remove the marked trees due to weather, staff and equipment. The letter mentioned the trees being marked on or around June 16, 2021 – five months prior to this accident. I do understand that there were several days of heat advisory over the time frame, and incidentally, the Forestry Department selected one of the hottest days of the summer to mark the trees, so obviously heat is a non-issue. One might also consider the six incidences of heavier rain or thunderstorms we suffered over the summer, with only three of those occurring during a Monday-Friday work week. While I cannot speak on staffing and equipment issues, I would hope the Forestry Department would consider tree trimming and removal a priority in the spring when we as Nebraskans know our weather and the likelihood for damaging thunderstorms and wind that can quickly cause a grossly neglected tree to become a hazard and cause damage to personal property and potentially injuring citizens, as noted on the city website.

I'm requesting again that the city reimburse me for the cost of the shattered windshield. I've attached a copy of the receipt for \$273.72, the LPD report-case CI 094919 by Officer Grell #1556, photos and climate data for the five months during the time the trees were neglected. I believe that five months is unreasonable to wait for neglected trees to be taken care of and the city is responsible for this damage.

If you need any additional information, please let me know. I can be reached by phone at 402-310-7036 and email at [christineniemann41@gmail.com](mailto:christineniemann41@gmail.com).

Respectfully,

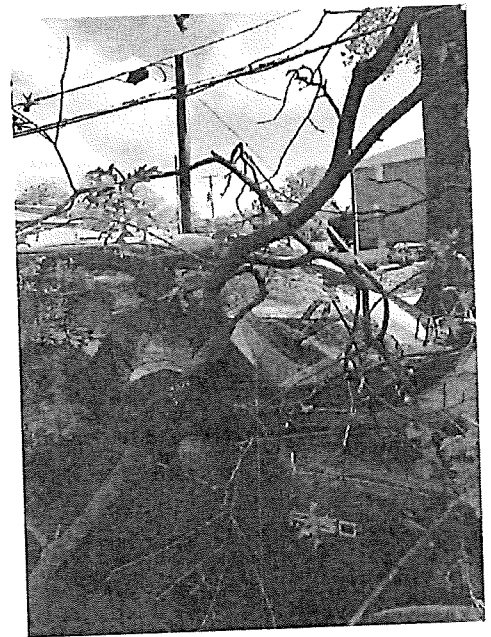
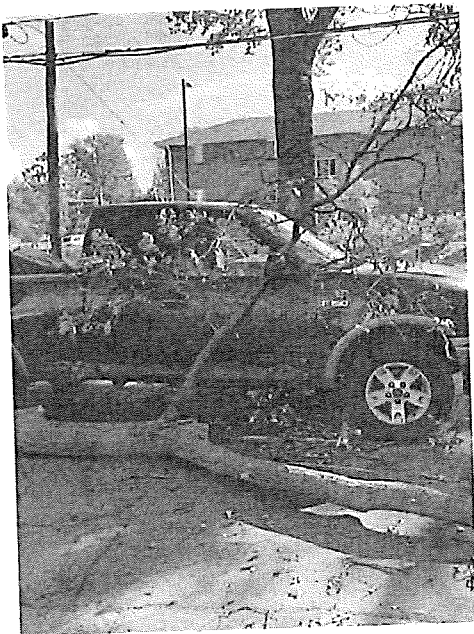
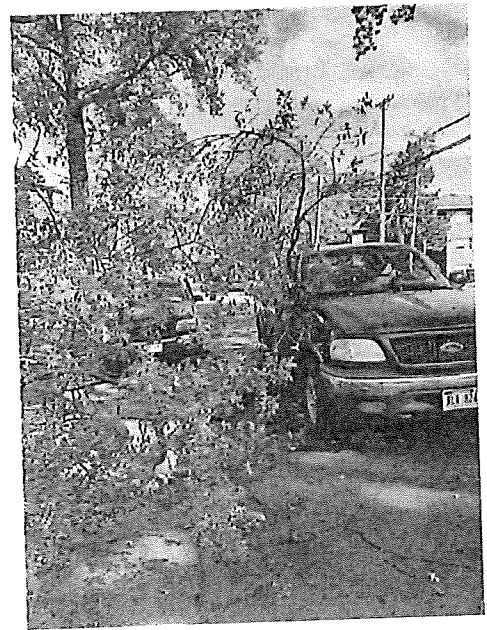
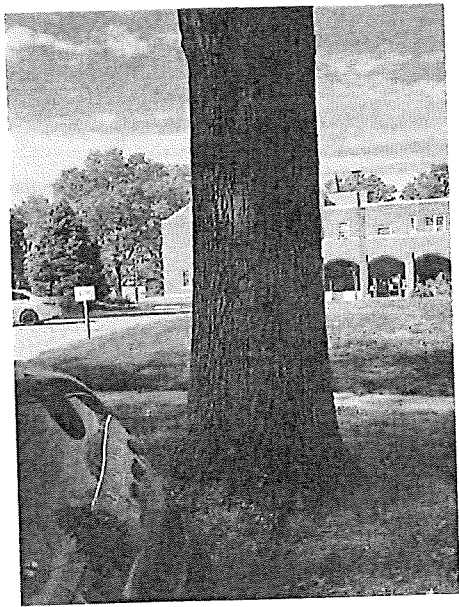


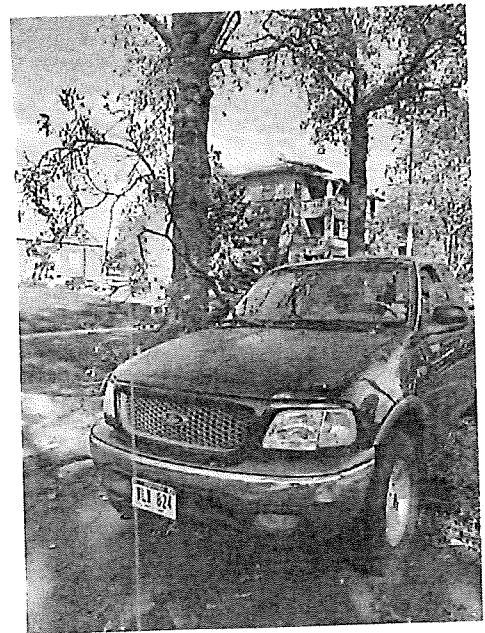
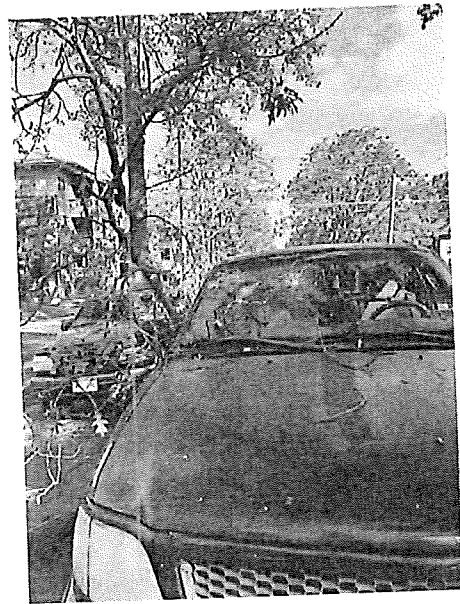
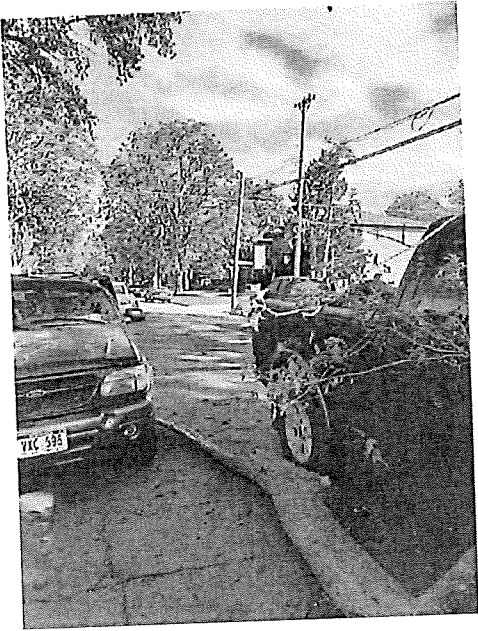
Christine Niemann

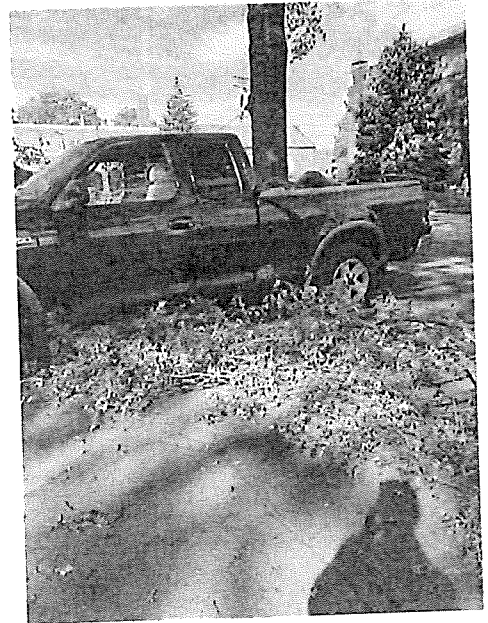
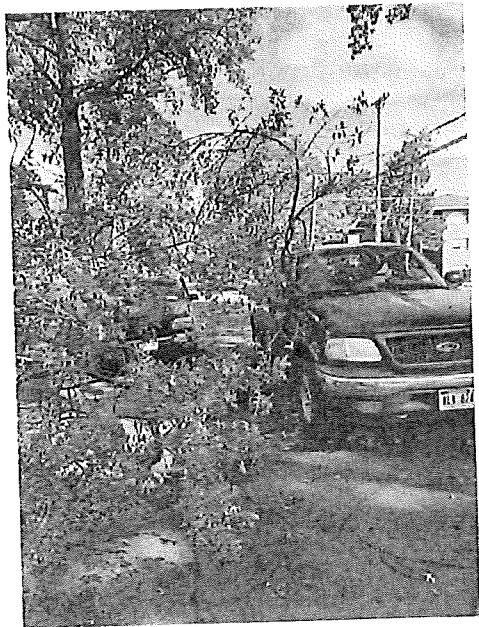
## Lincoln Police Department | 575 S 10th Street | Lincoln, NE 68508

Case#: C1-094919	Public Incident Report	
Report Taken: 1040 10-07-2021		
Occurred at or between: 1020 THU 10-07-2021 - 1040 THU 10-07-2021		Team: 4
Location: G ST / S 18TH ST ; S OF		Location Code: 1
Offense(s):		
# 1 : 24166 PROPERTY DAMAGE - NON-CRIMINAL		
Victim(s):		
Victim # 1 Type: Individual Victim of: Offense #1 Name: SARAH NIEMANN W/F ( 30 )		
Victim # 2 Type: Individual Victim of: Offense #1 Name: SYDNEY JANE NIEMANN W/F ( 20 )		
Victim # 3 Type: Individual Victim of: Offense #1 Name: MATTHEW C RIECK W/M ( 47 )		
Offender(s):		
Item(s):		
Damaged   Victim # 3 : 2000 BLK FORD EXPLORER NE VXC596 1FMZU73E4YZB22035		3,500.00
Damaged   Victim # 2 : 2002 BLUE FORD F150 NE WLW824 2FTRX18W12CA65405		500.00
Summary		
BRANCH FROM CITY TREE FELL ON VEHICLES CAUSING DAMAGE		
Report Completed by: # 1556 GRELL		

End of Report









# Nebraska AutoGlass, Inc.

212 S. Antelope Valley Parkway  
Lincoln, NE 68510  
Fed. I.D. # 47-0756660

(402) 474-9000  
Fax (402) 474-9036

Quote

Q003324

ACCOUNT NO.:	AGENT NO.:	PURCHASE ORDER NO.:	DATE: 06/20/21
CUSTOMER STATE TAX OR EXEMPTING	CUSTOMER FEDERAL TAX ID NO.	ADJ. CODE	ORDER TAKEN BY
			INSTALLED BY
			FEDERAL TAX ID NO. 47-0756660

BILL TO:

SARAH NIEMANN

402 641 0200 Mobile: 304 3963 DAVE

SOLD TO:

Ship To:  
SARAH NIEMANN

## INSURANCE PROOF OF LOSS

INSURANCE CO.	POLICY NO.
INSURANCE CO.	CLAIM NO.
PHONE NO.	CAUSE & LOSS LOCATION
POLICY NAME	VERIFIED BY
AGENT NAME	DATE OF LOSS
AGENT PHONE	DEDUCTIBLE

## VEHICLE INFORMATION

MAKE	MODEL	YEAR	DOORS
Ford	F Series F150	2002	2
ODOMETER	LICENSE	VEHICLE I.D. NO.	

Qty	Part Number	Description	Unit	Total
1	DZ012535BNHCOM	Windshield (Paint Band, Solar Controlled)	\$140.00	\$140.00
1	30P	Flat Labor (Flat Patch) (2.8 Hours)	\$100.00	\$100.00
1	HAH000004	Adhesive (2.0 Urethane, Dam, Primer)	\$20.00	\$20.00
1	WFT D1266	Moulding (Upper, Reveal)	\$20.00	\$20.00
1	MISC	COUPON	\$25.00	\$25.00
1	MISC	SHOP MATERIALS	\$6.00	\$6.00

PRICE INCLUDES \$25 COUPON

Roll over - Rusty  
No warranty

pd 6/29

### AUTHORIZATION TO PAY

I hereby authorize and empower the above-named insurance company to pay this invoice in full settlement, satisfaction and discharge of all loss under the above policy. Upon such payment, all rights I may have for claim and demand for loss and damage described above against the above named insurance company shall be thereby forever discharged. In the event that the above named insurance company does not make timely and/or full payment of this invoice according to its terms, I hereby accept responsibility for such payment and agree to pay all charge reflected on this invoice to the above named glass company subject to and according to all terms and conditions on this invoice. Nebraska AutoGlass warrants against defects in material or workmanship on repair or replacement for as long as you own the vehicle.

CUSTOMER'S SIGNATURE

Sub Total

\$261.99

Tax:

\$11.74

TERMS  
Total:

\$273.72

TOTAL SALE



UNIVERSITY of NEBRASKA-LINCOLN



Nebraska (<https://www.unl.edu/>) [Lincoln Weather and Climate \(/\)](#) [june-2021-lincoln-ne-climate-data](#)

# June 2021 Lincoln, NE, Climate Data



June 1, 2021: Lancaster County southeast of Lincoln, NE. Photo Ken Dewey

### Last Month's Data (May 2021)

[\(may-2021-lincoln-ne-climate-data\)](#) Next Month's Data (July 2021) [\(july-2021-lincoln-ne-climate-data\)](#)

NOTE: >> The NEW 1991-2020 Normals have been added to this page.  
more information at: [Lincoln's new 30-Year normals](https://lincolnweather.unl.edu/data/normals.asp) (<https://lincolnweather.unl.edu/data/normals.asp>)

### Year 2021 (and last year) Lincoln Precipitation in Inches compared to normal

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
Normal	0.73	0.89	1.55	2.69	4.91	4.48	3.25	3.32	2.90	2.14	1.30	1.18	28.93
2021	1.53	0.79	5.23	1.74	2.55	4.46							16.30
2020	1.29	0.13	1.67	0.88	5.09	3.15	5.73	1.27	1.62	0.40	1.20	1.20	23.63

Normal January 1 - May 31 Precipitation total = 10.77 inches  
 Normal January 1 - June 30 Precipitation total = 15.25 inches

NOTE: Lincoln's Heat Weather Climatology, LINK>> [Hot Weather Climatology](#).

[<https://lincolnweather.unl.edu/data/heat-waves.asp>] Record High Temperature June 17, 103°F. Old record 101°F set in 1918

All data in the following table are from the National Weather Service and [HPRCC](#)  
 [<http://www.hprcc.unl.edu/>] data archives.

*If columns are hidden, scroll the table right.*

June	2021	Max	Min	Mean	Dep	Pcpn	Rec Pcpn	Rec Max	Rec Min	HDD	CDD
Tuesday	June 1	79	51	65	-4	0.00	3.02	96	40	0	0
Wednesday	June 2	83	47	65	-5	0.00	2.00	100	43	0	0
Thursday	June 3	87	52	70	0	0.00	2.44	97	40	0	5
Friday	June 4	94	62	78	+8	0.00	2.64	100	40	0	13
Saturday	June 5	93	66	80	+9	0.00	4.08	101	42	0	15
Sunday	June 6	87	66	77	+6	0.00	1.72	107	44	0	12
Monday	June 7	92	65	79	+8	0.00	3.30	100	41	0	14
Tuesday	June 8	92	63	78	+6	T	2.92	102	39	0	13
Wednesday	June 9	94	65	80	+8	0.00	1.90	101	44	0	15
Thursday	June 10	96	71	84	+12	0.00	2.02	106	43	0	19
Friday	June 11	84	66	75	+2	1.99	3.03	103	44	0	10
Saturday	June 12	87	57	72	-1	0.00	3.72	101	43	0	7
Sunday	June 13	91	56	74	+1	0.00	1.88	102	43	0	9
Monday	June 14	96	62	79	+5	0.00	3.75	101	44	0	14
Tuesday	June 15	93	69	81	+7	0.00	2.88	108	44	0	16
Wednesday	June 16	102	71	87	+13	0.00	1.62	105	45	0	22
Thursday	June 17	103	72	88	+14	0.00	1.82	103	44	0	23
Friday	June 18	90	71	81	+6	0.04	1.78	105	50	0	16
Saturday	June 19	90	67	79	+4	T	2.33	104	42	0	14

June	2021	Max	Min	Mean	Dep	Pcpn	Rec Pcpn	Rec Max	Rec Min	HDD	CDD
Sunday	June 20	91	68	80	+5	0.06	1.76	106	47	0	15
Monday	June 21	80	61	71	-4	0.00	2.11	107	43	0	6
Tuesday	June 22	92	54	73	-3	T	2.40	102	49	0	8
Wednesday	June 23	93	64	79	+3	0.00	4.24	106	46	0	14
Thursday	June 24	86	68	77	+1	1.30	4.59	103	47	0	12
Friday	June 25	89	69	79	+3	1.07	3.00	103	42	0	14
Saturday	June 26	77	65	71	-5	T	3.17	108	49	0	6
Sunday	June 27	85	61	73	-3	0.00	2.72	104	49	0	8
Monday	June 28	86	67	77	0	T	1.99	103	52	0	12
Tuesday	June 29	87	64	76	-1	T	2.86	104	44	0	11
Wednesday	June 30	86	65	76	-1	0.00	1.86	105	51	0	11
June	2021	Max	Min	Mean	Dep	Pcpn	Rec Pcpn	Rec Max	Rec Min	HDD	CDD
	TOTAL					4.46				0	354
	AVERAGE	89.5	63.5	76.5							
	NORMAL	85.2	62.1	73.7		4.48				12	271
	DEPARTURE	+4.3	+1.4	+2.8		-0.02				-12	+83

From the record books:

TEMPERATURE: Data 1887-2020 (134 years)

Warmest recorded JUNE temperature, 108°F, June 15, 1946 AND June 26, 1936.

Coldest recorded JUNE temperature, 39°F, June 8, 1978.

PRECIPITATION: Data 1887-2020 (134 years)

Wettest June Total Precipitation: 12.93 inches, June 1967

Driest June Total Precipitation: 0.17 inches, June 2002

AVERAGE AND TOTAL are JUNE 2021.

Temperature is °F

Precipitation measurement is "inches"

Precipitation "T" = trace, precipitation was observed but not enough to be measured

NORMAL (Norm) refers to the 1991-2020 Standard Normals.

DEPARTURE is JUNE 2021 Average measured against 1978-2010 normals.

Max = Observed Maximum and Min = Observed Minimum temperatures in °F

**Mean = Observed Mean Daily temperature in °F.**

**Dep = Departure from normal ( \_ = below normal, + above normal), in °F.**

**Pcpn = Observed daily precipitation (midnight to midnight, CST) in inches.**

**Rec Pcpn = Record daily amount of precipitation in inches.**

**Rec Max = Record maximum temperature in °F.**

**Rec Min = Record Minimum temperature in °F.**

**HDD = heating degree day units (base of 65 degrees) in °F.**

**CDD = cooling degree day units (base of 65 degrees) in °F.**

**Norm Max = Daily Normal High Temperature (1991-2020 normals) in °F.**

**Norm Min = Daily Normal Low Temperature (1991-2020 normals) in °F.**

**Norm Mean = Daily Normal Mean Temperature (1991-2020 normals) in °F**

**NOTE: All data on this page are from the National Weather Service and HPRCC**  
**[<http://www.hprcc.unl.edu/>] data archives.**



**IN OUR GRIT,  
OUR GLORY.** **BIG** Nebraska

#### **CONTACT US**

Dr. Ken Dewey  
 925 Oldfather Hall  
 University of Nebraska-Lincoln  
 Lincoln, NE 68588-0370

[kdewey1@unl.edu](mailto:kdewey1@unl.edu)

#### **RELATED LINKS**

High Plains Regional Climate Center (HPRCC)  
 Weather Camp  
 Central Plains Severe Weather Symposium (CPSWS)  
 National Climatic Data Center (NCDC)  
 National Weather Service (NWS)  
 National Oceanic and Atmospheric Association (NOAA)  
 American Association of State Climatologists (AASC)  
 Storm Prediction Center

#### **CAMPUS LINKS**

Directory  
 Employment  
 Events  
 Libraries  
 Maps  
 News  
 Office of the Chancellor

UNIVERSITY of NEBRASKA-LINCOLN

# N LINCOLN WEATHER AND CLIMATE

Nebraska (<https://www.unl.edu/>) [Lincoln Weather and Climate \(/\)](#) [july-2021-lincoln-ne-climate-data](#)

## July 2021 Lincoln, NE, Climate Data



Rural Lincoln, NE, July 2021. Photo Ken Dewey

[Last Month's Data \(June 2021\)](#) ([june-2021-lincoln-ne-climate-data](#))

[Next Month's Data \(August 2021\)](#) ([august-2021-lincoln-ne-climate-data](#))

**NEW: Nebraska Tornadoes 1950-2020** (<https://lincolnweather.unl.edu/nebraska-monthly-tornadoes>)

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Normal January 1 - July 31 Precipitation total = 18.50 inches

NOTE: Lincoln's Heat Weather Climatology, [LINK>> Hot Weather Climatology](https://lincolnweather.unl.edu/data/heat-waves.asp)  
[\[https://lincolnweather.unl.edu/data/heat-waves.asp\]](https://lincolnweather.unl.edu/data/heat-waves.asp)

[\[https://lincolnweather.unl.edu/data/heat-waves.asp\]](https://lincolnweather.unl.edu/data/heat-waves.asp) All data in the following table are from the National Weather Service and [HPRCC](http://www.hprcc.unl.edu/) [\[http://www.hprcc.unl.edu/\]](http://www.hprcc.unl.edu/) data archives.

*If columns are hidden, scroll the table right.*

		Max	Min	Mean	Dep	Pcpn	Rec Pcpn	Rec Max	Rec Min	HDD	CDD
July	2021										
Thursday	July 1	87	63	75	-2	0.00	4.86	108	45	0	10
Friday	July 2	90	61	76	-1	0.00	1.24	108	50	0	11
Saturday	July 3	89	63	76	-1	0.00	1.20	108	49	0	11
Sunday	July 4	90	63	77	0	0.00	2.44	110	47	0	12
Monday	July 5	91	67	79	+1	0.00	3.17	110	49	0	14
Tuesday	July 6	90	67	79	+1	0.00	2.61	105	49	0	14
Wednesday	July 7	79	64	72	-6	0.15	3.01	104	49	0	7
Thursday	July 8	86	58	72	-6	0.00	3.19	102	50	0	7
Friday	July 9	97	69	83	+5	0.19	2.14	104	49	0	18
Saturday	July 10	84	65	75	-3	0.06	2.40	103	48	0	10
Sunday	July 11	82	61	72	-6	0.08	2.97	107	51	0	7
Monday	July 12	84	56	70	-8	0.00	1.94	111	52	0	5
Tuesday	July 13	90	61	76	-2	0.00	1.26	108	50	0	11
Wednesday	July 14	89	72	81	+3	0.19	1.15	107	49	0	6
Thursday	July 15	79	68	74	-4	0.35	2.04	112	51	0	9
Friday	July 16	83	64	74	-4	0.00	1.56	109	48	0	9
Saturday	July 17	87	68	78	0	T	1.55	112	49	0	13
Sunday	July 18	84	64	74	-4	0.00	2.56	108	50	0	9
Monday	July 19	86	58	72	-6	0.00	2.47	111	51	0	7
Tuesday	July 20	87	62	75	-3	0.00	1.77	110	54	0	10
Wednesday	July 21	87	61	74	-4	0.00	3.26	107	50	0	9



		Max	Min	Mean	Dep	Pcpn	Rec Pcpn	Rec Max	Rec Min	HDD	CDD
July	2021										
Thursday	July 22	90	66	78	0	0.00	1.47	105	53	0	13
Friday	July 23	95	71	83	+5	0.00	2.77	106	48	0	18
Saturday	July 24	88	71	80	+2	T	3.07	111	52	0	15
Sunday	July 25	89	64	77	-1	0.00	5.42	115	51	0	12
Monday	July 26	91	60	76	-2	0.00	2.91	109	49	0	11
Tuesday	July 27	96	69	83	+5	0.00	1.32	108	50	0	18
Wednesday	July 28	98	73	86	+8	0.00	1.97	106	47	0	21
Thursday	July 29	97	74	86	+8	0.00	1.92	105	49	0	21
Friday	July 30	92	74	83	+5	T	1.58	106	46	0	18
Saturday	July 31	82	68	75	-3	0.71	1.28	105	50	0	10
July	2021	Max	Min	Mean	Dep	Pcpn	Rec Pcpn	Rec Max	Rec Min	HDD	CDD
.	TOTAL					1.73				0	376
.	AVERAGE	88.4	65.3	76.8							
.	NORMAL	89.4	66.7	78.1		3.25				1	405
.	DEPARTURE	-1.0	-1.4	-1.3		-1.52				-1	-29

AVERAGE AND TOTAL are JULY 2021.

NORMAL (Norm) is the 1991-2020 "Standard Normals".

Temperature is °F

Precipitation measurement is "inches"

Precipitation "T" = trace, precipitation was observed but not enough to be measured

NORMAL (Norm) refers to the 1991-2020 "Standard Normals".

DEPARTURE is JULY 2021 Average measured against 1991-2020 normals.

Max = Observed Maximum and Min = Observed Minimum temperatures in °F

Mean = Observed Mean Daily temperature in °F

Dep = Departure from normal ( \_ = below normal, + above normal), in °F

Pcpn = Observed daily precipitation (midnight to midnight, CST) in inches.

Rec Pcpn = Record daily amount of precipitation in inches.

Rec Max = Record maximum temperature in °F

Rec Min = Record minimum temperature in °F

HDD = heating degree day units (base of 65 degrees) in °F

CDD = cooling degree day units (base of 65 degrees) in °F

Norm Max = Daily normal high Temperature (1991-2020 normals) in °F

Norm Min = Daily normal low Temperature (1991-2020 normals) in °F

Norm Mean = Daily normal mean Temperature (1991-2020 normals) in °F

UNIVERSITY of NEBRASKA-LINCOLN

# N LINCOLN WEATHER AND CLIMATE

Nebraska (<https://www.unl.edu/>) [Lincoln Weather and Climate \(/\)](#) [august-2021-lincoln-ne-climate-data](#)

## August 2021 Lincoln, NE, Climate Data



Several geese flying by with a nearby developing thunderstorm over Lincoln, NE, August 1, 2020.

LINKS: [Lincoln Hot Weather Climatology \[https://lincolnweather.unl.edu/data/heat-waves.asp\]](https://lincolnweather.unl.edu/data/heat-waves.asp)

[Last Month's Data \(July 2021\)](#)

[\[https://lincolnweather.unl.edu/july-2021-lincoln-ne-climate-data\]](https://lincolnweather.unl.edu/july-2021-lincoln-ne-climate-data) [Next Month's Data \(September 2021\)](#)  
([september-2021-lincoln-ne-climate-data](#))

NOTE >> The NEW 1991-2020 Normals have been added to this page.  
more information at: [Lincoln's new 30-Year normals \[https://lincolnweather.unl.edu/data/normals.asp\]](https://lincolnweather.unl.edu/data/normals.asp)

Tied Record "High-Low": 75°F on August 24, 2021 this is the warmest daily low for August 24  
(1887-2021)

Year 2021 (and last year) Lincoln Precipitation in Inches compared to normal

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
Normal	0.73	0.89	1.55	2.69	4.91	4.48	3.25	3.32	2.90	2.14	1.30	1.18	29.34
2021	1.53	0.79	5.23	1.74	2.55	4.46	1.73	3.41					21.44
2020	1.29	0.13	1.67	0.88	5.09	3.15	5.73	1.27	1.62	0.40	1.20	1.20	23.63

Normal January 1 - July 31 Precipitation total = 18.50 inches  
 Normal January 1 - August 31 Precipitation total = 21.82 inches

All data in the following table are from the National Weather Service and HPRCC  
[\[http://www.hprcc.unl.edu/\]](http://www.hprcc.unl.edu/) data archives.

*If columns are hidden, scroll to the right.*

August	2021	Max	Min	Mean	Dep	Pcpn	Rec Pcpn	Rec Max	Rec Min	HDD	CDD
Sunday	Aug. 1	83	60	72	-6	0.00	2.39	105	48	0	7
Monday	Aug. 2	82	55	69	-9	0.00	2.04	107	52	0	4
Tuesday	Aug. 3	83	54	69	-9	0.00	2.05	108	51	0	4
Wednesday	Aug. 4	87	62	75	-3	0.00	1.68	109	45	0	10
Thursday	Aug. 5	92	68	80	+2	0.00	1.60	109	48	0	15
Friday	Aug. 6	95	71	83	+6	0.01	1.68	104	49	0	18
Saturday	Aug. 7	92	64	78	+1	0.97	2.02	104	44	0	13
Sunday	Aug. 8	88	65	77	0	T	1.71	110	50	0	12
Monday	Aug. 9	97	67	82	+5	0.00	1.69	106	48	0	17
Tuesday	Aug. 10	93	75	84	+7	T	1.33	104	48	0	19
Wednesday	Aug. 11	92	73	83	+6	0.00	1.94	105	48	0	18
Thursday	Aug. 12	91	70	81	+4	0.00	2.94	107	47	0	16
Friday	Aug. 13	86	64	75	-1	0.00	1.83	108	49	0	10
Saturday	Aug. 14	88	60	74	-2	0.00	3.32	103	45	0	9
Sunday	Aug. 15	88	62	75	-1	0.00	1.72	106	48	0	10
Monday	Aug. 16	91	64	78	+2	0.00	4.27	107	49	0	13
Tuesday	Aug. 17	93	67	80	+4	0.00	2.54	107	44	0	15
Wednesday	Aug. 18	91	68	80	+4	0.00	2.36	110	45	0	15
Thursday	Aug. 19	91	69	80	+5	0.08	1.88	100	45	0	15
Friday	Aug. 20	92	69	81	+6	0.15	2.73	102	39	0	16
Saturday	Aug. 21	80	58	69	-6	0.00	2.41	104	47	0	4
Sunday	Aug. 22	91	58	75	0	0.00	2.94	103	46	0	10
Monday	Aug. 23	99	71	85	+10	T	1.28	103	43	0	20

August	2021	Max	Min	Mean	Dep	Pcpn	Rec Pcpn	Rec Max	Rec Min	HDD	CDD
Tuesday	Aug. 24	99	75	87	+13	T	1.90	107	43	0	22
Wednesday	Aug. 25	91	60	80	+6	0.20	3.09	105	45	0	15
Thursday	Aug. 26	100	77	89	+15	0.00	1.72	105	48	0	24
Friday	Aug. 27	100	76	88	+14	0.00	1.34	104	47	0	23
Saturday	Aug. 28	96	71	84	+10	T	2.93	103	41	0	19
Sunday	Aug. 29	80	65	73	0	1.12	5.45	101	41	0	8
Monday	Aug. 30	89	64	77	+4	0.00	2.23	103	42	0	12
Tuesday	Aug. 31	79	62	71	-2	0.88	1.96	103	42	0	6
.	2021	Max	Min	Mean	Dep	Pcpn	Rec Pcpn	Rec Max	Rec Min	HDD	CDD
.	TOTAL					3.41				0	419
.	AVERAGE	90.3	66.2	78.3							
.	NORMAL	87.2	64.1	75.6		3.32				3	333
.	DEPARTURE	+3.1	+2.1	+2.7		+0.09				-3	+86

AVERAGE and TOTAL are August 2021.

Temperature is °F

Precipitation measurement is "inches"

Precipitation "T" = trace, precipitation was observed but not enough to be measured

NORMAL (Norm) refers to the 1991-2020 Standard Normals

DEPARTURE is AUGUST 2021 Averages and totals measured against 1981-2010 normals.

Max = Observed Maximum and Min = Observed Minimum temperatures in °F

Mean = Observed Mean Daily temperature in °F

Dep = Departure from normal ( \_ = below normal, + above normal), in °F

Pcpn = Observed daily precipitation (midnight to midnight, CST) in inches.

Rec Pcpn = Record daily amount of precipitation in inches.

Rec Max = Record maximum temperature in °F

Rec Min = Record Minimum temperature in °F

HDD = heating degree day units (base of 65 degrees) in °F

CDD = cooling degree day units (base of 65 degrees) in °F

Norm Max = Daily Normal High Temperature (1991-2020 normals) in °F

Norm Min = Daily Normal Low Temperature (1991-2020 normals) in °F

Norm Mean = Daily Normal Mean Temperature (1991-2020 normals) in °F



## September 2021 Lincoln, NE, Climate Data



September 1, 2021. Photo by Ken Dewey

### Year 2021 (and last year) Lincoln Precipitation in Inches compared to normal

	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	TOTAL
Normal	0.73	0.89	1.55	2.69	4.91	4.48	3.25	3.32	2.90	2.14	1.30	1.18	29.34
2021	1.53	0.79	5.23	1.74	2.55	4.46	1.73	3.41	0.64				22.08
2020	1.29	0.13	1.67	0.88	5.09	3.15	5.73	1.27	1.62	0.40	1.20	1.20	23.63

Normal January 1 - August 31 Precipitation = 21.82 inches  
 Normal January 1 - September 30 Precipitation = 24.72 inches

LINK: **Lincoln Hot Weather Climatology** [<https://lincolnweather.unl.edu/data/heat-waves.asp>]

**RECORD HIGH TEMPERATURE September 27, 2021: 94°F, old record 93°F, 1956**

**Last Month, August 2021, Climate Data** ([august-2021-lincoln-ne-climate-data](https://lincolnweather.unl.edu/data/august-2021-lincoln-ne-climate-data))

**Next Month, October 2021, Climate Data** ([october-2021-lincoln-ne-climate-data](https://lincolnweather.unl.edu/data/october-2021-lincoln-ne-climate-data))

**NOTE >> The NEW 1991-2020 Normals have been added to this page.**  
more information at: **Lincoln's new 30-Year normals** [<https://lincolnweather.unl.edu/data/normals.asp>]

**All data in the following table are from the National Weather Service and HPRCC**  
[<http://www.hprcc.unl.edu/>] data archives.

*If columns are hidden, scroll the table right.*

September	2021	Max	Min	Mean	Dep	Pcpn	Rec Pcpn	Rec Max	Rec Min	HDD	CDD
Wednesday	Sept. 1	81	64	73	+1	0.00	2.60	106	42	0	8
Thursday	Sept. 2	76	69	73	+1	0.21	2.42	106	43	0	8
Friday	Sept. 3	76	67	72	0	0.05	2.37	102	35	0	7
Saturday	Sept. 4	79	62	71	0	T	2.15	102	40	0	6
Sunday	Sept. 5	86	57	72	+1	0.00	3.06	103	43	0	7
Monday	Sept. 6	91	61	76	+5	0.00	1.91	105	41	0	11
Tuesday	Sept. 7	84	56	70	0	0.00	2.01	104	42	0	5
Wednesday	Sept. 8	85	52	69	-1	0.00	4.68	103	40	0	4
Thursday	Sept. 9	83	52	68	-2	0.00	4.22	100	36	0	3
Friday	Sept. 10	90	59	75	+6	0.00	2.37	101	38	0	10
Saturday	Sept. 11	95	61	78	+9	0.00	1.59	99	29	0	13
Sunday	Sept. 12	76	64	70	+1	T	2.44	96	32	0	5
Monday	Sept. 13	91	61	76	+8	0.00	1.41	102	34	0	11
Tuesday	Sept. 14	81	55	68	0	T	2.28	99	34	0	3
Wednesday	Sept. 15	86	49	68	0	0.00	1.96	99	31	0	3
Thursday	Sept. 16	92	65	79	+12	0.00	2.53	100	34	0	14
Friday	Sept. 17	77	57	67	0	0.03	1.94	101	35	0	2
Saturday	Sept. 18	91	54	73	+6	0.00	2.54	100	31	0	8
Sunday	Sept. 19	93	64	79	+13	0.00	1.55	98	29	0	14
Monday	Sept. 20	76	58	67	+1	0.02	2.61	96	31	0	2

September	2021	Max	Min	Mean	Dep	Pcpn	Rec Pcpn	Rec Max	Rec Min	HDD	CDD
Tuesday	Sept. 21	75	44	60	-5	0.00	1.43	103	32	5	0
Wednesday	Sept. 22	75	40	58	-7	0.00	2.62	99	27	7	0
Thursday	Sept. 23	84	42	63	-1	0.00	3.63	97	31	2	0
Friday	Sept. 24	71	44	58	-6	0.01	1.74	93	31	7	0
Saturday	Sept. 25	81	37	59	-5	0.00	2.32	93	29	6	0
Sunday	Sept. 26	93	52	73	+10	0.00	1.60	95	28	0	8
Monday	Sept. 27	94	52	73	+10	0.00	1.37	94	32	0	8
Tuesday	Sept. 28	95	53	74	+12	0.00	4.70	102	28	0	9
Wednesday	Sept. 29	79	64	72	+10	0.32	1.75	94	26	0	7
Thursday	Sept. 30	79	62	71	+10	T	3.30	94	28	0	6
.	2021	Max	Min	Mean	Dep	Pcpn	Rec Pcpn	Rec Max	Rec Min	HDD	CDD
.	TOTAL					0.64				27	182
.	AVERAGE	83.8	55.9	69.9							
.	NORMAL	80.1	54.3	67.2		2.90				77	143
.	DEPARTURE	+3.7	+1.6	+2.7		-2.26				-50	+39

**AVERAGE AND TOTAL are SEPTEMBER 2021.**

**Temperature is °F**

**Precipitation measurement is "Inches"**

**Precipitation "T" = trace, precipitation was observed but not enough to be measured**

**NORMAL (Norm) refers to the 1991-2020 Standard normals**

**DEPARTURE is SEPTEMBER 2021 Averages and totals measured against 1991-2020 Normals.**

**Max = Observed Maximum and Min = Observed Minimum temperatures in °F.**

**Mean = Observed Mean Daily temperature in °F.**

**Dep = Departure from normal ( \_ = below normal, + above normal), in °F.**

**Pcpn = Observed daily precipitation (midnight to midnight, CST) in inches.**

**Rec Pcpn = Record daily amount of precipitation in inches.**

**Rec Max = Record maximum temperature in °F.**

**Rec Min = Record Minimum temperature in °F.**

**HDD = heating degree day units (base of 65 degrees) in °F.**

**CDD = cooling degree day units (base of 65 degrees) in °F.**

**JaMel E. Ways**

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**From:** Tim Rinne <walterinne@gmail.com>  
**Sent:** Friday, November 19, 2021 9:07 AM  
**To:** Council Packet  
**Subject:** Letter of support on the 2050 Comp Plan  
**Attachments:** City Council letter on Comp Plan local food.docx

Dear City Council Office Staff,

Attached is a letter of support from the Lincoln-Lancaster County Food Policy Council in advance of Monday's Lincoln City Council public hearing on the draft 2050 Comprehensive Plan.

Please distribute this letter to the seven City Council members, and -- if you would -- notify me that the transmission came through successfully.

Thank you for your assistance.

Tim Rinne  
Co-founder and Steering Committee Member  
Lincoln-Lancaster County Food Policy Council  
Home Address:  
605 N. 26th Street, Lincoln, NE 68503  
Cell: 402-730-6675  
Landline: 402-475-7616



# **Lincoln-Lancaster County Food Policy Council**

**"We develop integrated policies that promote a healthy and sustainable local food system."**

November 19, 2021

Dear Lincoln City County Members,

Lincoln was built on food.

Before early Lincoln residents set about constructing with wood, limestone, iron, concrete and steel, they had to have food. Food is the foundation of everything we do (and has been from 1867 to this very day). Before we even try to construct, commute, compute and communicate, we need to eat. The City Council itself couldn't even convene to conduct its business if its members weren't getting regular meals.

Over the past 75 years, however, 'food' has been almost completely absent from our city and county's Comprehensive Planning discussions. Our previous Comp Plans have focused on transportation and energy, housing and infrastructure, commercial and industrial development, population growth, recreational opportunities and quality of life. We've even talked about the necessity of an ample and reliable water supply. But nary a word about its equally important twin, 'food'.

With the proposed 2050 Comprehensive Plan, however, that oversight is on the verge of being corrected.

For the first time ever, the proposed Comprehensive Plan update gives food the prominence it has long deserved. Starting with the City Council's approval this past winter of the "2021-2027 Climate Action Plan" (with its emphasis on "Building a Resilient Local Food System"), local food production and consumption has become an "Action Area" and "Key Initiative" for county and community development.

The draft 2050 Comp Plan, though, takes this new-found focus on food to an even higher level, with its call for developing a local food "master plan". Adoption of the proposed 2050 Comp

Plan will give us a 'foothold' for building a county-wide local food system, putting our entire county on the path to increased *Food Security*... And as the disruptions of the COVID pandemic and Climate Change are daily demonstrating (with supply chain bottlenecks and intermittent shortages), the specter of food insecurity is no longer hypothetical. It's an already-existing reality.

Food Security starts at home with locally produced and consumed foods. And Nebraska—agricultural 'breadbasket' that it is—is perfectly positioned to grow the edible crops that can supply the bulk of our plant-based diet and enable us to, once again, actually make some of our *own bread*. Whereas relying exclusively on the global food system to feed us (as we currently are) creates unnecessary social and economic risks, localizing our food supply and keeping our 'food dollars' at home in our city and county actively works to build and strengthen our local economy.

The Lincoln-Lancaster County Food Policy Council urges the Lincoln City Council to get Lincoln and Lancaster County fully on the path of "building a resilient local food system" by adopting the draft 2050 Comprehensive Plan.

Sincerely,

Tim Rinne

Co-founder and Steering Committee Member,  
Lincoln-Lancaster County Food Policy Council

Home Address:

605 N. 26<sup>th</sup> Street, Lincoln, NE 68503

402-730-6675 (c); 402-475-7616 (h)

walterinne@gmail.com

**JaMel E. Ways**

**From:** Robert Borer <robertjborer@gmail.com>  
**Sent:** Friday, November 19, 2021 9:35 AM  
**To:** WethePeople@lanaster.ne.gov  
**Subject:** We the People have the Power

Friends-

The following story broke in May of 2020 and perfectly illustrates our system of checks and balances.

Quoting:

[HEADLINE:] **Illinois: Lesser Magistrates 1 – Tyrants 0**

As we reported the other day, little Madison County, Illinois stepped forward on May 18th and interposed against the tyrant – Governor JB Pritzker – and his emergency 'Stay at Home' order. The county openly declared their defiance to the governor and interposed on behalf of businesses in their county – that they would protect them if they opened.

On May 19th, the very next day, the Illinois State Police also jumped into the fray – siding with Madison County officials. They released a statement that they would not arrest anyone who violated the governor's unconstitutional order.

On May 20th, Gov. JB Pritzker withdrew his controversial emergency rule that would have allowed businessmen to be charged with a misdemeanor if they reopened before his order expired.

These actions by the county magistrates and the state police demonstrate the doctrine of the lesser magistrates. When the superior authority makes law, policy, or court opinion repugnant to the constitutions – state or national – it is the duty of the lesser-ranking magistrates to interpose and defy their law, policy, or court opinion.

The doctrine of the lesser magistrates is a Christian doctrine rooted in the historic Christian doctrine of interposition.

America's founders established America as a true federalism. In a federalism all four governments established by God – self, family, church, and civil government – are important, and have their own role, functions, and limits.

In a federalism, there are multiple levels of government and multiple branches at each level, so that if any one branch begins to play the tyrant – the other branches interpose against that branch and resist them.

Those in civil government take an oath to uphold their state Constitution and the U. S. Constitution. They do not take an oath of subservience to the federal government, and they do not take an oath of subservience to the state government.

When any one branch makes law, policy, or court opinion repugnant to the state or national constitutions, it is the duty of the other branches of government to uphold their oath and defend the constitutions – and to resist and defy that branch.

The people must assure the magistrates they will stand with them if they do right with their possession, in their persons, and in their prayers – both publicly and privately.

Stay informed and keep in touch with our efforts. Together we can confront tyrants and tyranny. [end quote]

The story can be found here: <https://defytyrants.com/illinois-lesser-magistrates-1-tyrants-0/>

It started here: <https://defytyrants.com/interposition-in-illinois-by-magistrates-churchmen/>

In the end, We the People serve as the ultimate check and balance on tyranny (the strength of the Constitution lies in the will of the people to defend it), barring exclusive divine intervention, of course.

At the same time, God works through means (that is, through people). And it may very well be the case, as it often is, that God and man are working *together* to denounce and resist evil. This is indeed the case in Lincoln, NE, notwithstanding all the "churches" and establishments that bowed the knee to Bairdon and "idols of gold and silver" previously. Some have their reward, as they hold fast (too bad they won't be able to take it with them). But others (real Nebraskans) have thought twice, recanted and decided they were on the wrong side. Places all over the city that stood by her tyrannical mandates in the past are refusing to be her puppets any longer. She'd be totally out, if it weren't for big pharma and the deep state propping her up. But once they go down, she goes down with them. It's only a matter of time.

Keep the faith. Pray without ceasing. Faint not. The Truth will prevail.

God Bless.

Bob

**JaMel E. Ways**

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**From:** Michaela Schwarten <michaela@hbal.org>  
**Sent:** Friday, November 19, 2021 3:55 PM  
**To:** Bennie R. Shobe; Richard W. Meginnis; Jane Raybould; Sandra J. Washington; Tammy J. Ward; James M. Bowers; Tom J. Beckius; Council Packet  
**Subject:** Plan Forward  
**Attachments:** 2021.11.22 HBAL Comp Plan Letter.pdf

Good afternoon Council Members –

Please see the attached letter with comments on the 2050 Comp Plan from the Home Builders Association.

Regards,

**Michaela Schwarten**

*Executive Vice President*

Home Builders Association of Lincoln  
402-423-4225

6100 S. 58<sup>th</sup> Street, Ste. C, Lincoln NE 68516

[www.HBAL.org](http://www.HBAL.org) | [Michaela@HBAL.org](mailto:Michaela@HBAL.org)



November 22, 2021

Lincoln City Council  
555 S. 10th Street  
Lincoln NE 68508

To the Lincoln City Council:

After reviewing the proposed Lincoln-Lancaster County Comprehensive Plan 2050 (Plan) the Home Builders Association of Lincoln (HBAL) appreciates the Plan's recognition of housing as a system. It acknowledges the need for a healthy housing market at all levels and encourages flexibility in certain policies to allow Lincoln the flexibility to work within market constraints to meet Lincoln's housing needs.

HBAL supports several policies within the Plan that will prove important for maintaining housing affordability in the community. Including policies specifically aimed at allowing flexibility in housing type. The policies also include a commitment to review zoning codes to facilitate missing middle housing, to expand opportunities for Accessory Dwelling Units, and to revisit the concept of assessment districts as a means of building infrastructure for new development. In addition, a review of parking requirements with the concept of eliminating parking minimums and modifying codes to make non-standard lots buildable are great strides toward meeting community needs.

However, HBAL feels the Plan incorporates several policies which increase the cost of housing and development. These policies should have further discussions, be changed or be removed from the Plan. Specifically, the Plan demands strict adherence to policies of annexation prior to "upzoning" (contiguous zoning) and using only gravity flow sewer. These policies explicitly limit the areas available to build housing and implicitly prohibit the use of Sanitary Improvement Districts (SIDs) as a tool for new development. SIDs will not solve all the problems of Lincoln's housing market, but with considered community conversation, could serve as a tool to bring additional reasonably priced housing to the Lincoln market.

In addition, the Plan incorporates several policies developed within the Salt Creek Resiliency Plan that are currently under discussion with community stakeholder groups to be implemented in updates to Lincoln's Drainage Criteria Manual. It is inappropriate for these policies, such as those within P18: Conservation Design and P25: Opens Space with Development, to be adopted now into the Plan while community discussion is still ongoing.

Enclosed, HBAL has identified those policies and sections of the Plan that should be revised to allow flexibility for development of new, attainable housing, or to be removed to recognize ongoing community input processes. We hope you will consider adopting these revisions.

Sincerely,



Matt Kinning  
HBAL President

## G6: Healthy, Active, and Connected People

**Lincoln and Lancaster County will be a healthy community that continuously creates and improves both its physical and social environments where every person is free to make choices amid a variety of healthy, available, accessible, and affordable options.**



The interaction between people and their environments, natural as well as human-made, has re-emerged as a major public health issue. A community that encourages healthy, active, and connected people is one that continuously creates and improves both its physical and social environments. Examining the interaction between health and the environment requires considering the effects of factors in the broad physical and social environments, which include housing, access to community facilities and resources, land use, transportation, industry, workforce development, and agriculture.

Making the healthy choice the easy choice is one way to help people achieve optimal health. This can be accomplished in many ways such as: working with schools and businesses on wellness initiatives; improving local access to healthy foods and creating community gardens; creating a community plan to account for health impacts of new community projects; continuing to implement the Complete Streets program to encourage active transportation; and creating community gardens.

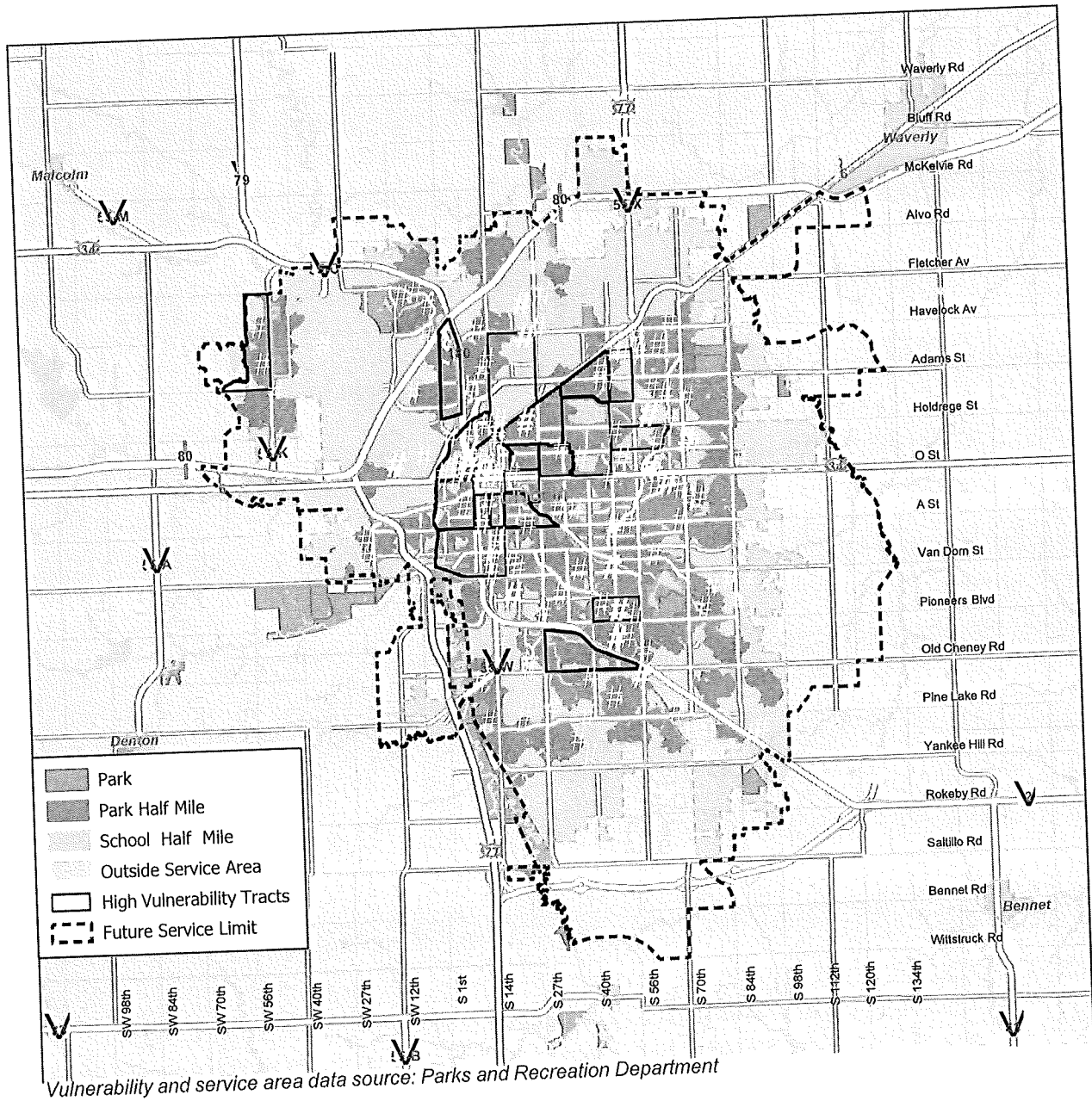
One of the public health functions of the Lincoln-Lancaster County Health Department is to continuously assess the health status of the community. Data on vital statistics, behaviors, communicable disease and other indicators of health status is compiled in the Community Health Assessment and includes the participation of partners such as Bryan Health Systems and CHI St. Elizabeth, Nebraska Hospital Association, Nebraska Department of Health and Human Services, and others. The assessment includes detailed information about the health of our community, including geographic health disparities. The Lincoln Community Health Endowment's Place Matters project has utilized such maps to answer the question, "How does where we live, learn, work, and play affect our health?" The maps, which can be accessed through the Community Health Endowment website, show that health disparities are not geographically distributed equitably throughout the community.

The Community Health Improvement Plan (CHIP) is developed based on and in conjunction with the Community Health Assessment. The CHIP includes goals, objectives, and strategies organized within four priority areas: access to care, chronic disease prevention, behavioral health, and injury prevention. The CHIP is a guiding document to address community health needs.

Inequities in access to recreation and open spaces contribute to health disparities. The map below identifies the most vulnerable populations (percentage below poverty level; racial and ethnic minority population; life expectancy; and the percentage that passed the Youth Fitness Test) and evaluate access by a 10 minute walk to parks and schools that provide recreational opportunities. Lincoln's Community Centers and Amenities (public, non-profit, or for profit services) show opportunities for physical and emotional well-being and are mostly concentrated in the areas with the highest need. The map identifies residential units outside of the 10 minute walk in areas with vulnerable populations that should be addressed. There are also underserved/non-served residents in newer growth areas. ~~It is important to note that while the costs for land and development of park facilities have grown since impact fees were first instituted,~~

these fees have not increased to match inflation, creating a backlog of Neighborhood Park development. Funding for other park facilities has also been unable to keep up with inflation rates, creating a backlog of maintenance. This map does not reflect private rec facilities within apartment complexes or other private residential uses.

Figure G6.a: Parks and Recreational Facilities





The community will address the two most urgent climate vulnerabilities by developing a strategy to secure a second source of water supply, and by implementing the recommendations of the Salt Creek Resiliency Study.

### Policies Related to this Goal

- P18: Conservation Design
- P19: Native Prairie
- P20: Ecology and Habitat
- P21: Floodplains and Riparian Areas
- P22: Local Food
- P23: Salt Valley Greenway and Connecting Green Corridors Concept Implementation
- P24: Environmental Resource Protection
- P48: Renewable Energy
- P49: Conservation of Energy
- P50: Water Quantity and Quality
- P54: Wastewater Resource Recovery Facilities
- P55: Watershed Planning
- P59: Electric Utility
- P63: Transportation and the Environment

### Community Indicators Related to this Goal

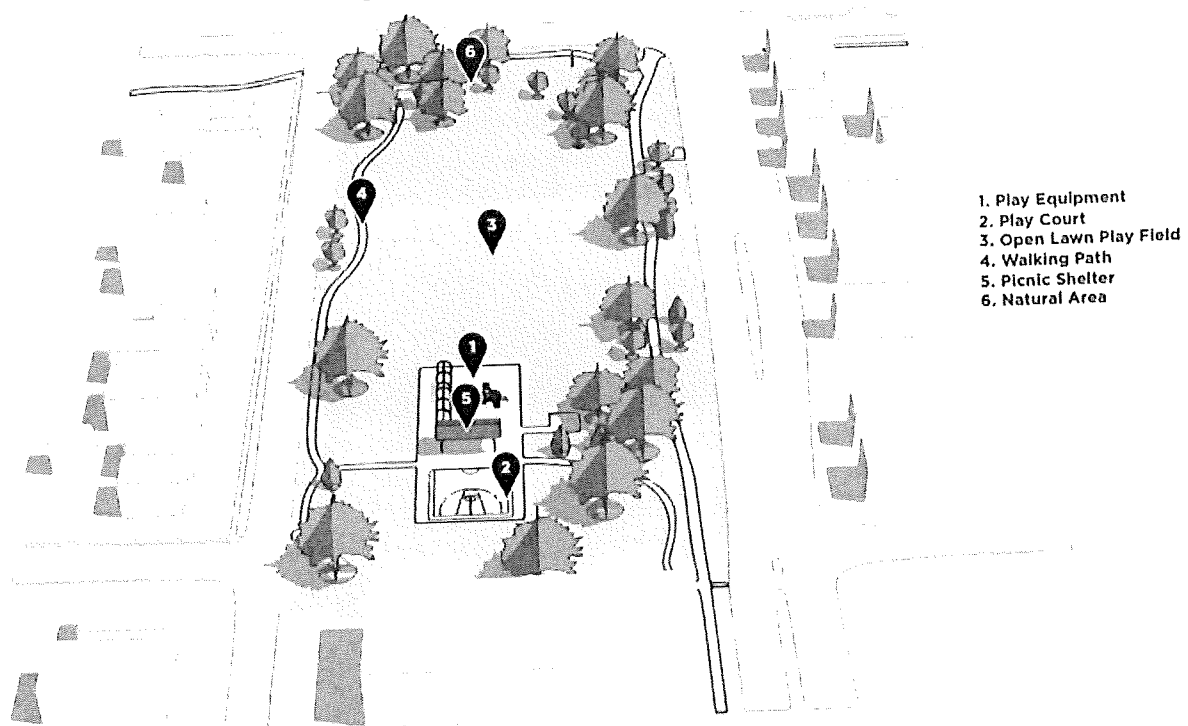
Growth Indicators

## Neighborhood Parks

Neighborhood parks are centrally located within areas of residential development and intended to be accessible by no more than a ten-minute walk from residences within the neighborhood. Typical activity areas include playground equipment, open lawn areas for informal games and activities or play courts with a single basketball goal for informal games, shaded seating, and walking paths. When possible, neighborhood parks are co-located with elementary schools, a concept referred to as "Sparks". Neighborhood parks that are associated with schools are typically 2 acres in size and located so that they can be accessed by students during the day and still easily accessible to the neighborhood when school is not in session. When parks are not located with schools, an area of about 4 acres is desirable to provide some of the open play area which is provided by school playfields in a "Spark". In some cases, Neighborhood Park services are provided within larger Community Parks.

The level of service (LOS) goal for Neighborhood Parks is based on both the financial resources anticipated to be available for park development and on programmatic objectives. It is anticipated that until a new funding source is identified development of Neighborhood Parks will be financed primarily through impact fees. ~~It is important to note that while the cost for land and development of park facilities have grown since impact fees were first instituted, these fees have not increased to match inflation, creating a backlog of Neighborhood Park development.~~

Figure E5.c: Neighborhood Park Diagram

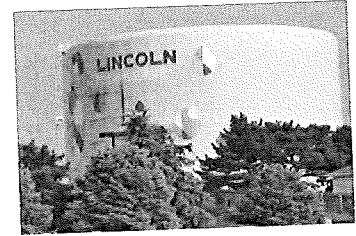


1. Encourage a mix of compatible land uses to develop more complete neighborhoods:
  - a. Similar uses on the same block face: residential faces residential.
  - b. Similar housing densities developed near each other: single-family and "missing middle" residential (3-12 units) scattered throughout with higher density residential (more than 12 units) near the neighborhood edge or clustered near commercial centers.
  - c. Non-residential uses, including parking lots, should be screened from residential areas.
  - d. Locate mixed-use centers so as residents can safely access essential goods and services (i.e. not located across arterial streets) and no more than a 15-minute walk from all residences.
  - e. Support existing Commercial Centers and encourage inclusion of essential goods and services.
  - f. Infill and redevelopment projects should meet or exceed Neighborhood or Commercial Design Standards.
2. ~~Require sidewalks~~ connectivity throughout neighborhoods on both sides of all streets or in alternative locations as allowed through design standards or review process.
3. Strive for residences to be located within 1 mile to an existing or planned multi-use trail.
4. Strive for residences to be located within 1/2 mile to an existing or planned neighborhood park.
5. Integrate transit stops into developing neighborhoods and within a 1/2 mile distance from residences. ~~(need input from StarTran)~~
6. Develop shorter block lengths to provide multiple connections across residential and commercial areas.
7. Encourage locations within neighborhoods to grow local food.
8. Infill development should balance expanding housing options and neighborhood character by complementing the character of the existing neighborhood and providing appropriate transitions, scale and context. Encourage pedestrian orientation with parking at rear of residential and neighborhood commercial uses.
9. Allow non-standard lots to be buildable.
10. Retain and encourage a mix of housing in order to provide a mix of housing types at a variety of price points.
11. Encourage historic preservation and the rehabilitation and maintenance of buildings.
12. Support retention of public and semi-public uses (elementary schools, churches) as centers of neighborhoods.
13. Maintain existing pattern of streets for connectivity.
14. Maintain arterial streets that are compatible with the existing neighborhood character with two through lanes and a center turn lane where applicable.
15. Utilize streets for commercial and residential parking.
16. Encourage shared parking whenever possible: permit minor incursions of accessory parking for public/semi-public uses into neighborhoods if properly screened.
17. Maintain alley access and encourage shared driveways to parking areas in order to reduce interruptions to pedestrian traffic, to preserve on-street parking capacity, and to reduce automobile conflict points.
18. Support the preservation and restoration of natural resources, and limit stream or drainageway crossings.
19. Encourage additional density of a variety of housing types and price points on open and available land areas.
20. Encourage middle housing in Neighborhood Edges.

\* Items 1-5 above will inform development of a Complete Neighborhoods assessment tool.

## E8: Energy and Utilities

**This Element examines energy and individual utilities including water, wastewater, watershed management, solid waste, electric services, information technology, and natural gas service.**



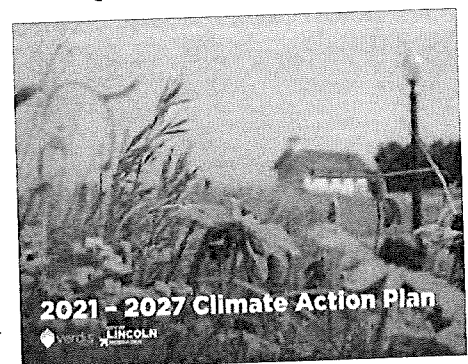
Energy use, supply and conservation are topics of global as well as local concern. This element includes an assessment of energy use, evaluates the utilization of renewable energy sources, and describes efforts to conserve energy in the community. The relationship between land use patterns and energy consumption has been widely researched and is a topic of national conversation. As Lincoln and Lancaster County continue to plan for the future, the need to consider the impacts of energy supply and demand is increasing in importance.

The provision of other basic services (such as water, wastewater, and electricity) is also discussed in this element. The need to plan for the extension of these services to new growth areas is one of the primary reasons for comprehensive planning. Lincoln has a history and policy of providing utilities only to those areas that have been annexed into the City. Lincoln wastewater collection systems operate on a gravity flow principle and so are planned to extend along the natural drainage of the land, or drainage basins. These growth policies have served Lincoln well in that it has retained a clear differentiation between urban and rural areas and has been able to resist sprawl to a greater degree than many other communities. However, these policies also constrain growth impacting Lincoln's ability to grow its economy and to increase housing availability. The efficient extension of utilities balanced with Lincoln's housing needs will continue to be a major factor inland use planning.

### Energy

The City of Lincoln Climate Action Plan has come about from an understanding of the need to significantly reduce greenhouse gas (GHG) emissions in order to slow the pace of climate change and protect Lincoln residents' way of life. It is a vision for what the city of Lincoln could become over the next 30 years. It is a vision of a city that is thriving with local businesses and verdant greenways; a city that uses both ordinary and innovative measures to reduce greenhouse gas emissions in transportation, electricity and buildings; a city that is inclusive, welcoming and fair. The energy element and various policies and action steps within PlanForward have been updated to reflect the recommendations from the City of Lincoln Climate Action Plan.

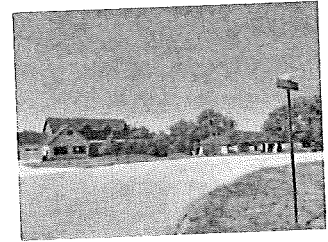
The Lincoln Climate Action Plan offers a bold and ambitious vision to reduce net greenhouse gas emissions 80% by 2050, and represents the first plan of its kind in the state of Nebraska. A myriad of strategies in the plan speak to achieving this target, from increasing energy efficiency, generating more electricity from renewable energy, switching to electric vehicles and active commuting modes, and employing natural climate solutions. To develop and advance the Plan, the City worked closely with community partners such as the Lincoln Electric System, which set a complementary goal to achieve net zero carbon dioxide production from its power generation portfolio by 2040. Moreover, the Plan sets a course for securing a second source of water supply for Lincoln as well as for identifying proposals for mitigating flood impacts in the Salt Creek Watershed Basin to be reviewed by Lincoln's development community and ensure that Lincoln is resilient to climate change. The Lincoln Climate Action Plan required considerable coalition-building and robust





### P4: Rural Housing

*Allow for acreage development in appropriate areas of Lancaster County while preserving land resources for efficient future urban development, continued agricultural uses, and natural open spaces.*



There is a small but steady demand for acreages in rural Lancaster County, and planning for limited acreage development will ensure that demand can be met while minimizing negative impacts. Allowing for development of additional acreages will increase housing choice in Lancaster County. ~~There is already ample supply of potential acreage areas that can meet demand for at least the next two decades. Additional acreage development in any of the growth tiers is discouraged.~~ Over the past 10 years there have been approximately 60 new acreage homes per year built in rural Lancaster County. As of January 1, 2021 there was a supply of approximately 1,300 potential new acreage units, either through existing approvals that haven't been built or Low Density Residential areas on the Future Land Use map that do not yet have approvals.

### Action Steps

1. Preserve agricultural land within Tier I, II, and III growth areas, both to reduce conflicts in the future growth of Lincoln and to ensure available land for the production of food products that are important to the health and economic vitality of the community.
2. Support acreage development within areas with development approvals, on areas designated as low-density residential in the County, and on areas designated as low-density residential in the village and smaller city jurisdictions.
3. Continue to use GIS data and other sources, along with adopted county zoning criteria, to help determine which lands are most suitable for acreage development.
4. Require applicants seeking plan designation or rezoning for acreages to provide information on water quality and quantity if planning to use on-site wells.
5. Pursue state legislation to enable the County to establish a transfer of development rights program that helps encourage acreage development in more suitable locations while protecting environmental resources and prime farmland, while also respecting property rights by compensating owners who agree to the transfers.
6. Encourage an existing or new private land trust to pursue the donation of agricultural easements on prime farmland in the county.
7. Expand education for prospective home buyers on the implications of rural living.
8. Educate homeowners in acreage subdivisions of the City's annexation and growth policies.
9. Review the "build-through" model for acreages in the County and make recommendations that align with the PlanForward policies and growth scenario.

## P18: Conservation Design

*Promote conservation design principles with both new growth and redevelopment projects.*



Conservation design is a type of development where buildings are grouped together on part of the site while permanently protecting the remainder of the site from development. This type of development provides great flexibility of design to fit site-specific resource protection needs. Conservation design creates the same number of residences under current zoning and subdivision regulations or may offer incentives, such as a density bonus, to encourage this type of development. There is a savings in development and maintenance costs due to less road surface, shorter utility runs, less grading and other site preparation costs. The preserved land may be owned and managed by a homeowners association, a land trust, or the City.

Conservation-focused design can help to reduce the heat island effect, increase shade, protect habitat, slow stormwater runoff, and improve mental health. Site designs that are compatible with the natural characteristics of the site, conservation design for new subdivisions, clustering development, minimizing grading and impervious surfaces, and preserving site hydrology to the maximum extent possible are encouraged.

### Action Steps

1. Encourage conservation design principles as part of the development process. Developments that incorporate conservation design principles should be eligible for greater densities, height, lot, and area adjustments. Examples of conservation design best practices include:
  - a. ~~Development setbacks beyond the minimum floodplain corridor in order to help preserve riparian habitat.~~
  - b. ~~Land area within new developments that is designated specifically for trees and/or prairie.~~
  - e-a. Sustainable landscape design that includes native and drought-tolerant plantings, limited use of turf grass, rain gardens, bioswales, infiltration beds, and constructed wetlands.
  - d. ~~Cluster subdivision design that protects flood-prone areas by grouping new development in less sensitive areas within a subdivision while maintaining a high overall building density.~~
  - e-b. Dedication of a portion or all of a building's roof space as a green roof.
  - f. ~~Minimizing disturbance of the natural topography on a development site.~~
2. Incorporate conservation design principles into public projects and development projects utilizing public funds (such as TIF) as appropriate.
3. ~~Incorporate conservation design into new subdivisions with the initial steps of completing an inventory of existing and future land uses, natural resource evaluation, and a build-out map. Utilize goals of the Lincoln Climate Plan as a guide for developing conservation design recommendations.~~
- 4-3. Promote development of conservation design standards of new subdivisions that maximize open space conservation and interconnected network of such open spaces while being sensitive to overall building density.

4.32

PlanForward 2050



- f. Tax benefits from charitable donations of land and easements for preservation.
7. Trails should be an integral part of the community's green spaces and corridors. Pursue the active coordination of all future trail network extensions and enhancements. The urban network of trails should connect employment centers, shopping areas, schools, and residential neighborhoods.
  8. Seek establishment of trail easements or comparable options along selected county roads.
  9. Monitor rail lines which may be abandoned in the future for acquisition as trails as part of an overall open space and recreation system for the county.
  10. Preserve prime agricultural land within the Tier I and Tier II areas, both to reduce conflicts in the future growth of Lincoln and to ensure available land for the production of food products that are important to the health and economic vitality of the community.
  11. Develop planning guidelines, management techniques and supporting policies for preserving native prairies and grassland. Include carbon sequestration measurements in all cost-benefit and environmental impact studies.
  12. Encourage the retention of linear connections of green spaces ~~wherever possible. Minimum corridor standards should be revised to provide an objective predictable standard for determining requirements of corridor preservation. Efforts should be made to preserve small stream corridors throughout future developments. Adopt revised minimum corridor standards to preserve longer and wider stream corridors.~~
  13. Pursue greenways connecting urban and rural areas. Such corridors should follow stream courses and connect valuable natural resource areas.
  14. Ensure that as greenways and open space corridors are identified and created, provisions are made for possible future access points across these areas. This may include, but not be limited to, access for new road alignments, road widenings, utilities, and other similar services
  15. Identify open space areas that are particularly valued by community residents for rare or unique attributes and establish development regulations utilizing a balance of incentive and mandatory measures.

#### Goals Supported by this Policy

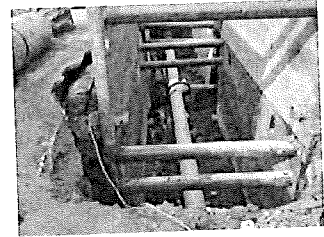
- G7: Environmental Stewardship and Sustainability  
G8: Community Resiliency  
G11: Rural Environment

#### Elements Related to this Policy

- E4: Environmental Resources  
E5: Parks, Recreation, & Open Space

### **P53: Gravity Flow Collection System**

*The City's wastewater collection system, in general, will continue to be a gravity flow system that is designed to use gravity as the main energy source to convey wastewater from the community to the water resource recovery facilities.*



A gravity flow wastewater collection system encourages orderly growth within the natural drainage basin boundaries and is an efficient and reliable way to serve urban areas. This policy encourages urban growth from the lower portion of the drainage basin to the upper and discourages pumping of wastewater across basin boundaries. However, this policy must be balanced with PlanForward policies regarding housing availability and a growing economy.

#### **Action Steps**

1. Continue to use gravity as free energy conveyance for wastewater.
2. Enhance programs to manage I&I (inflow and infiltration) into the system, thereby preserving pipeline capacity for wastewater and not ground water.
3. Support infill development which utilizes existing infrastructure.
4. Utilize the CIP to plan for and expand the collection system to follow the comprehensive plan growth tiers of development.
5. Consider utilization of lift stations to pump wastewater across basin boundaries where demonstrated to meet priorities and policies of PlanForward 2050.

#### **Goals Supported by this Policy**

G10: Effective Government

#### **Elements Related to this Policy**

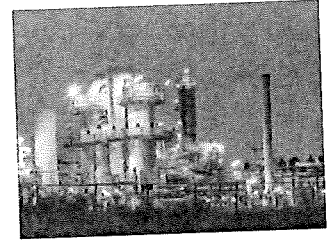
E8: Energy & Utilities

4.92

PlanForward 2050

## P61: Industrial Zoning and Pipelines

*Discourage residential land uses and buildings with vulnerable populations from locating near high-pressure pipelines and industrial zoning districts. Provide adequate separation between vulnerable populations and hazardous materials to protect and promote the public's health.*



There are several major pipelines that travel through Lancaster County and parts of our community. Our community will continue to grow into where these high-pressure pipelines are currently located and additional pipelines will be required to support the growth of our community and the nation. Most of these new pipelines are proposed and developed by private companies. These pipelines transport large quantities of hazardous materials that can have serious public health and safety impacts to adjacent properties in the event of pipeline failure or damage. Therefore, considerations should be given before siting uses with vulnerable populations including residential structures, childcare centers, retirement facilities, schools, or hospitals ~~should not be located near~~ pipelines. Uses that are acceptable-encouraged near pipelines include residential garages, commercial and industrial uses, parking lots, open spaces or roads.

Industrial zoning can also pose a significant risk to adjacent properties with vulnerable populations due to the types of uses that can store, use or produce hazardous materials. Rail lines are also a concern near vulnerable populations due to the transport of hazardous materials in large quantities.

### Action Steps

1. ~~Consideration should be given before~~ Land uses with vulnerable populations should not be ~~are~~ located within pipeline planning areas. For large\_
1. high-pressure pipelines, pipeline planning areas are established based upon pipeline metrics or the United States Department of Transportation's Emergency Response Guidebook. Most high-pressure pipelines have a planning area of approximately 150-250 feet from either side of the pipeline.
2. Consideration should be given before siting ~~Land uses with vulnerable populations should not be located~~ within 300 feet of an industrially-zoned district or heavy industrial use such as a rail line. Even if a given industrial site does not include hazardous materials at present, a hazardous use could be added in the future.
3. ~~Do not support expansion of existing residential uses currently located within a pipeline planning area or within 300 feet of an industrial zoning district.~~
- 4.3. Businesses and government agencies should continue to work together on developing and updating Emergency Management Plans for dealing with accidents and emergencies.
- 5.4. Continue strategic re-zonings of legacy industrial districts to less intensive commercial zoning districts when near residential uses.

### Goals Supported by this Policy

- G1: Safe, Affordable, and Accessible Housing
- G8: Community Resiliency

### Elements Related to this Policy

- E8: Energy & Utilities



**JaMel E. Ways**

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**From:** Debra Roberts <mmouse1227@hotmail.com>  
**Sent:** Friday, November 19, 2021 4:52 PM  
**To:** Council Packet  
**Subject:** Fw: Junk Cars

City Council,  
I am resending this to you because you are responding to me. What is the deal that you will not respond or do anything to these people. The junk cars are still sitting on the streets and using the city streets for storage. Please respond to my letter if not, I will contact the Mayor or the Governor  
Thank you,  
Debra Roberts

---

**From:** Debra Roberts <mmouse1227@hotmail.com>  
**Sent:** Sunday, November 14, 2021 12:21 AM  
**To:** councilpacket@lincoln.ne.gov <councilpacket@lincoln.ne.gov>  
**Cc:** Debra Roberts <mmouse1227@hotmail.com>  
**Subject:** Junk Cars

Hello City Council.

I am writing to you all because we have an issue with some property owners with Junk cars and cars parked on the street for months damaged and using 3 trailers as storage on city property  
We have called the Police but they will not do nothing to them. I know it is a City Ordinance that vehicles have to be licenced, insured and running and moved on residential property. I will list the addresses and what they are doing.

1. Kendle's Auto Salvage 1645 South 1<sup>st</sup> Street- Junk cars outside the fence. I was told they are to be parked behind the fence area. 1510 South 2<sup>nd</sup> Street. He has lots of vehicles parked on the property and not fenced in. He owns the house at 141 Garfield. He has rented the house for years and these vehicles have been parked in the grass for many years. Not registered, they don't run and are not licensed. They are junk vehicles.
2. L & L 1530 South 2<sup>nd</sup> Street-This is a business that fixes vehicles. He as had a vehicle sitting on South 2<sup>nd</sup> Street across from his business that has been missing the front in for months and the windshield is all busted. Other Junk cars sitting on the street there. Also, on Garfield Street on the other side of his business he stores 3 trailers there on City property. And behind his business he has not mowed the Alley for quite some time now. He has junk piled in the Alley.

I want to bring it to your attention because LPD will not do anything about it. I didn't know we could use City Property to store our equipment. This is very upsetting that just because it is in a neighborhood that is mostly businesses that the people that live in the area has to deal with this. An owner said she had a car her property and it has set for about 1 month because her grandson put it there because he couldn't drive the car in the winter months. It sits to low. It was licensed, insured and ran. The Police told her that she had 3 days to get off the property. It couldn't just sit there.

I would like to know why some people can do whatever they want and other people can't. I would like it if you would look into this. That area looks like ONE BIG JUNK YARD!! It really looks bad. I appreciate that you have taken the time to read my letter. I look forward to hearing from you concerning the matter.

Thank you again,  
Deb Roberts

Sent from Mail for Windows

## JaMel E. Ways

---

**From:** Tami Frank <tfrank@healthylincoln.org>  
**Sent:** Monday, November 22, 2021 6:53 AM  
**To:** Council Packet  
**Subject:** Letters of Support for Comp Plan and LRTP  
**Attachments:** PHL and REACH Team Letter of Support-City Council-LRTP.pdf; PHL REACH LAT Ltr of Support Comp Plan-City Council.pdf

Please accept the attached letters of support originally submitted to the City of Lincoln Planning and Lincoln Transportation and Utilities departments, and the Lincoln/Lancaster County Planning Commission regarding the Comprehensive Plan and Long Range Transportation Plan from Partnership for a Healthy Lincoln and our partners, Malone, El Centro de las Americas, and the Asian Community and Cultural Center. Thank you in advance for considering these goals to improve access to parks and community space, safe and affordable housing, active transportation, increased opportunities for local, healthy foods while applying an equity and inclusion lens to ensure civic participation that preserves the history and culture of Lincoln's neighborhoods and promotes transportation equity for all.

Tami Frank, BS, CLC

Vice President, Operations

Partnership for a Healthy Lincoln

4600 Valley Road, Suite 250

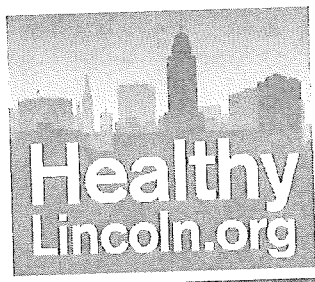
Lincoln, NE 68510

Cell/Direct: 402-310-2060

Office: 402-430-9940

[www.healthylincoln.org](http://www.healthylincoln.org)





## Partnership for a Healthy Lincoln

Bob Rauner, MD, MPH  
*President*

Tami Frank, BS, CLC  
*Vice President, Operations*

Mary Jo Gillespie, MPA, RDN, LMNT  
*Vice President, Health Systems*

Ted Fraser, MS  
*Health Data Analyst*

Isha Jain, MD  
*Research Analyst*

Julie Pearson-Anderson, BA  
*Communications Manager*

Veronica Cockerill, BS  
*Program Coordinator*

Anna Kokhanets, AS  
*Wellness Programs Manager*

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November 22, 2021

Lincoln City Council  
555 S. 10th Street #111  
Lincoln, NE 68508

Dear City Council members,

Partnership for a Healthy Lincoln, or PHL, (HealthyLincoln.org) is a non-profit organization dedicated to improving the health, wellness, and fitness of communities, thousands of people at a time. PHL was awarded a five-year Centers for Disease Control and Prevention Racial and Ethnic Approaches to Community Health (REACH) grant to support coordinated health improvement projects that address significant disparities in health outcomes within Lincoln's low-income Black/African American and Hispanic neighborhoods, through nutrition, physical activity, and aligning healthcare providers and community outreach efforts.

As part of the REACH work, PHL partners with other entities, such as El Centro de las Americas, Malone, and the Asian Community and Cultural Center to bring about policy and systems changes that align with the CDC's Active People, Healthy Nation effort. Physical activity is very important in reducing risks of disease and very relevant during this pandemic. The attention to active transportation and transit in the Long Range Transportation Plan (LRTP) directly impacts this work. As such, we lend our voice of support to this plan moving forward.

We are happy to see the vision of a balanced transportation system that allows for a choice of transportation modes, with attention to public transportation, bicycling and walking. Active transportation is one way to enhance the public health, environment, and economy of our community. We draw attention to the note on page 6-19 that much community input demonstrated a need for a balanced approach to funding transportation. Our work with partners in Lincoln's cultural centers mirrors that concern.

We are particularly encouraged by the adoption of a new Transportation Equity goal. It is important to recognize that there are differences in experience in moving about our city, and not all have the same access to transportation choice. We applaud efforts to "identify and work to eliminate disparity in the quality of and access to transportation options for all community members" (p 8.2). We urge continued efforts to discern needs and comfort levels of all residents as they try to get to places where they live, work, play and engage in the community. It is commendable that Transportation equity is then used as part of the scoring matrix for evaluation of future transportation projects (Appendix F).

We endorse the policy noted on Page 8-5 for Complete Streets: "Plan, design, build and maintain streets to provide travel mode choice and to accommodate people of all ages and abilities." We are happy to see that Lincoln is prepared to move forward with a Complete Streets Program that considers all users when designing streets. We encourage pursuit of an updated gap analysis, again with a focus on equity. Action Step #7 to "Enhance neighborhoods by adding safe and accessible connections to transit, multiuse trails, sidewalks and bicycle facilities" would allow more people to have access to activity friendly routes to everyday destinations (a key CDC physical activity strategy). As we work to increase routes, we should also strive to consider that proximity may not be access for all. Consideration of what makes people feel welcome and represented in spaces is important.

We strongly endorse the Policy to "Increase the safety and connectivity of the pedestrian environment to encourage walking and the use of mobility aids as a mode of transportation" (p.8-11). Constructing and repairing sidewalks, addressing sidewalk intersection safety, snow removal concerns, and implementing safety campaigns are important action steps. With our efforts to boost more physical activity, we also are happy to see the Policy (and related Action Steps) to "Improve and expand the on-street bicycle and trail network to support public health, recreation, and bicycling as a mode of transportation" (p.8-13). We emphasize the move towards less stress and more safety for people on bikes or foot. As we work to increase the number of people who walk and bicycle, we strongly support the idea of accommodating all ages and abilities in the design of such facilities. It is important that the network provide connections to everyday destinations.

Transit policy is closely related to Transportation Equity (p.8.15). We encourage continued discussions to ensure that access to employment, education, housing, and key destinations is available at the times needed for those dependent upon transit, and to attract choice riders as well. Amenities at transit stops and last mile connections for those on foot or bicycles will help to enhance the system. The Shared Mobility Policy (8-19) aligns closely with our efforts in promoting physical activity. Bike Share has been noted to be one way to address transportation inequity in cities across the US. We endorse strengthening and expanding the shared mobility system and infrastructure to support it. We applaud and encourage continued efforts to educate and expand its reach to meet the needs of residents of varying cultures and experience.

As the community looks at Advanced Mobility options and the integration of Autonomous Vehicles, we would strongly urge the notion of safety for all community members as noted on page 8-21. With the emphasis on Complete Streets, and community spaces and placemaking noted in other parts of the Comp Plan, we draw attention to the desire that some of our streets be places for people, and not just continued emphasis on accommodations for vehicular traffic.

As the city and county develop their Transportation Partnerships (p.8-23), we encourage continued conversations about how the transition from county roads to city streets may facilitate or prohibit the development of a Complete Streets system. An eye to how future development may accommodate transportation choice may make it more affordable for such infrastructure.

We support the Policy noted in Transportation Safety (p.8-24) to "Strive to reduce transportation-related deaths and injuries, especially for vulnerable users (pedestrians, bicyclists, motorcycle users, the elderly, youth, and individuals with disabilities)." We also are happy to see the emphasis on transportation infrastructure's role in safety and a call for lower speed on some streets. It is important that street design encourages the desired behavior for all users. Each of the Action Steps listed within this policy seem to be very important steps to a safer system for all. As we look at equity and safety, we would urge consideration of how restrictive ordinances and disparate enforcement can contribute to what Charles T. Brown terms "Arrested Mobility," and a less inclusive and comfortable space for some of our residents.

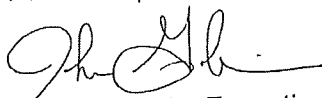
We encourage further discussion as to how to fund pedestrian and bicycle projects and programs as part of a balanced transportation system, particularly in Lincoln's low-income neighborhoods that rely more on multi-modal transportation. We reiterate how active transportation contributes to a healthier, more climate resilient and economically advantaged community.

In summary, there is much of the LRTP that aligns with our goals for increasing physical activity by increasing the number of activity friendly routes to everyday destinations. As such, we encourage adoption of the LRTP by Lincoln and Lancaster County. We offer our support and partnership in bringing this plan to action.

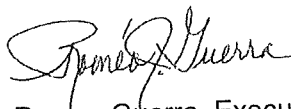
Sincerely,



Bob Rauner, President  
Partnership for a Healthy Lincoln



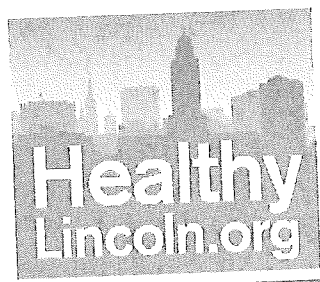
John Goodwin, Executive Director  
Malone



Romeo Guerra, Executive Director  
El Centro de las Americas



Sheila Dorsey Vinton, Executive Director  
Asian Community and Cultural Center



**Partnership for  
a Healthy Lincoln**

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November 22, 2021

Lincoln City Council  
555 S. 10th Street #111  
Lincoln, NE 68508

Dear City Council members,

Partnership for a Healthy Lincoln is pleased to support the Lincoln-Lancaster County 2050 Comprehensive Plan. Its vision and goals directly contribute to the health and livability of our community. Partnership for a Healthy Lincoln, or PHL, (HealthyLincoln.org) is a non-profit organization dedicated to improving the health, wellness, and fitness of communities. PHL partners with other entities, such as El Centro de las Americas, Malone, and the Asian Community and Cultural Center on projects to reduce health disparities and works with existing private and public organizations to cooperate and share resources increasing the reach and effectiveness of our common health goals. We feel that many of the Comp Plan policies will indeed contribute to achieving the desired health outcomes for more members of our community.

We are pleased to see continued support for Safe, Affordable and Accessible Housing in our community (G-1). Much research has connected the need for stable housing to positive health outcomes. The notion of Complete Neighborhoods espoused in Goal 2, builds on that connection by encouraging that services and goods to meet daily needs are within a 15-minute walk of residences. Such a neighborhood contributes greatly to activity friendly routes to everyday destinations (a goal of our CDC work). The link between the built environment and one's ability to walk and bike has been well documented.

The goal of Equity and Inclusion (G-5) must be a part of any plans for our community's future. We support this as noted in the plan, as a core principle in the planning and policy development process. We agree that it is important to acknowledge racial housing and structural discrimination as a part of Lincoln's history. We are happy to see the focus on the Social Determinants of Health and health disparities as an important area to consider as we plan for our future. We support applying the lens of racial equity into policy decisions.

The goal of Healthy Active and Connected People (G-6) aligns very closely with our work to increase physical activity levels. We endorse "examining access to parks and trails and infrastructure for Active Transportation" and noting inequities in the trail network. Based on input we have gathered, we would encourage consideration that such routes are comfortable and welcoming for all cultures, ages, and abilities.

Environmental Stewardship and Sustainability (G-7) again draws further attention to the need for more trips to be made by persons bicycling, walking, or taking transit to decrease greenhouse gas emissions.

As PHL, El Centro, Malone and the Asian Center work to increase supports in the built environment to encourage physical activity, the goal of Civic Participation (G-8) relates closely to this work. We agree that "it is important to give all members of the community a voice and the capacity to influence decisions." We appreciate the consideration of barriers to such participation. We would encourage exploration of additional ways to learn of lived experiences to inform decisions by participation in community and cultural events, community art events, pop up events in neighborhoods and presence at bus stops, grocery/convenience stores and other community spaces.

The History and Culture Goal (G-12) also relates to the work of a healthier community. We agree with the statement that "as the population continues to become more diverse, the richness and variety of Lincoln and Lancaster County's cultural assets will enrich the quality of life for all those living here."

In addition to these goals, there are many elements, policies and action steps that align closely with our work and which we support as a part of the Comp Plan.

We strongly support the option for Local Food that allows for nutritious food to be grown closer to where people live and across all neighborhoods (Element 4 and Policy 22). We are happy to see the discussion of expansion of community and urban gardens to allow for more equitable access to all neighborhoods. This allows for addressing obesity, nutrition, and physical activity by participation in gardening.

Access to Parks, Recreation and Open Space in Element 5 and Policy 29 on Neighborhood Parks are vital to a healthier community. Having a neighborhood park within a 10-minute walk of residents is a laudable goal. Addressing street tree equity helps with climate resilience, but also allows for more to gather and move about comfortably in their community. We support the plan to "identify opportunities to acquire/develop neighborhood parks in established neighborhoods that are deficient in Neighborhood Park resources, particularly in those neighborhoods where indicators of vulnerability are higher" (E-5). We support drawing this attention to trails as well. In policy # 29, Action Step # 4 states "as community demographics shift, seek out opportunities to provide neighborhood park activities that address the needs of different cultures, age groups, and abilities." We completely agree with looking beyond proximity, to addressing comfort and representation as important to a diverse community.

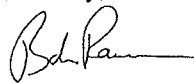
Policy 26 addresses Community Forestry Management. We endorse the Action Step #13: "Assess baseline tree canopy with emphasis on low-income neighborhoods and prioritize tree plantings to reduce heat island effect, increase stormwater management, and reduce utility bills. This is also important to making places within the community more supportive of physical activity.

Policy 39 related to Community Spaces also relates to the work of REACH. We encourage the effort to "engage diverse stakeholder groups in the enhancement of existing community spaces and the development of new community spaces..." (Action Step 2). We applaud the plan to "explore and implement temporary design solutions... as a way to experiment with new ideas that may lead to more permanent design improvements in community spaces" (Action Step 5). Many communities have found success in supporting physical activity through such efforts in close collaboration with neighborhood residents. We are happy to see Action Step 6 which would "Support implementation of community-led placemaking projects in the public right-of-way and other community spaces..." Such efforts contribute to a feeling of belonging and making places more comfortable for active transportation.

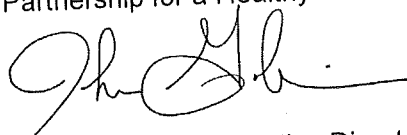
As a community health organization, we also support Health Care Access (Policy 43) to achieve health equity for all. Implementing many of the action steps within the Comp Plan will move us closer to that goal.

Because of our commitment to the health of our entire community and the important impact of the Comprehensive Plan to the health and livability here, we at PHL, El Centro, Malone and the Asian Center offer our enthusiastic support to this visionary document. We and our partners look forward to partnering with you in bringing these goals and action steps to fruition in the coming years.

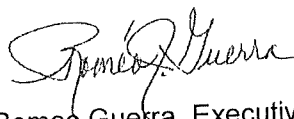
Sincerely,



Bob Rauner, President  
Partnership for a Healthy Lincoln



John Goodwin, Executive Director  
Malone



Romeo Guerra, Executive Director  
El Centro de las Americas



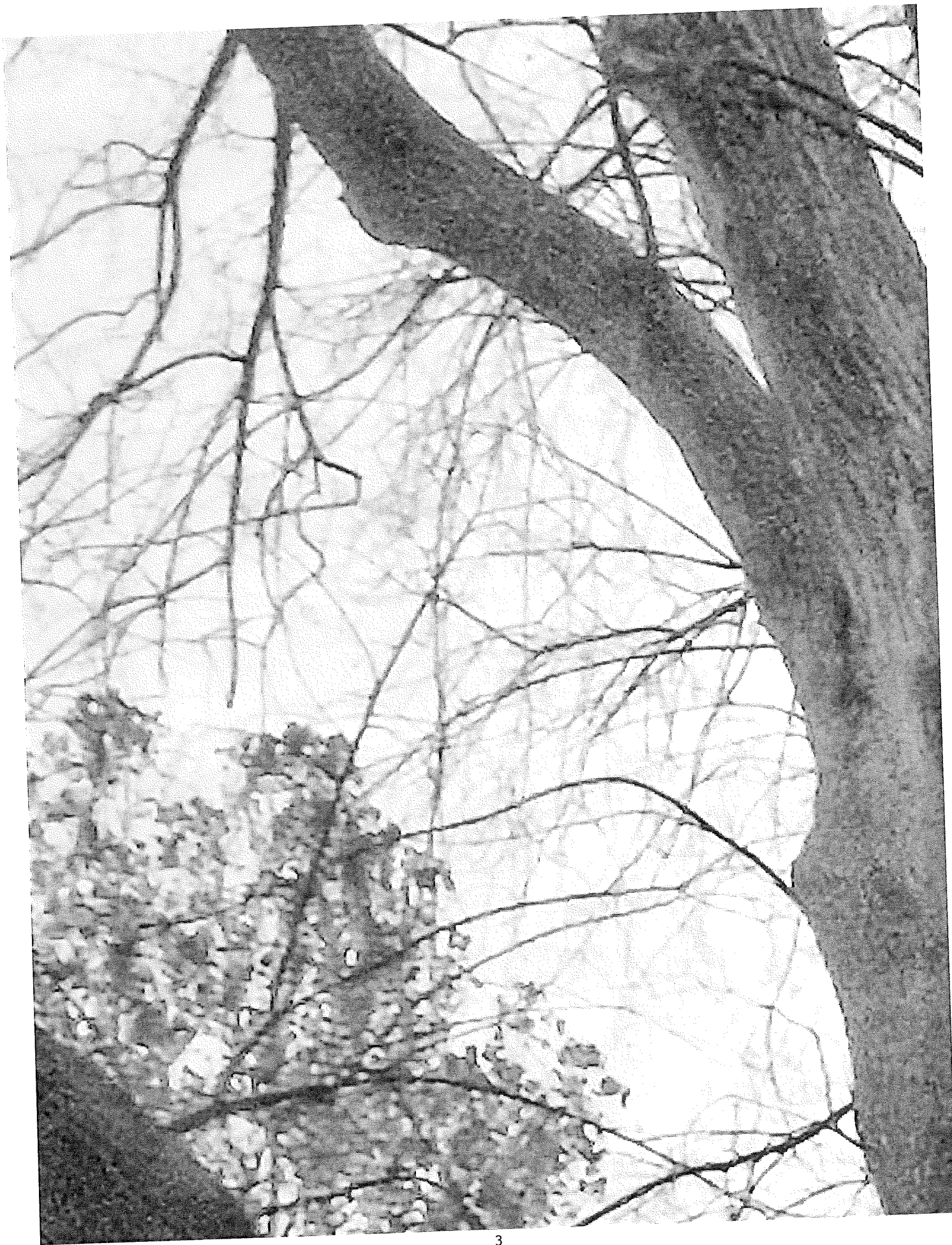
Sheila Dorsey Vinton, Executive Director  
Asian Community and Cultural Center

**JaMel E. Ways**

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**From:** Richard Bagby <witherbeerick@gmail.com>  
**Sent:** Monday, November 22, 2021 9:14 AM  
**To:** Council Packet  
**Cc:** Holland Kathy  
**Subject:** Items 21R-517, 21-154 Tabitha InterGen project  
**Attachments:** WNA City Council statement Tabitha Intergenerational Project.rtf







Richard Bagby,  
Witherbee Neighborhood Association





Recent actions at the Planning Commission and at City Council have made clear that a project like this one will be approved. Increasing the population density within the city limits is admittedly a laudable goal. We just don't see some of the specifics of this particular project as being compatible with the neighborhood. After the project was approved by Planning Commission we have continued to meet with officials from Tabitha to shape the project. We truly appreciate their efforts.

The Witherbee Neighborhood Association's objections to this project were presented to the Planning Commission. They remain unchanged. We object to the waiving of zoning standards on R2 zoned residential properties through the PUD process. We object to the size and placement of the building. We remain concerned about increased traffic. We remain concerned about storm water run-off.

What is our take on it?

To the Planning Commission and the City Council:  
We have to ask. Do low and moderate income neighborhoods built out 60 years ago not merit the same livability standards as new neighborhoods on the edges? Does R2 zoning mean anything anymore? Why is the PUD process allowed to void zoning regulations as long as the project is big enough?

To Developers: No.  
This one is unique due to affiliation with Tabitha and placement on the Tabitha campus. We wish to issue a statement regarding large apartment complex developments looking to duplicate this scale on a similar property within established single-family residential neighborhoods. No.

Witherbee Neighborhood Association is pro-neighborhood. Tabitha is a good corporate citizen and a good neighbor. We have met with and continue to meet with Tabitha officials to address our concerns. Tabitha has made several changes to the proposal at our suggestion and request. Through their actions Christie Hinrichs and Joyce Ebmeier and the team at Tabitha show that they remain concerned that their project be a plus not just for Tabitha, but also for the neighborhood and the city.

The Witherbee Neighborhood Association pledges to work with Tabitha to make this project fit as well as possible into our single-family neighborhood.

It would be our preference that we did not have to do so.

**JaMel E. Ways**

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**From:** Gillett, Bryce <bryce.gillett@trimarkusa.com>  
**Sent:** Monday, November 22, 2021 3:16 PM  
**To:** Cheri L. Howard; Mayor; Council Packet; Pat D. Lopez  
**Subject:** No Masks/your choice

Just had a great week long vacation in Redington Beach Florida, and then a weekend at a soccer tourney in Kansas City.

Florida- no mask restrictions anywhere. Some people wore them, some did not. Some employees at various places we went to wore them, some did not. Very nice to see people living within their freedoms of personal choice. Even in the airport (federally mandated) they were pretty lax. Even in the airplanes, (federally mandated) pretty lax. Sure they'd say it in their message, and if it was below your nose you might get asked to pull it up... until the beverage cart came along and then magically Covid disappeared. I was safe with my coffee and cookie, or Coke and Almonds.

Kansas City area- both Kansas and Missouri sides of the river were great. Signs up on some establishments to mask, but the majority of staff and patrons whether in a bar/restaurant, grocery store, or hotel, were not wearing masks. Some did, most did not. Very nice to visit other places both far away and nearby that have allowed their residents the freedom to choose.

I haven't seen any recent press releases about extending or discontinuing. What's the plan for December?



**HOCKENBERGS**

**Bryce Gillett, Outside Sales**

**TriMark Hockenbergs | Lincoln NE & surrounding area**

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## JaMel E. Ways

**From:** swallas@allophone.com  
**Sent:** Monday, November 22, 2021 6:39 PM  
**To:** Council Packet; info@madonna.org  
**Attachments:** Backyard of the house at 5320 Normal.docx

Good afternoon,

Let me introduce myself and my family. My husband worked for the State Military Department for 31 years, he served with a combination of Air Force and Air National Guard for 24 years. He is considered a disabled veteran as he lost some of his hearing from too much time on the flight line. He is 69 years old and has Parkinson's. I served with Air National Guard for 13 years, I have 150 hours at UNL in Art Education, I have an associate degree in Business from Southeast Community College, and on December 3<sup>rd</sup> I will be finishing a degree in Early Childhood Education Inclusive and have a teacher's certificate. I have done Licensed Family Childcare for 21 years and am the only accredited Family Childcare, a Wonderschool, a certified Nature Explorer Classroom, Step Up to Quality Rated, a T.E.A.C.H. scholarship recipient and currently serve on the T.E.A.C.H. board. My son just graduated from Southeast Community College with a HVAC degree. We have lived in our home at 5414 Normal Blvd, Lincoln, Nebraska for 35 years as of December 1<sup>st</sup>. Most importantly we are registered voters and an essential part of the community of Lincoln.

The purpose of this writing is concern over what is happening to our neighborhood and our home. I moved into my home 35 years ago and into a neighborhood where most of my neighbors built their homes when anything past 56<sup>th</sup> street was cornfield. Some of those neighbors have passed away and others have moved away, but some remain. I can honestly say this has been a neighborhood where we care for each other and our homes. One of those neighbors is 81 years old and has Alzheimer's. I am blessed to call her my friend, and my son called her grandma growing up even though we are not blood relation. Another neighbor a retired fire fighter had custody of his grandchildren and we provided care for them for two years. I would have said until recently the last year or two Madonna has been one of those neighbors. They not only provided a service to Lincoln and many jobs, but they were respectful neighbors.

When Madonna started buying property in the neighborhood, they were respectful and tended to the property they bought. About a year ago, that changed. Some of the property was left empty to deteriorate and no repairs were made. We overlooked that knowing they wanted to expand and as that expansion took place they would tend to the properties and continued to be good neighbors. Madonna purchased the home at 5320 Normal Blvd. Madonna stored a broken commercial air conditioner unit and old fall zone mats in the back yard and the grass and weeds over ran the back yard several times. We did not say a word as it was far enough down from us and the property around it was owned by Madonna. (please note the photos)

When Madonna started their expansion, we didn't say a word as it didn't affect us. Madonna bought the home at 2315 South 56<sup>th</sup> street and the homes at 5401 Glade and 5411 Glade. We noticed the weeds and grass on the homes at Glade Street were over our shared fences. Our back yard lines up with their property. I called the operator at Madonna and was transferred to someone I believe is named Kathy. She apologized and assured me it would be taken care of. I thanked her.

As Madonna continued their expansion, problems with parking arose. I am currently, student teaching, and sometimes I couldn't get to 56<sup>th</sup> street via Glade. The construction, and employees from Madonna parked wherever. I contact the operator and was transferred again to the Kathy(?) person. She assured me she would talk to their employees. It went on for weeks. I made several phone calls to Madonna. I was always told it isn't our problem call the police. I did daily. Several tickets were written, and Madonna employees began respecting the parking zone.

I was very upset when my husband and I went around the block and saw a gentleman with a Sampson t shirt on moving a trailer in front of a fire hydrant. I called Madonna operator again and talked to the Kathy (?) person again. She told me it wasn't my problem as the fire hydrant was on the opposite block I lived on, and I have a fire hydrant on my corner. I explained that if the houses behind me don't have access to a fire hydrant my house will catch on fire also. Furthermore, I must live here. She told me to call the police again. We did.

I noticed on one of our nightly walks Madonna's properties on 2315 Glade Street had debris all over it and the garage door was left open. We watched a possum walk into the garage like he owned it. We also noticed debris all over the property. We continued our walk, and we noticed the debris being stored still at 2315 South 56 street. I decided to call Madonna again and complain. I also complained about the continued parking situation. I got transferred again to the Kathy (?) person. She said I suppose you are the one that called us in for the long grass at 2315 South 56<sup>th</sup> street. I said no! I didn't, but I will call again about the grass at 5401 Glade and 5411 Glade if you don't clean it up properly. They closed the garage door the next day and mowed the grass. The debris is still laying out. (Please note the photos).

I received a phone call on November 2nd from a Kevin at my home number. My husband told me, and I tried to return the call the

next day. It took two days to reach him. He asked if they could take our chain link fence down and put up a six-foot fence as they wanted to rent the house on 5401 Glade and were moving clergy into 5411 Glade. I said I understood with my neighbors barking dog and our children it would be easier for you. As soon as the fence was up, the noise began. It was two days I came home from student teaching and my husband, who lost his hearing from his military service, complained about loud noises in the back yard. I went to look, they moved in gravel, broke the porch on one house, broke the cement driveway and moved in a trailer and construction items. They have since the photo was taken added another trailer and more construction items. They not only lied to us, but they made a huge mess of our neighborhood again.

My husband called the building and safety and asked them to come out today. They were to call us back. At 3:30 today my husband called them and was told Madonna was informed and was handling it. Seriously, Madonna can expand, they can add whatever they want, but as neighbors in my neighborhood they need to take care of their properties and follow the same laws and rules the rest of the neighborhood does.

Thank you for hearing me out! Please note a copy of this letter was sent to the Lincoln Journal Star and we cc Madonna in this letter. We would gladly talk to anyone about this situation.

Sincerely,

Shelley Wallace

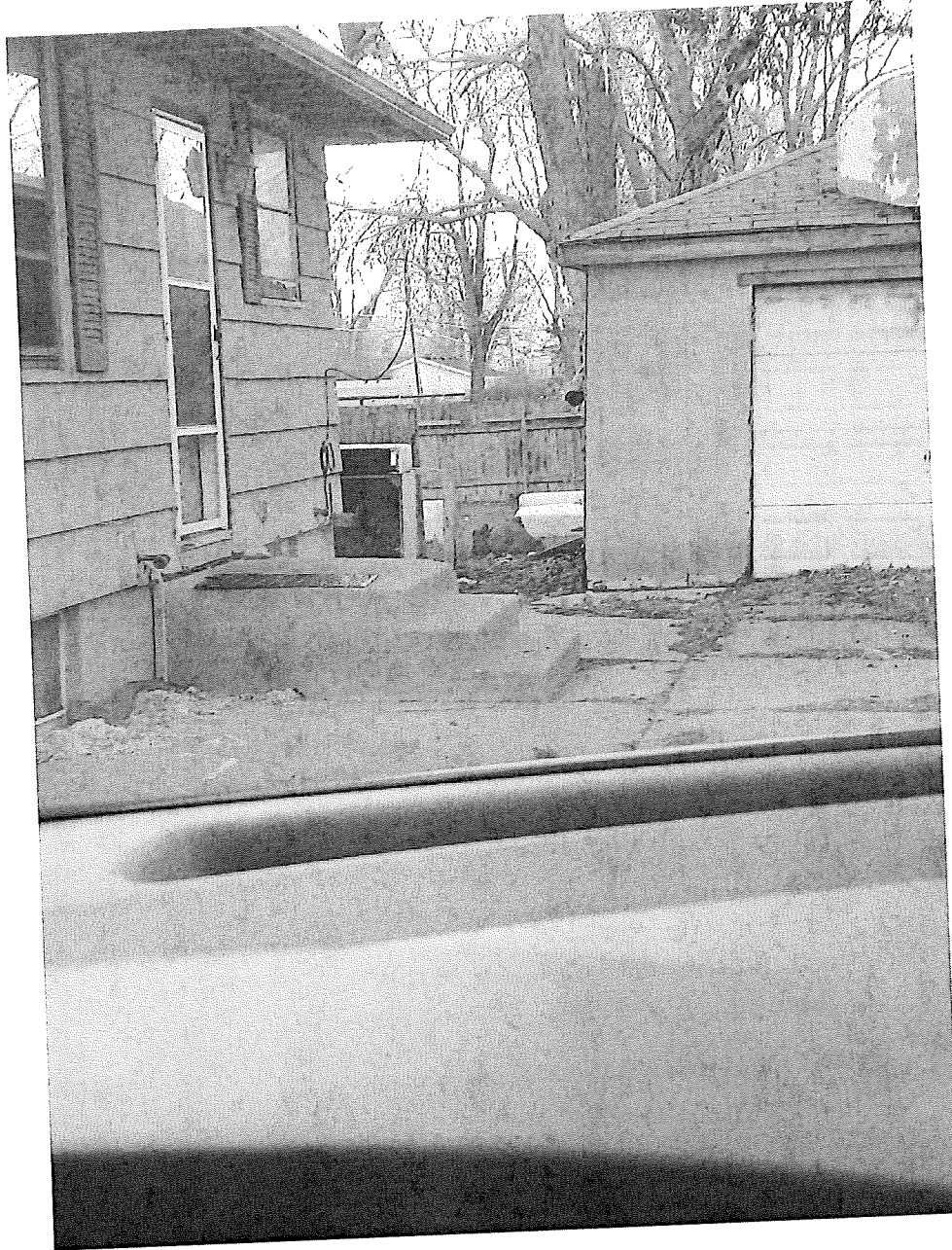
Backyard of the house at 5320 Normal. These photos were taken from the street at Glade using my phone.



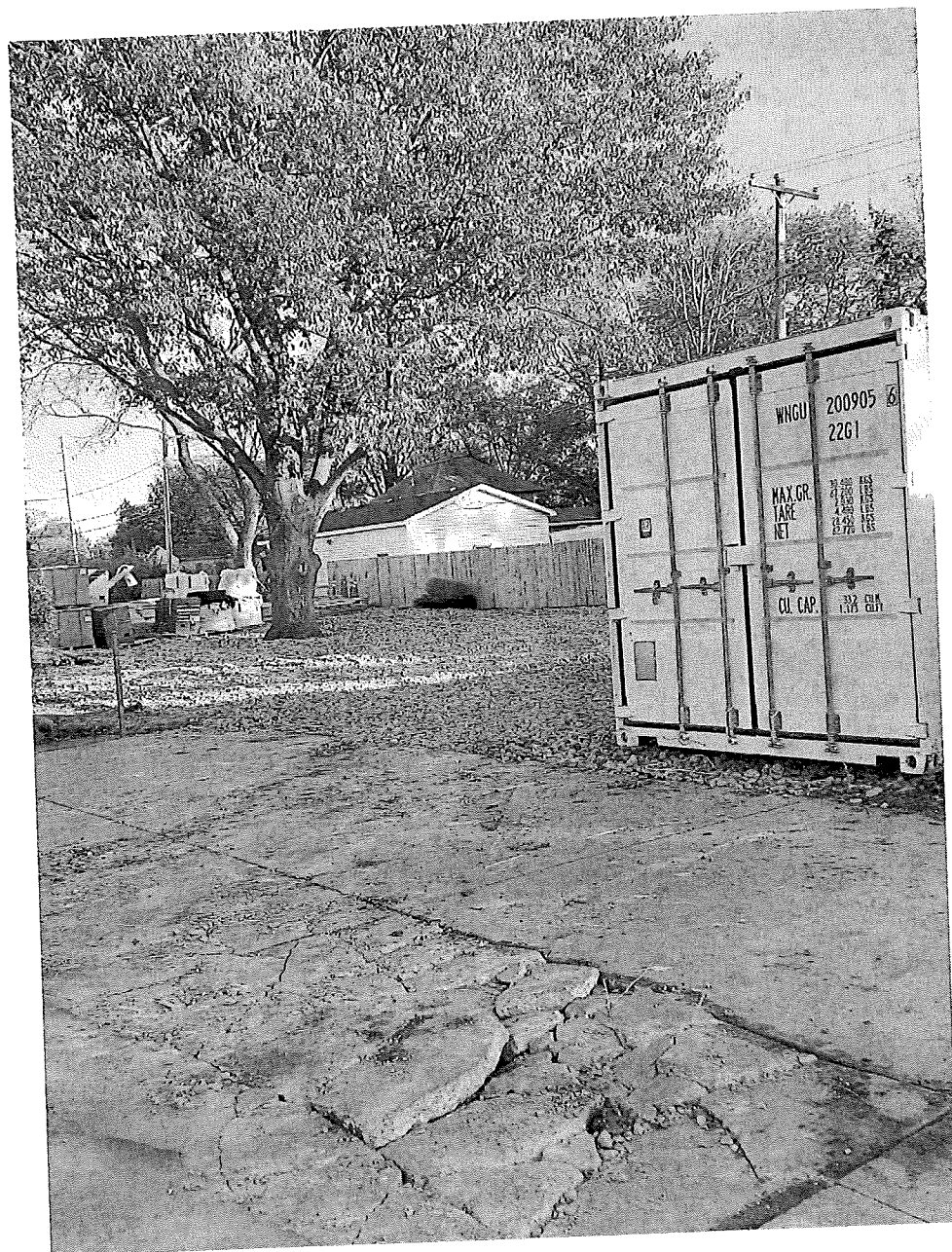


Property at 2315 Glade taken from the street with my phone.

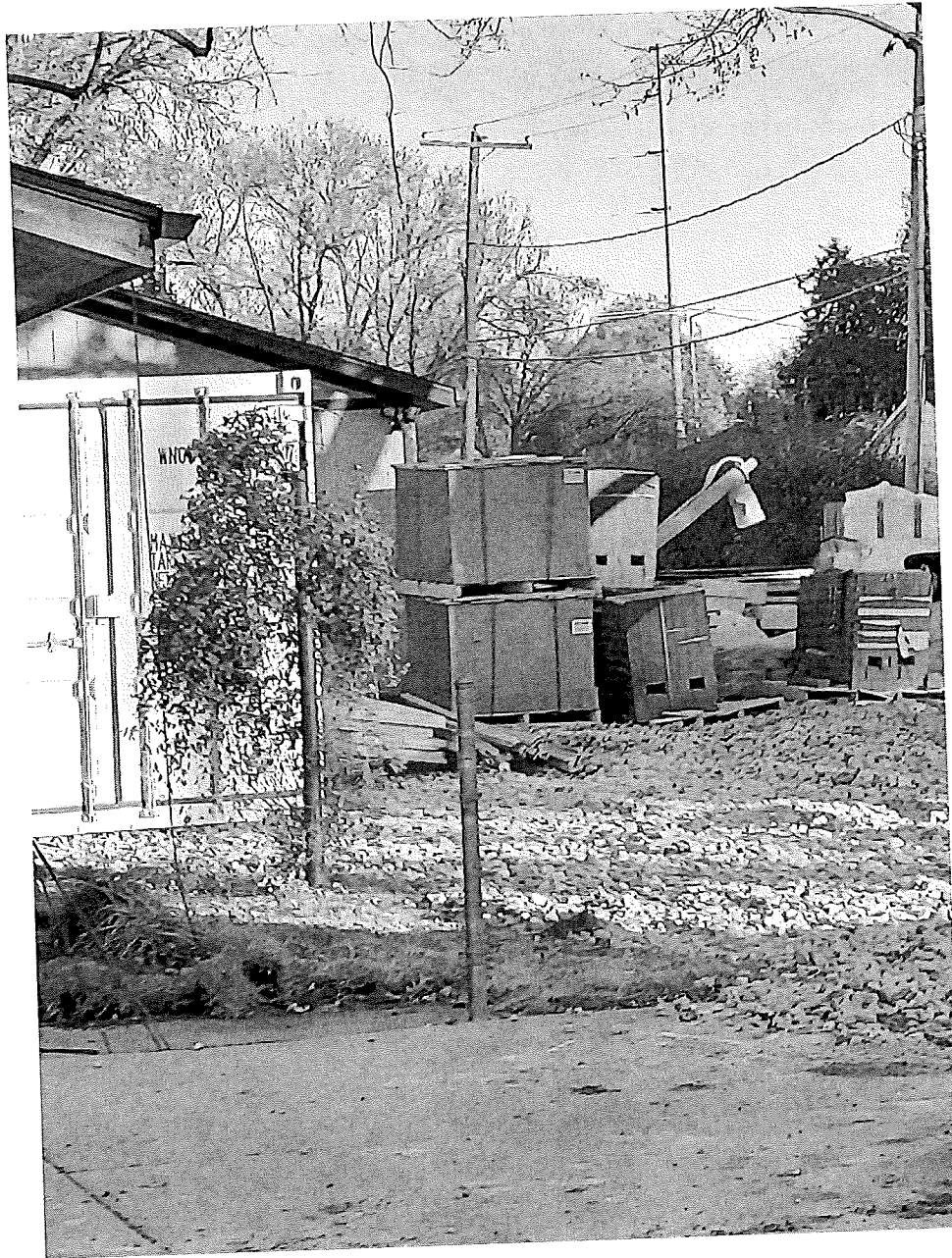




Property at 5401 Glade and 5411 Glade. Photos taken from the street with my phone.









## JaMel E. Ways

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**From:** PeaceinNE <peaceinNE@protonmail.com>  
**Sent:** Monday, November 22, 2021 9:31 PM  
**To:** Robert; Council Packet; Mayor; Bob Rauner; Don Mayhew; s Joel; D Uhing; Commish; Health; Scott E. Holmes; Pat D. Lopez; Pat D. Lopez; James Bowers; K Garcia; Sean H. Flowerday; Stephanie; Jasmine Tollette; J Loy; 1955; Jackie Miller; Tom; Jenifer T. Holloway; Adelle L. Burk; R Aguilar; M Cavanaugh; J Day; M Dorn; M Flood; C Friesen; T Ragert; D Hughes; Pete Ricketts; 1977; J Slama; D Murman; M Moser; J Lowe; L Linehan; B Lindstrom; M Hilgers; B Hansen; S Halloran; M Groene; S Geist; S Erdman; R Clements; T Briese; T Brewer; B Bostelman; J Arch; J Albrecht; A Wishart; M Williams; J Wayne; L Walz; T Vargas; J Stinner; P Pansingbrooks; R Pahis; A Morfeld; T McKinney; J McCollister; S Lathrop; M Kolterman; M Hunt; H Ilkemann; M Hansen  
**Cc:** join  
**Subject:** Library meet up.....keep top of mind

Hi All,

This is a good plan, keep in mind!  
Please see attachment.

Happy Thanksgiving everyone! God bless you, your family, friends and most of all thank you Jesus!

Love,

Charyl

Sent from ProtonMail mobile

**JaMel E. Ways**

---

**From:** Elina Newman <newmanforlincoln@gmail.com>  
**Sent:** Tuesday, November 23, 2021 12:40 PM  
**To:** Council Packet  
**Subject:** Redistricting

Hello fellow council members,

Do you happen to know when the redistricting for Lincoln will be completed?

Elina Newman, PhD, CPhT

**JaMel E. Ways**

**From:** Gillett, Bryce <bryce.gillett@trimarkusa.com>  
**Sent:** Tuesday, November 23, 2021 4:52 PM  
**To:** Cheri L. Howard  
**Cc:** Council Packet; Pat D. Lopez; Mayor  
**Subject:** RE: Mask Update?

Disappointing, but not surprising considering the stance of the mayor, city council, and Ms. Lopez. How are cases going up if we have a mask mandate yet Omaha and other areas do not. I just don't understand the science- masks do not work. I looked at numbers yesterday and it looks like almost identical cases by percentage and graphing when comparing the larger city areas of Omaha to Lincoln. Am I missing something?

Maybe science is in fact telling us something, but it doesn't fit under the narrative of control, so we have to overlook that part of science to make sure that a perceived aspect of control is still at the forefront.



**HOCKENBERGS**

**Bryce Gillett, Outside Sales**

**TriMark Hockenbergs | Lincoln NE & surrounding area**  
**P 402-339-8900 | C 402-310-9340 | E [bryce.gillett@trimarkusa.com](mailto:bryce.gillett@trimarkusa.com) | [hockenbergs.com](http://hockenbergs.com)**

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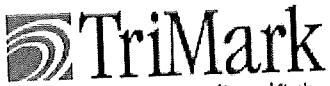
**From:** Cheri L. Howard <CLHoward@lincoln.ne.gov>  
**Sent:** Tuesday, November 23, 2021 4:08 PM  
**To:** Gillett, Bryce <bryce.gillett@trimarkusa.com>  
**Subject:** RE: Mask Update?

There were technical difficulties in the live feed but it will be posted on YouTube shortly.  
The DHM was extended through Dec 23<sup>rd</sup>.

*Cheri*

**From:** Gillett, Bryce <bryce.gillett@trimarkusa.com>  
**Sent:** Tuesday, November 23, 2021 4:06 PM  
**To:** Cheri L. Howard <CLHoward@lincoln.ne.gov>  
**Subject:** Mask Update?

Where can I go to find the update? Has anything been posted yet?



Foodservice Equipment, Supplies and Design

**HOCKENBERGS**

**Bryce Gillett, *Outside Sales***

**TriMark Hockenbergs | *Lincoln* NE & surrounding area**

**P 402-339-8900 | C 402-310-9340 | E [bryce.gillett@trimarkusa.com](mailto:bryce.gillett@trimarkusa.com) | [hockenbergs.com](http://hockenbergs.com)**

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**JaMel E. Ways**

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**From:** Jeremy Swanson <jrandallswanson@gmail.com>  
**Sent:** Friday, November 26, 2021 12:50 PM  
**To:** Council Packet  
**Subject:** Balloon release at NE game

I am disappointed to see the large number of balloons being released at the Nebraska football game. Hundreds of pieces of litter will unnecessarily be spread across Nebraska potentially harming wildlife and waterways. There has to be a more environmentally friendly option. Will someone be held accountable for this?

## JaMel E. Ways

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**From:** Robert Borer <robertjborer@gmail.com>  
**Sent:** Friday, November 26, 2021 1:57 PM  
**To:** WethePeople@gov.org  
**Subject:** We the People Intel Briefing --> We have a Judge, with brains AND brawn (i.e., cojones)!!  
**Attachments:** Judgment-Ending-Health-Department-Orders.pdf

Friends-

We may be facing a constitutional crisis soon, if we don't find more judges like the one I'm about to introduce you to (Daniel R. Green, out of Missouri).

And why a constitutional crisis? Because nearly all three branches of government are failing, if not refusing, to do their jobs. They regularly ignore their oaths.

What are their jobs? To protect our Liberties! To protect and defend our state and U.S. Constitutions! ...against all enemies, foreign **and domestic**!

Locally speaking, our enforcement branch, that is, the executive branch, is sitting on its hands, afraid to act. Afraid to stand up to the tyrants.

Our Constitution is the supreme law of the State. All local laws, codes, mandates and/or statutes in conflict with it are null and void. There is plenty there that they can use to nullify local tyrants like Bairdon. Why not start with equal protection? All residents of Nebraska are NOT being treated equally or fairly, from county to county, by our public servants. Boogeyman disease is not a county disease. Our Constitution applies to all Nebraska citizens. (See more along these lines below and/or in the attached decision.)

What does a constitutional crisis call for? Military intervention. Don't kid yourself. Brandon does not have control of the military, not where it counts anyway. If any group has a vested interest in the wellbeing of this country, it's the one composed of all those who signed up to die for it.

(Please don't misunderstand me. We still have a few heroes around the country, and locally, as this decision clearly demonstrates.)

At any rate, I wanted to unload this recent decision by Judge Green in Missouri on you, so you could chew on it over the weekend. It's short. It's common sense. And the good judge uses very plain language. No legalese.

Below are some select quotes, to get you motivated...to think, to stand up and to fight the good fight. The entire decision is attached, in its original form. I converted it into a searchable, highlightable and extractable format, in case you'd like a copy of that instead, to highlight as you read. Just write. Spread it far and wide, either way. We need to embolden more people to stand up.

Thanks to Kimberly Lepper for bringing this to my attention. Had so much else to share, but this 'trump'ed everything.

Almost forgot, here's a short article on the net about the case:  
<https://themissouritimes.com/missouri-judge-strips-local-health-departments-ability-to-impose-covid-19-orders/>

God bless and godspeed.

Bob

P.S. The mayor's office has been blindcopied. We hope she will respond to this common sense judgment by saying she's



had a change of heart, but we are not holding our breath. She has bigger fish to please. We all know it is she, and not Lopez, who is running this obscene show (wherein Lady Liberty has been stripped of her torch and the scales of justice have been destroyed).

#### Quotes:

This case is about whether Missouri's Department of Health and Senior Services regulations can abolish representative government in the creation of public health laws, and whether it can authorize closure of a school or assembly based on the unfettered opinion of an unelected official. This Court finds it cannot.

The Court concludes that the DHSS regulations (1) violate separation of powers principles of art. II, § 1 of the Missouri Constitution...and (4) violate the equal protection clause of the Missouri Constitution, Mo. Const. art. II, § 1.

Separation of powers among the three branches of government — legislative, administrative, judicial — is fundamental to the preservation of liberty. DHSS regulations break our three branch system of government in ways that a middle school civics student would recognize because they place the creation of orders or laws, and enforcement of those laws, into the hands of an unelected administrative official.

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."

"It is incumbent on the courts [not to mention the executive and legislative branches] to ensure decisions are made according to the rule of law, not hysteria. ... One hopes that this great principle—essential to any free society, including ours—will not itself become yet another casualty of COVID 19."

Any law "which attempts to clothe an administrative officer with arbitrary discretion, without a definite standard or rule for his guidance, is...unconstitutional."

...an ordinance or statute is unconstitutional when it "attempts to clothe an administrative officer with arbitrary discretion...

The requirements that the Missouri Constitution and over a century of Missouri Supreme Court precedent place on delegations of authority applies to DHSS. DHSS is limited to a definite standard for its delegated duty, and no arbitrary discretion can be or is involved.

The DHSS regulations violate the principles of separation of powers by unlawfully placing unguided and unbridled rulemaking power in the hands of a public official.

DHSS asserts that words such as "necessary," "adequate," and "appropriate" smattered throughout the regulations provide sufficient standards to guide agency officials in developing control measures and creating and enforcing their own rules and orders. Decades of case law consistently holds otherwise. Delegations of authority that include the phrase "in accordance with public convenience and necessity" are insufficient due to lack of criterion or standard.

The purported authority cited by the Acting Secretary in the Masking Order does not convey the authority required...the Masking Order is void ab initio.

Federal courts also agree. The United States Supreme Court held that a delegation authorizing an executive to take action "as he may deem necessary" is an unconstitutional delegation because it assumes positive motives with no set standards.

The authority that the DHSS regulations purport to grant to an administrative official to implement control measures and create and enforce orders is open-ended discretion—a catch all to permit naked lawmaking by bureaucrats throughout Missouri.

...health agency directors throughout Missouri have used the power...to exercise unbridled and unfettered personal authority...Mo. Const. art. II, § 1 simply and clearly prohibits, without question, such lawmaking.

DHSS's permissive closure regulation effectively converts the recommendations, and even whims, of a health agency director into enforceable law.... This incredible power cannot lawfully be placed in the hands of one bureaucrat.

Schools and places of public assemblies should no longer fear arbitrary closure based on the whims of public health bureaucrats. This system is entirely inconsistent with representative government and separation of powers and makes a mockery of our Missouri Constitution and the concept of separation of powers.

DHSS regulations, as implemented, violate the equal protection clause of the Missouri Constitution. Article I, Section II of the Missouri Constitution provides that "all persons are created equal and are entitled to equal rights and opportunity under the law." Mo. Const. art I, § 2. Equal protection of the law means "equal security or burden under the laws to everyone similarly situated; and that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes of persons in the same place and under like circumstances." Equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

Throughout 2020 and 2021, Missouri's residents and businesses have been subjected to orders created and issued by bureaucratic edict outside the constitutionally mandatory legislative process. These orders substantially differ between counties even though COVID 19 is not a county specific disease. Plaintiffs presented evidence that Missourians have been subjected to unconstitutionally created "health orders" that, for example, prohibit them from leaving their homes located in certain counties except for certain delineated reasons, permit worship services but prohibit Bible study, require churches in some counties to turn people away from their services if fire code capacity reaches 25%, require elementary students to wear masks indoors, even while playing basketball, and prohibited children from giving "high fives." Plaintiff Shannon Robinson was not permitted to have people over to her own home, even in masks, even socially distanced, because she has a large family and the number of people would exceed permitted attendance at her own dinner table. When she moved from St. Louis County to Franklin County, she could again have friends over. Restaurants have been unilaterally shut down even without any presence of infection and without inspection based on administratively issued "health orders" that violate the Constitution and have not been promulgated pursuant to the APA's procedural protections, while restaurants down the street in a neighboring county remain open. Children are removed from schools in some counties but not others, based on different masking rules issued by local health bureaucrats that are unconstitutionally created.

Because DHSS permits discretionary orders on a county by county basis by bureaucrats in each respective county, Missourians have faced disparate treatment based on county lines. In a statewide pandemic as defined by 19 CSR 20-20.010(37), it is not fair or equitable for a business in one county to be arbitrarily closed down, when another business in another county experiencing the same exact pandemic situation is not also closed down for the same reasons. The DHSS regulations authorize arbitrary and capricious rulemaking that creates a substantial inequity among affected people and businesses. This is particularly true of those who live in a county with an overactive, unelected and unchecked bureaucrat intent on exerting power that is not similarly exerted in other counties by their unelected health bureaucrats.

Can it be said that COVID-19 knows to stop at specific county lines and does not travel over? It is completely irrational that, at this point in time, now that COVID-19 has spread across the globe, a first grader in Wildwood is not allowed to play sports, while a first grader in Jefferson County who lives less than a mile away is allowed to do so. Individual freedoms are affected in different ways throughout Missouri relating to the same COVID-19 illness thanks to the DHSS regulations that allow one person to make and enforce laws, and close things down with no standards other than a completely unappealable and unchallengeable "opinion" regarding public health protection. The DHSS regulations permit different treatment across county lines in a manner that is completely arbitrary and violates the equal protection clause of the Missouri Constitution, Mo. Const. art. II, § 1.

Missouri's local health authorities have grown accustomed to issuing edicts and coercing compliance. It is far past time for this unconstitutional conduct to stop.

IN THE CIRCUIT COURT OF COLE COUNTY  
STATE OF MISSOURI

SHANNON ROBINSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	20AC-CC00515
	)	
MISSOURI DEPARTMENT OF HEALTH	)	
AND SENIOR SERVICES,	)	
	)	
Defendant.	)	

**JUDGMENT**

This case is about whether Missouri's Department of Health and Senior Services regulations can abolish representative government in the creation of public health laws, and whether it can authorize closure of a school or assembly based on the unfettered opinion of an unelected official. This Court finds it cannot.

Plaintiffs Shannon Robinson, B&R STL, and Church of the Word (a benevolent corporation) filed this action seeking a declaratory judgment pursuant to Mo. Rev. Stat. § 536.050 that rules issued by the Department of Health and Senior Services ("DHSS"), codified at 19 CSR 20-20.010 et seq., which authorize the Director of DHSS or a local health agency director to exercise personal discretion to (1) implement discretionary "control measures" including the "creation and enforcement of orders" affecting individuals, schools, organizations, businesses and other entities, and (2) close schools and places of public assembly based solely on his/her opinion, are invalid. 19 CSR 20-20.010(26); 19 CSR 20-20.040(2)(G)-(I); 19 CSR 20-20.040(6); 19 CSR 20-20.050(3) (collectively "DHSS regulations"). This matter comes to this court as a Motion for Summary/Declaratory Judgment. The Court concludes that the DHSS regulations (1) violate separation of powers principles of art. II, § 1 of the Missouri Constitution;

(2) violate the Missouri Administrative Procedure Act, Mo. Rev. Stat. § 536.010 et seq.; (3) are inconsistent with the public health law framework established by Missouri statutes; and (4) violate the equal protection clause of the Missouri Constitution, MO. CONST. art. II, § 1.

**1. The DHSS regulations violate separation of powers principles of art. II, § 1 of the Missouri Constitution.**

Separation of powers among the three branches of government – legislative, administrative, judicial – is fundamental to the preservation of liberty. DHSS regulations break our three-branch system of government in ways that a middle school civics student would recognize because they place the creation of orders or laws, and enforcement of those laws, into the hands of an unelected administrative official.

“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.” Baron de Montesquieu, *The Spirit of the Laws* (London: J. Nourse and P. Vaillant, 1758), Book XI, ch. 6, p. 16. “One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority.” Cooley, *Constitutional Limitations* (1886), pp. 116-117. “It is incumbent on the courts to ensure decisions are made according to the rule of law, not hysteria. . . . One hopes that this great principle—essential to any free society, including ours—will not itself become yet another casualty of COVID-19.” *Dept. of Health and Human Services v. Manke*, CC: 20-004700-CZ (Mich. 2020, Justice Viviano, concurring).

The Missouri Constitution provides as follows:

The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of

powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

MO. CONST. art. II, § 1.

Thus, absent express direction or express permission in the Missouri Constitution for one of three departments of government to exercise powers belonging to either of the other two departments, acts done “must incontinently be condemned as unwarranted by the constitution. . . . Each department of the government is essentially and necessarily distinct from the others, and neither can lawfully trench upon or interfere with the powers of the other; and our safety, both as to national and state governments, is largely dependent upon the preservation of the distribution of power and authority made by the constitution, and the laws made in pursuance thereof.” *Missouri Coalition for Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125 (Mo. 1997), citing *Albright v. Fisher*, 164 Mo. 56, 64 S.W. 106, 108–09 (1901).

The Missouri Supreme Court has recognized that a legislative body generally cannot delegate its authority, but alone must exercise its legislative functions. *Automobile Club of Mo. v. City of St. Louis*, 334 S.W.2d 355 (Mo. 1960); *State ex rel. Priest v. Gunn*, 326 S.W.2d 314, 320, 321 (Mo. banc 1959). A law delegating certain authority “is constitutional if a definite standard is provided and no arbitrary discretion is involved.” *State v. Bridges*, 398 S.W.2d 1, 5 (Mo. 1966); *Behnke v. City of Moberly*, 243 S.W.2d 549 (Mo. App. 1951). Any law “which attempts to clothe an administrative officer with arbitrary discretion, without a definite standard or rule for his guidance, is an unwarranted attempt to delegate legislative functions to such officer, and for that reason is unconstitutional.” *Lux v. Milwaukee Mechanics Ins. Co.*, 15 S.W.2d 343 (Mo. 1929).

The Missouri Supreme Court has well developed case law on the subject of unconstitutional delegations of power to executive branch officials. Although “a legislative body cannot delegate its authority,” the Court has held that “it may empower certain officers, boards and commissions to carry out in detail the legislative purposes and promulgate rules by which to put in force legislative regulations.” *Auto. Club of Mo. v. City of St. Louis*, 334 S.W.2d 355, 358 (Mo.1960). This is particularly so where the executive agency possesses special expertise. *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 74 (Mo.1982). Delegation is constitutional only when the delegating statute or ordinance “contains sufficient criteria or guidelines” to guide the executive official's decision-making. *Ruggeri v. City of St. Louis*, 441 S.W.2d 361, 363 (Mo.1969); see also *Auto. Club of Mo.*, 334 S.W.2d at 358. Conversely, an ordinance or statute is unconstitutional when it “attempts to clothe an administrative officer with arbitrary discretion, without a definite standard or rule for his guidance.” *Porporis v. City of Warson Woods*, 352 S.W.2d 605, 607 (Mo.1962) (internal quotes omitted); see also *Howe v. City of St. Louis*, 512 S.W.2d 127, 133 (Mo.1974). Regarding the delegation of law-making functions in particular, the Court has recognized that “the duty and power to define crimes and ordain punishment is exclusively vested in the legislature,” *State v. Brown*, 660 S.W.2d 694, 698 (Mo.1983). The requirements that the Missouri Constitution and over a century of Missouri Supreme Court precedent place on delegations of authority applies to DHSS. DHSS is limited to a definite standard for its delegated duty, and no arbitrary discretion can be or is involved. *State v. Bridges*, 398 S.W.2d at 5.

DHSS has statutory authority to “designate those diseases which are infectious, contagious, communicable or dangerous in their nature and shall make and enforce adequate orders, findings, rules and regulations to prevent the spread of such diseases and to determine the prevalence of such diseases within the state.” Mo. Rev. Stat. § 192.026. DHSS regulations delegate to the DHSS Director and local health agency directors throughout Missouri the power to implement discretionary “control measures” including the “creation and enforcement of orders” within their jurisdictions. 19 CSR 20-20.040(2)(G)-(I); 19 CSR 20-20.040(6). DHSS regulations also authorize an individual health agency director to close a school or place of public assembly if “in the opinion of the [health official] the closing is necessary to protect the public health.” 19 CSR 20-20.050(3). Thus, the state delegated rulemaking power to an administrative agency, and the administrative agency, has in turn, delegated broad rulemaking power to an unelected administrative official. This type of double delegation, which results in lawmaking by an administrative entity, is an impermissible combination of legislative and administrative power. *Cavanaugh v. Gerk*, 280 S.W.2d 51 (Mo. banc 1926) (rules promulgated by a traffic council pursuant to general provisions are unauthorized by law). The DHSS regulations violate the principles of separation of powers by unlawfully placing unguided and unbridled rulemaking power in the hands of a public official.

DHSS asserts that words such as “necessary,” “adequate,” and “appropriate” smattered throughout the regulations provide sufficient standards to guide agency officials in developing control measures and creating and enforcing their own rules and orders. Decades of case law consistently holds otherwise. Delegations of authority that include the phrase “in accordance with *public convenience and necessity*” are insufficient due to lack of criterion or standard. *Automobile Club*, 334 S.W.2d at 359 (emphasis supplied). Also, delegations that permit

discretionary declarations that a building is a public nuisance and allow an official to take “steps as may be *necessary* for the immediate abatement of any and all such nuisances” are also insufficient due to lack of criterion or standard for abatement. *Lux*, 15 S.W.2d at 345 (emphasis supplied); *see also Clay v. City of St. Louis*, 495 S.W.2d 672, 674 (Mo. App. 1973) (a delegation that instructed an agency to “establish a fee schedule” was insufficient because it did not set forth any standards to follow when setting the fees).

Other states, like Michigan, Wisconsin, and Pennsylvania have recently come to the same conclusion regarding administrative order-creation in connection with COVID-19.

“The powers conferred by [a Michigan statute granting an executive authority to take action] simply cannot be rendered constitutional by the standards ‘reasonable’ and ‘necessary,’ either separately or in tandem.” *Midwest Inst. Of Health, PLLC v. Governor of Mich. (In re Certified Questions from the United States Dist. Court)*, No. 16, 506 Mich. 332 (Mich. 2020).

The Wisconsin Supreme Court also addressed this issue when it struck down a statewide “Safer at Home Order” issued by a Director of Wisconsin’s department of health in response to COVID-19 concerns. *Wisconsin Legislature v. Palm*, 942 N.W.2d 900 (Wisc. 2021). The order was created by a Wisconsin administrative official pursuant to a state regulation that gave her broad authority to take “all emergency measures *necessary* to control communicable diseases.” *Palm*, 942 N.W.2d at 917. The term “necessary” did not provide sufficient standards for her action. *Id.* Most recently the Pennsylvania court held: “

The purported authority cited by the Acting Secretary in the Masking Order does not convey the authority required to promulgate a new regulation without compliance with the formal rulemaking requirements of the . . . Regulatory Review Act. Therefore, because the Acting Secretary did not comply with the requirements of the [state APA], the Masking Order is void ab initio. For this Court to rule otherwise would be tantamount to giving the Acting Secretary unbridled authority to issue orders with the effect of regulations in the absence



of. compliance with the. . . [state APA]. As this would be contrary to Pennsylvania's existing law, we decline to do so.

Corman, et.al v. Acting Secretary of the Pennsylvania Department of Health, No. 294

M.D. 2021 (Nov. 10)

Federal courts also agree. The United States Supreme Court held that a delegation authorizing an executive to take action "as he may deem necessary" is an unconstitutional delegation because it assumes positive motives with no set standards. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1934); *see also State v. Becerra*, 2021 WL 2514138 (M.D. Fla.) (holding that Center for Disease Control ("CDC") lacked authority to issue a "conditional sailing order" to the cruise industry, rejecting the CDC's argument that a federal statute authorized the Secretary to freely employ his "judgment" about restrictions "necessary" to prevent the transmission of COVID-19).

- i. *Regulations that delegate unfettered and unbridled rulemaking to an administrative official based on "necessity" are invalid.*

The authority that the DHSS regulations purport to grant to an administrative official to implement control measures and create and enforce orders is open-ended discretion—a catch-all to permit naked lawmaking by bureaucrats throughout Missouri. The regulations codified at 19 CSR 20-20.040(2)(G) -(I), 19 CSR 20-20.040(6) fail to set forth any standards to guide the DHSS Director or the DHSS-deputized local health agency directors in their creation of orders purporting to prevent the spread of a communicable disease into the state. The state's enabling act provides no standards for the issuance of orders. Mo. Rev. Stat. § 192.026. Orders authorized by the regulations are completely within the discretion of the agency official and are limitless, standardless, and lack adequate legislative guidance for their creation. The regulations also fail to provide any procedural safeguards for those aggrieved by the orders. The regulations create a

system of statewide health governance that enables unelected officials to become accountable to no one. Authorizing necessary, or appropriate, or adequate orders does not set forth the required standard or guideline for the administrative official.

Plaintiffs produced ample evidence that health agency directors throughout Missouri have used the power granted to them by 19 CSR 20-20.040 to exercise unbridled and unfettered personal authority to in effect, legislate. Local health directors have created generally applicable orders, both in writing and verbally, requiring individuals within their jurisdictions to wear masks, limiting gathering sizes in peoples' own homes, creating capacity restrictions, limiting usage of school and business facilities including tables, desks, and even lockers, mandating spacing between people, ordering students be excluded from school via quarantine and isolation rules created by health directors based on masking or other criteria not adequately set forth in either by the state legislature or by DHSS rules, among other generally applicable orders. This impermissible power to independently create new laws is purportedly delegated to them by 19 CSR 20-20.040(2)(G) -(I), 19 CSR 20-20.040(6) but MO. CONST. art. II, § 1 simply and clearly prohibits, without question, such lawmaking.

A local health agency director is constitutionally prohibited from exercising discretion to issue generally applicable rules prohibiting or requiring certain conduct and disciplinary consequences for violations of the director's unilaterally created rules. Yet, this has been happening across the state for over 18 months, thanks to unconstitutional language buried in state regulations. DHSS regulations that permit an agency health director to create and enforce orders and take other discretionary "control measures," which are predominantly set forth in 19 CSR 20-20.040(2) (G)-(I) and (6), are unconstitutional and are therefore invalid.

- ii. *DHSS regulation that delegates unfettered and unbridled decision-making authority to an administrative official to close a school or assembly based on the official's "opinion" is invalid.*

The DHSS regulation authorizing a health agency director's discretionary closure of a school or place of public assembly based on the director's personal opinion is invalid. 19 CSR 20-20.050(3). This regulation clothes an individual health agency director with the power to "close any public or private school or other place of public or private assembly when in the opinion of the [health agency director] the closing is necessary to protect the public health." The use of the term "in the opinion of" clearly designates complete discretion in an administrative bureaucrat to determine closure. The regulation even prohibits reopening "until permitted by whomever ordered the closure." 19 CSR 20-20.050(3).

The Missouri Supreme Court has held that a bureaucrat cannot possess such broad authority. In *Lux v. Milwaukee Mechanics Ins. Co.*, 15 S.W.2d 343 (Mo. 1929), a challenged ordinance clothed an appointed city official, the superintendent of buildings, with full discretionary power to declare any building which becomes unsafe from fire to be a public nuisance, and authorized the superintendent to take immediate steps to abate such nuisance. The challenged ordinance was held unconstitutional because it gave a city official the power to condemn a building without providing guides, tests, or standards to protect the property owner from arbitrary action.

A health agency director with the authority to shut down a school or assembly wields incredible power to coerce his subjects into submission. DHSS's permissive closure regulation effectively converts the recommendations, and even whims, of a health agency director into enforceable law. If the health agency director holds the "opinion" that a school is not doing enough, he can close it. And according to the regulation, he is the only one who can permit it to

be reopened. This incredible power cannot lawfully be placed in the hands of one bureaucrat. *Lux*, 15 S.W.2d at 345. Put simply, if “as may be *necessary* for the immediate abatement of any and all such nuisances” was insufficient according to Missouri’s highest court in *Lux*, then “necessary to protect the public health” based on “opinion” is definitely insufficient.

Schools and places of public assemblies should no longer fear arbitrary closure based on the whims of public health bureaucrats. This system is entirely inconsistent with representative government and separation of powers and makes a mockery of our Missouri Constitution and the concept of separation of powers. The DHSS regulation set forth at 19 CSR 20-20.050(3) is unconstitutional and is therefore invalid.

**2. DHSS regulations violate the Missouri Administrative Procedure Act, Mo. Rev. Stat. § 536.010, et seq.**

The DHSS regulations are also invalid because they authorize rulemaking by state and local agency officials in violation of the Missouri Administrative Procedure Act, § 536.010, et seq. A “rule” is defined by Mo. Rev. Stat. § 536.010(6) to include “each agency statement of *general applicability* that implements, interprets, or prescribes law or policy.” (emphasis supplied). “Any agency announcement of policy or interpretation of law that has future effect and acts on unnamed and unspecified facts is a ‘rule.’” *Department of Social Services; Div. of Medical Services v. Little Hills Healthcare LLC*, 236 S.W.3d 637 (Mo. banc 2007), citing *NME Hospitals, Inc. v. Department of Social Servs.*, 850 S.W.2d 71, 74 (Mo. banc 1993).

Rules promulgated by DHSS must comply with the procedural requirements of the Administrative Procedure Act Sections 536.021 and 536.024 prior to enactment and enforcement. Mo. Rev. Stat. § 192.006. These procedural requirements include a number of steps, including publication, notice and comment period, and approval of the Missouri Legislature prior to finality. In *Little Hills*, a state agency imposed a financial calculation related

to Medicaid reimbursement that did not proceed through the procedural safeguards set forth in Chapter 536 prior to its implementation. Because the financial calculation had general applicability to the public, it was ineffective unless and until the procedural due process set forth in Chapter 536 occurred. 236 S.W.3d at 643 (“failure to promulgate a rule as required voids the decision that should have been properly promulgated as a rule”).

Although the regulations contained in 19 CSR 20-20.010 et seq. were themselves promulgated pursuant to the APA’s procedural protections, the regulations specifically authorize subsequent rulemaking by administrative officers for which there are no procedural protections prior to implementation. DHSS is prohibited by the APA from giving an unelected official the power to do what DHSS itself lacks the power to do – enact rules outside the procedural protections set forth in Chapter 536, RSMo. DHSS has done *exactly that* by authorizing one person at a local agency to create and enforce orders, rules or regulations without ensuring that the procedural safeguards applicable to DHSS actions are also applicable to the bureaucrat’s actions.

Plaintiffs presented evidence that these subsequent rules – those directed to prevention of COVID-19 – have been issued as “orders” by local health agency directors throughout Missouri in reliance on 19 CSR 20-20.040(2) and (6). Local health agency directors, in reliance on 19 CSR 20-20.040, have enacted rules all by themselves, with no notice, sometimes posted them on the internet by surprise, sometimes sent them by email, and sometimes provided verbal orders. They also haphazardly ordered the shutdown of businesses not in compliance with their self-imposed laws.

DHSS regulations that permit agency directors to implement discretionary control measures and create and enforce orders that fit within the definition of “rule” are invalid because

they violate the APA. Thus, regulations codified at 19 CSR 20-20.040(2)(G) -(I), (6) expressly authorize violations of the APA and are therefore invalid.

**3. DHSS regulations are inconsistent with the framework established by Missouri statutes for the creation of public health law and violate Section 31 of Article I of the Constitution of Missouri.**

Missouri statutes give elected legislative bodies, not individual health agency directors, authority to create county-wide laws related to communicable disease.<sup>1</sup> More specifically, Mo. Rev. Stat. § 192.300 provides: “County commissions [which include county councils] and the county health center boards of the several counties may make and promulgate orders, ordinances, rules or regulations, respectively as will tend to enhance the public health and prevent the entrance of infectious, contagious, communicable or dangerous diseases into such county.” A “county health center board”<sup>2</sup> is an elected governing body established by Mo. Rev. Stat. Chapter 205.

Missouri law also provides for criminal punishment for violation of a public health law adopted by a county council or county commission. Mo. Rev. Stat. § 192.300(4) provides: “Any person, firm, corporation or association which violates any of the orders or ordinances adopted, promulgated and published by such county commission is guilty of a misdemeanor and shall be prosecuted, tried and fined as otherwise provided by law.” Thus, when a county council or

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<sup>1</sup> No Missouri statute specifically authorizes an individual health agency official to unilaterally issue orders, rules or regulations related to communicable disease. To do so would be an unlawful delegation of authority in violation of MO. CONST. art. II, § 1. The legislature recently placed a time limit on certain orders related to communicable disease. Mo. Rev. Stat. 67.265. A time limit does not rectify the constitutionally deficient DHSS regulations because health agency officials are constitutionally prohibited from creating generally applicable laws for any length of time, no matter how brief.

<sup>2</sup> It is also commonly referred to as a “county health center board of trustees.”

commission enacts a law to prevent the spread of contagious disease that is generally applicable to all individuals, schools, businesses, governments and other organizations, the legislature must determine that the order or ordinance is so necessary that a violation of the law justifies applicable criminal sanctions.

Further, the Missouri Constitution provides "that no law shall delegate to any commission, bureau, board or other administrative agency authority to make any rule fixing a fine or imprisonment as punishment for its violation." MO. CONST. art. 1, § 31. Thus, DHSS regulations that authorize a county health agency director to write a law cannot possibly be considered, within the statutory framework of Section 192.300, a county-wide law. To do so would violate the creation authority set forth in Mo. Rev. Stat. § 192.300 and the prohibition on criminal punishment set forth in Section 31 of Article I of the Missouri Constitution.

**4. The DHSS regulations, as implemented, violate the equal protection clause of the Missouri Constitution.**

Article I, Section II of the Missouri Constitution provides that "all persons are created equal and are entitled to equal rights and opportunity under the law." MO. CONST. art I, § 2. Equal protection of the law means "equal security or burden under the laws to everyone similarly situated; and that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes of persons in the same place and under like circumstances." *Kansas City v. Webb*, 484 S.W.2d 817 (Mo. banc 1972) citing *Ex Parte Wilson*, 330 Mo. 230, 48 S.W.2d 919, 921. Equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. *Id.*, citing *Missouri v. Lewis*, 101 U.S. 22, 31, 25 L.Ed. 989.

Throughout 2020 and 2021, Missouri's residents and businesses have been subjected to orders created and issued by bureaucratic edict outside the constitutionally mandatory legislative process. These orders substantially differ between counties even though COVID-19 is not a county-specific disease. Plaintiffs presented evidence that Missourians have been subjected to unconstitutionally created "health orders" that, for example, prohibit them from leaving their homes located in certain counties except for certain delineated reasons, permit worship services but prohibit Bible study, require churches in some counties to turn people away from their services if fire code capacity reaches 25%, require elementary students to wear masks indoors, even while playing basketball, and prohibited children from giving "high fives." Plaintiff Shannon Robinson was not permitted to have people over to her own home, even in masks, even socially distanced, because she has a large family and the number of people would exceed permitted attendance at her own dinner table. When she moved from St. Louis County to Franklin County, she could again have friends over. Restaurants have been unilaterally shut down even without any presence of infection and without inspection based on administratively issued "health orders" that violate the Constitution and have not been promulgated pursuant to the APA's procedural protections, while restaurants down the street in a neighboring county remain open. Children are removed from schools in some counties but not others, based on different masking rules issued by local health bureaucrats that are unconstitutionally created.

Plaintiffs presented evidence that these orders issued by health agency directors go into effect without public comment, and become effective once posted on the internet. These bureaucratic edicts are for an indefinite duration until they are removed or edited based on the opinion of the bureaucrat who wrote them.



Because DHSS permits discretionary orders on a county by county basis by bureaucrats in each respective county, Missourians have faced disparate treatment based on county lines. In a statewide pandemic as defined by 19 CSR 20-20.010(37), it is not fair or equitable for a business in one county to be arbitrarily closed down, when another business in another county experiencing the same exact pandemic situation is not also closed down for the same reasons. The DHSS regulations authorize arbitrary and capricious rulemaking that creates a substantial inequity among affected people and businesses. This is particularly true of those who live in a county with an overactive, unelected and unchecked bureaucrat intent on exerting power that is not similarly exerted in other counties by their unelected health bureaucrats.

Can it be said that COVID-19 knows to stop at specific county lines and does not travel over? It is completely irrational that, at this point in time, now that COVID-19 has spread across the globe, a first grader in Wildwood is not allowed to play sports, while a first grader in Jefferson County who lives less than a mile away is allowed to do so. Individual freedoms are affected in different ways throughout Missouri relating to the same COVID-19 illness thanks to the DHSS regulations that allow one person to make and enforce laws, and close things down with no standards other than a completely unappealable and unchallengeable "opinion" regarding public health protection. The DHSS regulations permit different treatment across county lines in a manner that is completely arbitrary and violates the equal protection clause of the Missouri Constitution, MO. CONST. art. II, § 1.

Missouri's local health authorities have grown accustomed to issuing edicts and coercing compliance. It is far past time for this unconstitutional conduct to stop.

For the foregoing reasons, this court issues the following orders:

- 1) This court declares that 19 CSR 20-20.040(2)(G) -(I), 19 CSR 20-20.040(6), including references to discretionary control measures contained in 19 CSR 20-20.010 et seq., violate the Missouri Constitution and Missouri statutes and are therefore invalid.
- 2) This court declares that 19 CSR 20-20.050(3) violates the Missouri Constitution and Missouri statutes and is therefore invalid.
- 3) The Director of the Department of Health and Senior Services, pursuant to Mo. Rev. Stat. § 536.022, shall file a notice of this court's action with the Missouri Secretary of State in accordance with the requirements of Mo. Rev. Stat. § 536.022.
- 4) The Missouri Secretary of State shall take action required by Mo. Rev. Stat. § 536.022(4) regarding placing a notice in the register and removing the invalid regulations from the register.
- 5) Consistent with Plaintiffs' request for relief that this Court deems just and proper, DHSS and local health authorities are ordered to refrain from taking actions pursuant to 19 CSR 20-20.010 et seq. that require independent discretion in a manner inconsistent with this opinion and inconsistent with the constitution's limitation on legislative delegations and the APA's limitations on rulemaking authority. This includes discretionary verbal or written orders for which the legislature has failed to provide specific standards or guidelines, and to the extent that standards or guidelines for a particular action have been provided, they must be followed.
- 6) Plaintiffs presented evidence that students are being excluded from schools by discretionary written or verbal order or direction of local health authorities. Consistent with Plaintiffs' request for relief that this Court deems just and proper, and to eliminate the need for additional plaintiffs to request this Court strike invalid applications of DHSS

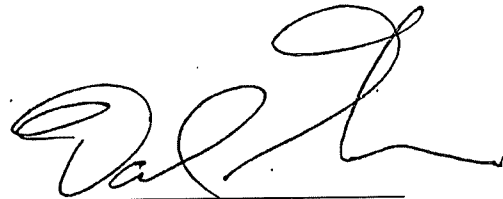
regulations regarding communicable disease, this Court directs DHSS to instruct local health authorities to refrain from issuing verbal or written orders regarding circumstances under which children can be excluded from school. 19 CSR 20-20.030(1) specifically provides that “persons suffering from a reportable disease or who are liable to transmit a reportable disease listed in 19 CSR 20-20.020(1)-(3) shall be barred from attending school.” “Liable” means in a position to incur transmission (<https://www.merriam-webster.com/dictionary/liable>). Without determining whether 19 CSR 20-20.030 is constitutional, it is clear that any quarantine and isolation rules, or rules that exclude students from school, created by a local health authority outside the language of 19 CSR 20-20.030, are prohibited.

- 7) Consistent with Plaintiffs’ request for relief that this Court deems just and proper, this Court orders that any and all discretionary orders or rules, whether written or verbal, that have been issued outside the protections of the Missouri Administrative Procedure Act and constitute a statement of general applicability that implements, interprets, or prescribes law or policy, or close a business based on the opinion or discretion of an agency official without any standards or guidance, by Director of the Department of Health and Senior Services and all local health authorities as defined by 19 CSR 20-20.010(26), are null and void.
- 8) Consistent with Plaintiffs’ request for relief that this Court deems just and proper, this Court orders the Director of the Department of Health and Senior Services to provide a copy of this order to all local health authorities throughout Missouri, and to post it with 19 CSR 20-20.010 et seq. in locations where the same is made publicly available by DHSS.

9) This court orders payment of Plaintiffs' attorney's fees and costs pursuant to Mo. Rev.

Stat. § 536.050.

Dated: 11/22/21

  
\_\_\_\_\_  
Daniel R. Green

## JaMel E. Ways

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**From:** Dave Dunning <DDUNNING2@neb.rr.com>  
**Sent:** Saturday, November 27, 2021 3:30 PM  
**To:** Richard W. Meginnis  
**Cc:** 'kathy\_dunning@hotmail.com'; Council Packet  
**Subject:** FW: Claim for damage to water heater and plumbing  
**Attachments:** 20211029\_091125.jpg; 20211029\_091135.jpg; 20211028\_200855.jpg; 20211029\_100653.jpg

Greetings.

We filed the claim below to the city attorney. When the city re-energized the water line, it blew the top off of our water heater as evidenced by the photos attached. A plumber talked in person with one of the city manager's on site the next day--Andy from LWS construction: 402-441-5921. Please see the attached documentation, including photos.

The original claim below had a typo--the damage occurred on October 28, not October 27.

The assistant city attorney, Danielle Rowley, denied our claim in a letter received on November 27.

The evidence of the city's responsibility in this matter is clear and overwhelming.

We are appealing to you as our city council representative to overturn the city attorney's decision and provide reimbursement for us.

Thank you for your consideration.

Best regards,  
Dave and Kathy Dunning  
402-423-0185

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From: "Dave Dunning"  
To: "claims@lincoln.ne.gov"  
Cc:  
Sent: Thursday November 4 2021 9:29:21AM  
Subject: Claim for damage to water heater and plumbing

November 4, 2021

City Attorney's Office

Lincoln, NE

Greetings.

Construction crews working on the city's water system in our neighborhood shut-off our water on Thursday, October 27, and re-energized the water system later that day. We had received notice the day before that water would be off for about 5 hours, but no warning about any potential household plumbing problems.

At about 8:30 p.m. on the evening of October 27, we found in our basement:

- the pipes to our water heater blown off of their connections to the water heater (see attached pictures) and significant flooding in our basement; and a
- dripping faucet in our bathtub immediately above the water heater.

We immediately called a plumber and turned off the water to the water heater and tripped the electric breaker serving the water heater. We spent hours removing water from our basement.

A plumber from Mark's plumbing came to our house on October 28 and spoke with Andy from the Lincoln Water System construction crew. The plumber said that the re-energized system definitely blew off the connections to the water heater, causing a catastrophic failure, and also damaged the cartridge in our bathtub plumbing. Both the water heater and the cartridge had to be replaced (see attached picture of new cartridge being installed).

The plumbing bill is included with this documentation. We are requesting \$1,446.75 as reimbursement to replace the water heater and bathtub cartridge. Since the plumbers were already at our house, I asked them to also replace another bathtub cartridge, and we are not asking reimbursement for that expense (half of \$29.76, or \$14.88). We are also not asking for reimbursement for our time to remove dozens of gallons of water from our basement or the expense to rent a vacuum to help remove the water.

Thank you for your consideration.

Best regards,

Dave Dunning

4707 Fir Hollow Lane

Lincoln, NE 68516

402-423-0185

ddunning2@neb.rr.com





# ENERGY GUIDE

EMERSON

water use  
Capacity of  
61 gal/ton  
Compare the  
Energy Use of  
Others before you go

1900

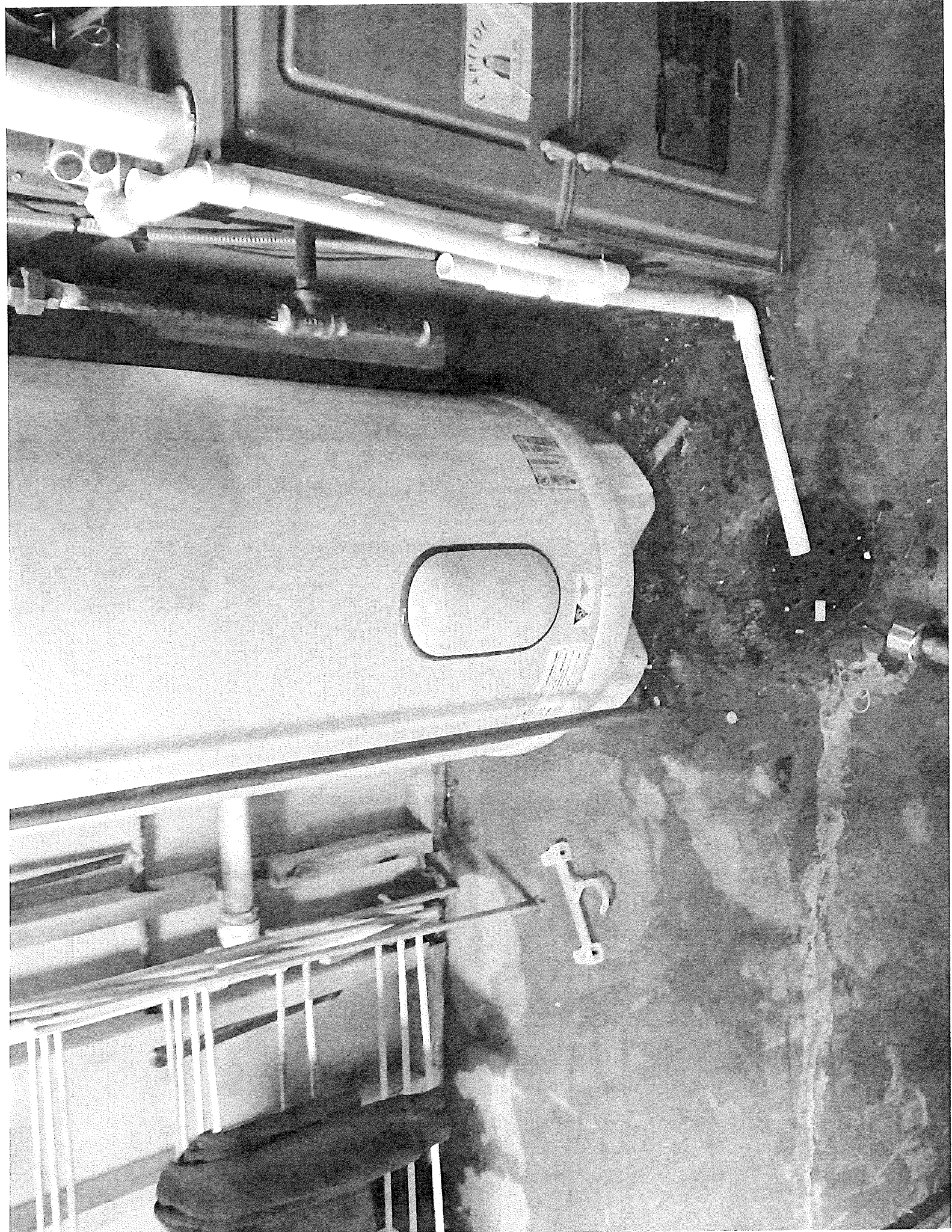


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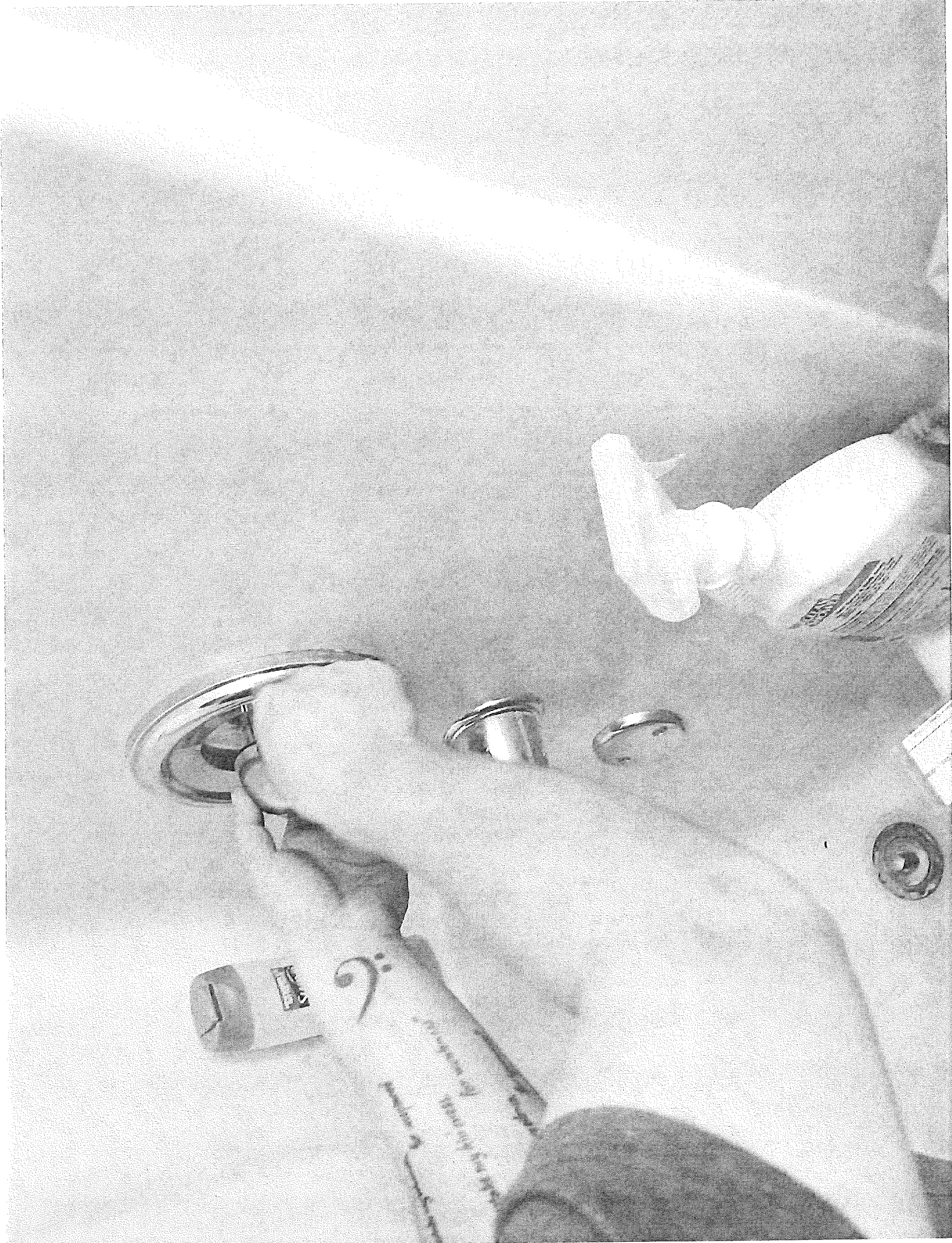
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**JaMel E. Ways**

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**From:** Carla L. Harris <CHarris@CLINEWILLIAMS.COM> on behalf of Andrew R. Willis  
<awillis@clnewilliams.com>  
**Sent:** Tuesday, November 30, 2021 10:28 AM  
**To:** Daniel K. Marvin; Council Packet  
**Cc:** Andrew R. Willis; Mike Works  
**Subject:** Northwest 48th Street Redevelopment Area  
**Attachments:** Letter re Northwest 48th St Redev. Area.pdf

Please find attached a letter executed by Mike Works with REV Development, LLC in support of the proposed blight and substandard declaration for the Northwest 48<sup>th</sup> Street Redevelopment Area. If you have any questions or wish to discuss, please do not hesitate to contact our office.

Thank you,



CARLA L. HARRIS | Legal Assistant  
CLINE WILLIAMS WRIGHT JOHNSON & OLDFATHER, L.L.P.  
233 South 13th Street | 1900 US Bank Bldg. | Lincoln, NE 68508  
Direct: 402.479.7122 | Main: 402.474.6900 | [www.clinewilliams.com](http://www.clinewilliams.com)  
Lincoln | Omaha | Aurora | Fort Collins | Holyoke

November 23, 2021

**VIA EMAIL: dmarvin@lincoln.ne.gov**

Daniel K. Marvin  
Director  
Urban Development Department  
City of Lincoln  
555 South 10<sup>th</sup> Street, Room 205  
Lincoln, NE 68508

**VIA EMAIL: councilpacket@lincoln.ne.gov**

City Council Members  
Lincoln City Council  
555 South 10<sup>th</sup> Street, Room 111  
Lincoln, NE 68508

Re: Northwest 48<sup>th</sup> Street Redevelopment Area

Dear Director Marvin and Members of the City Council:

I am writing this letter in support of the proposed blight and substandard declaration for the Northwest 48<sup>th</sup> Street Redevelopment Area. My company has certain property in the proposed redevelopment area under contract and we are in the due diligence phase to determine if the construction and development of multifamily housing will be feasible. We desire to include affordable housing as a significant portion of the units, but price increases of materials and labor have made affordable housing costs prohibitive without the use of TIF. The blight and substandard declaration would allow us to apply for TIF and make affordable housing in this area a realistic option.

I am happy to provide any additional information right now, and we will look forward to further discussions on our proposed housing project if the area is declared blighted and substandard and if tax increment financing is available. For now, it is enough to say that without the use of TIF, it is not feasible to include any affordable housing units in our proposed development, if it is feasible to build at all. Therefore, we support the blight and substandard declaration of the Northwest 48<sup>th</sup> Street Redevelopment Area and the opportunity for additional affordable housing development in the City of Lincoln.

Sincerely,



Mike Works  
Manager of REV Development, LLC

**JaMel E. Ways**

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**From:** Chris Niemann <chris@royouker.com>  
**Sent:** Tuesday, November 30, 2021 10:36 AM  
**To:** Council Packet  
**Subject:** Question regarding submittal to the City Council

Good Morning,

I submitted a request for some documentation to be presented to the City Council during their November 22 meeting. How do I find out if they received the information and if it was approved or denied? There are no minutes to refer to on the website.

Thank you,

Christine Niemann  
Office Manager  
R. O. Youker, Inc.  
402-477-7640  
chris@royouker.com

**RO YOUKER**  
STRUCTURAL ENGINEERING

## JaMel E. Ways

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**From:** Robert Borer <robertjborer@gmail.com>  
**Sent:** Tuesday, November 30, 2021 11:00 AM  
**To:** [dhhs.regulations@nebraska.gov](mailto:dhhs.regulations@nebraska.gov)  
**Subject:** DHHS 'Code' and We the People  
**Attachments:** Judgment-Ending-Health-Department-Orders.pdf; cms-injunction.pdf

Robert J. Borer  
Lincoln, NE 68516

November 30, 2021

Nebraska Dept. of Health and Human Services  
301 Centennial Mall South  
Lincoln, NE 68509  
[dhhs.regulations@nebraska.gov](mailto:dhhs.regulations@nebraska.gov)

To Whom it May Concern:

The proposed changes to Nebraska Administrative Code Title 173 Chapter 6 are nowhere near sufficient.

2020 went down as the year our nation (along with most of the rest of the world) was introduced to rank tyranny via orchestrated, lawless and blanket DHMs issued by unelected bureaucrats serving special interests. These bureaucrats made war on our God-given, inherent and inalienable rights to life, liberty, happiness (the pursuit thereof), private property, assembly, due process and equal protection. They made war on our Constitution. They made war on our Republic.

And they did it all largely unhindered. Our system of separate powers and checks and balances did not work. If our elected "servants" weren't party to the tyranny, they were too afraid to think for themselves and stand up to it (which is a function of our deeply flawed government school system).

The DHMs had no basis in common sense, sound logic, or actual, solid, reproducible science that included parallel control experiments. Completely baseless, foolish, divisive doctrines like asymptomatic spread and face-diaper prophylaxis were conjured up out of thin air (in pursuit of a globalist green new deal depopulation agenda).

The State has adopted, through special interest-lobbying, a very narrow and self-serving model of health care (germophobic, toxic, allopathic medicine) that is fundamentally defective and stands to make astronomical profits off their "diagnoses." In the last one hundred years of Big Pharma-dominated "health care," we have only gotten sicker. Much sicker. They sell "cures" to sick people that would make any healthy person sick.

Millions of us have thrived throughout "covid" without taking any of their so-called and nonsensical precautions, or any pharmaceuticals. We know what Big Pharma is about, we know where dis-ease comes from and we know how to take care of ourselves.

Big Pharma knows only three things (because these three things are highly profitable): Cut, burn and poison. Cut the "offending" body part out, burn the dis-eased tissue with radiation, and/or poison it with drugs. It's a model born of a philosophy of materialism/atheism. Dis-ease is looked upon as an invader from without rather than the absence of health from within due to malnutrition and toxicity. Millions died prematurely these past ~20 months, not from "covid," but from medical malpractice and government malfeasance in response to rebranded respiratory illness.

Nothing in our U.S. or State Constitution or Revised Statutes authorizes so-called public health officials to suspend the rights of healthy people. Our Constitution is the supreme law of Nebraska. All statutes, laws, codes and mandates in

conflict with it are null and void. The disparate "rules" from one county to another are proof of arbitrary and capricious rulemaking. County boundaries are not barriers to illness.

There is no inherent right to a hospital bed, and certainly not at the expense of our natural God-given rights. The idea is absurd on its face. Such a positive "right" would amount to enslaving others.

We the People (a very large portion) will not suffer this "long train of abuses and usurpations" again. We will no longer accept their lies and the regurgitated nonsense of the CDC and other corrupt, industry-controlled government agencies.

It has been said that, "The strength of the Constitution lies in the will of the people to defend it." We are up to the challenge. We have to be. How else can we expect elected officials to defend it (as their oath requires) if we aren't prepared to do the same?

We will be our own check and balance against tyranny from this point on. Since ours is no longer a government OF, BY and FOR the People, but of a privileged class of career politicians who choose not to be servants but rather aiders and abettors of these usurpers, we will stand up for ourselves. And we will do so enmass. Count on it.

NAC Title 173 Chapter 6 belongs in the trash.

See two very recent court decisions attached below.

Robert J. Borer

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

STATE OF MISSOURI, *et al.*,

Plaintiffs,

vs.

JOSEPH R. BIDEN, JR., *in his official capacity*  
*as the President of the United States of America*,  
*et al.*,

Defendants.

Case No. 4:21-cv-01329-MTS

**MEMORANDUM AND ORDER**

**I. INTRODUCTION**

This case concerns the Centers for Medicare and Medicaid Services' ("CMS") federal vaccine mandate on a wide range of healthcare facilities. On November 5, 2021, CMS issued an Interim Final Rule with Comment Period ("IFC") entitled "Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination" (the "mandate"), 86 Fed. Reg. 61,555 (Nov. 5, 2021), revising the "requirements that most Medicare- and Medicaid-certified providers and suppliers must meet to participate in the Medicare and Medicaid programs." 86 Fed. Reg. 61,555–601. Specifically, the mandate requires nearly every employee, volunteer, and third-party contractor working<sup>1</sup> at fifteen<sup>2</sup> categories of healthcare facilities to be vaccinated against SARS-

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<sup>1</sup> The mandate applies to a wide-range of people working at the facilities, including, employees, trainees, students, volunteers, or *contractors*, who provide any care, treatment, or *other* services for the facility. 86 Fed. Reg. at 61,570 (emphasis added).

<sup>2</sup> The CMS vaccine mandate covers fifteen categories of Medicare- and Medicaid-certified providers and suppliers: (1) Ambulatory Surgical Centers (ASCs); (2) Hospices; (3) Psychiatric residential treatment facilities (PRTFs); (4) Programs of All-Inclusive Care for the Elderly (PACE); (5) Hospitals (acute care hospitals, psychiatric hospitals, long term care hospitals, children's hospitals, hospital swing beds, transplant centers, cancer hospitals, and rehabilitation hospitals); (6) Long Term Care (LTC) Facilities, generally referred to as nursing homes; (7) Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICFs-IID); (8) Home Health Agencies (HHAs); (9) Comprehensive Outpatient Rehabilitation Facilities (CORFs); (10) Critical Access Hospitals (CAHs); (11) Clinics,



CoV-2 (“COVID”) and to have received at least a first dose of the vaccine prior to December 6, 2021. *See id.* at 61,573. On November 10, 2021, Plaintiffs, the States of Missouri, Nebraska, Arkansas, Kansas, Iowa, Wyoming, Alaska, South Dakota, North Dakota, and New Hampshire (collectively, “Plaintiffs”) filed a Complaint challenging the mandate. Doc. [1]. The Complaint seeks preliminary and permanent injunctive and declaratory relief. On November 12, 2021, Plaintiffs filed a motion for a preliminary injunction, Doc. [6], requesting that this Court issue a preliminary injunction enjoining Defendants from imposing the mandate.

Having fully reviewed the administrative record and submitted material, the Court finds that a preliminary injunction is warranted here.

## II. DISCUSSION

### A. The Court has jurisdiction.

Defendants argue that this Court “lacks jurisdiction” over Plaintiffs’ claims because “Congress has withdrawn federal-question jurisdiction over claims like this one that arise under the Medicare statute,” citing 42 U.S.C. § 405(h), as incorporated by 42 U.S.C. § 1395ii. Doc. [23] at 15–19. The Court does not agree. As Defendants readily concede, “State governments” such as the Plaintiff States are neither “institution[s]” nor “agenc[ies]” “dissatisfied” with the Secretary’s determination regarding eligibility or receipt of benefits under 42 U.S.C. § 1395cc(h)(1) and, therefore, “the States<sup>3</sup> themselves could not use that statute’s vehicle for judicial review.” *Id.* at 19; *see Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 16 (2000) (explaining that § 405(h) does not apply if application “would mean no review at all”). In

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rehabilitation agencies, and public health agencies as providers of outpatient physical therapy and speech-language pathology services; (12) Community Mental Health Centers (CMHCs); (13) Home Infusion Therapy (HIT) suppliers; (14) Rural Health Clinics (RHCs)/Federally Qualified Health Centers (FQHCs); and (15) End-Stage Renal Disease (ESRD) Facilities. 86 Fed. Reg. at 61,569–70.

<sup>3</sup> The Plaintiff States bring their claims in a number of capacities: sovereign, quasi-sovereign/*parens patriae*, and proprietary. *See, e.g.*, Doc. [1] ¶¶ 5, 7, 9.

addition, Plaintiffs' claims that arise under the Medicaid Act—as opposed to the Medicare Act—are not subject to the § 405(h)'s jurisdictional bar. *See Avon Nursing & Rehab. v. Becerra*, 995 F.3d 305, 311 (2d Cir. 2021) (“Unlike the Medicare Act, the Medicaid Act does not incorporate the Social Security Act’s claim-channeling and jurisdiction-stripping provisions, 42 U.S.C. § 405(g) and (h). Federal courts thus have jurisdiction over claims arising under the Medicaid Act pursuant to 28 U.S.C. § 1331.”). Thus, all aspects of the mandate that purport to change a Medicaid regulation are clearly not barred, even under Defendants’ arguments. Nonetheless, the Court finds that it has jurisdiction over claims arising under both Medicare and Medicaid.

**B. A preliminary injunction is warranted here.**

Plaintiffs seek a preliminary injunction of the mandate’s enforcement pending a full judicial review of the mandate’s legality. The Court addresses their request today. Whether a court should issue a preliminary injunction involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). “While no single factor is determinative, the probability of success factor is the most significant.” *Home Instead, Inc. v. Florance*, 721 F.3d 494, 497 (8th Cir. 2013) (internal quotations and citations omitted).

Each of these factors favors a preliminary injunction here.

***a. Plaintiffs demonstrate a likelihood of success on the merits.***

***i. Congress did not grant CMS authority to mandate the vaccine.***

Plaintiffs are likely to succeed in their argument that Congress has not provided CMS the authority to enact the regulation at issue here. “[A]n agency literally has no power to act, let alone

pre-empt<sup>4</sup> the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.” *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 357 (1986). While the Court agrees Congress has authorized the Secretary of Health and Human Services (the “Secretary”) *general* authority to enact regulations for the “administration” of Medicare and Medicaid and the “health and safety” of recipients, the nature and breadth of the CMS mandate requires clear authorization from Congress—and Congress has provided none.<sup>5</sup> *See Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486 (2021) (“It would be one thing if Congress had specifically authorized the action that the CDC has taken. But that has not happened.”). Courts have long required Congress to speak clearly when providing agency authorization if it (1) intends for an agency to exercise powers of vast economic and political significance; (2) if the authority would significantly alter the balance between federal and state power; or (3) if an administrative interpretation of a statute invokes the outer limits of Congress’ power. Any one of those fundamental principles would require clear congressional authorization for this mandate, but here, all three are present. Even in exigency, the Secretary cannot “bring about an enormous and

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<sup>4</sup> CMS intends for the mandate to preempt any arguably inconsistent state and local laws regarding vaccination. *See, e.g.*, 86 Fed. Reg. at 61,568 (“We intend . . . that this nationwide regulation preempts inconsistent State and local laws applied to Medicare- and Medicaid-certified providers and suppliers.”).

<sup>5</sup> The Court notes that Congress has provided the Secretary of Health and Human Services (the “Secretary”) authority to enact regulations “necessary to the efficient administration” of the Social Security Act and regulations “necessary to carry out the administration of” of Medicare. 42 U.S.C. §§ 1302(a), 1395hh(a)(1). Among the regulations the Secretary may promulgate under its power of “administration” is the setting of things like “standards,” “criteria,” or “requirements” for specific facilities. *See, e.g., Id.* at § 1396d(h)(1)(B)(i) (governing Psychiatric Residential Treatment Facilities (“PRTFs”) and mentioning “standards as may be prescribed in regulations by the Secretary”); *Id.* at § 1395i–4(e) (governing Critical Access Hospitals (“CAHs”) and mentioning “criteria as the Secretary may require”); *Id.* at § 1395rr(b)(1)(A) (governing End-Stage Renal Disease (“ESRD”) facilities and mentioning “requirements as the Secretary shall by regulation prescribe”). For some facilities, Congress has authorized the Secretary to set rules or conditions necessary to, or that will ensure, the “health and safety” of recipients of services. *See, e.g., Id.* at § 1395i–3(d)(4)(B) (addressing LTC facilities and mentioning “requirements relating to the health, safety, and well-being of residents . . . as the Secretary may find necessary”); *Id.* at § 1395x(e)(9) (addressing hospitals and mentioning “requirements as the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services”). However, the Court need not decide whether those regulations are properly interpreted by CMS to confer it authority to issue the vaccine mandate that it has. Instead, and irrespective of that determination, the Court’s inquiry focuses on whether Congress specifically authorized such action, for reasons discussed above.

transformative expansion in [his] regulatory authority without clear congressional authorization.”

*See Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

1. ***Given the vast economic and political significance of this vaccine mandate, only a clear authorization from Congress would empower CMS to act.***

*First*, Congress must “speak clearly when authorizing an agency to exercise powers of ‘vast economic and political significance.’” *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (quoting *Util. Air Reg.*, 573 U.S. at 324). The mandate’s economic cost is overwhelming. CMS estimates that compliance with the Mandate—just in the first year—is around 1.38 billion dollars. 86 Fed. Reg. at 61,613. Those costs, though, do not take into account the economic significance this mandate has from the effects on facilities closing or limiting services and a significant exodus of employees that choose not to receive a vaccination.<sup>6</sup> Likewise, the political significance of a mandatory coronavirus vaccine is hard to understate, especially when forced by the heavy hand of the federal government. Indeed, it would be difficult to identify many other issues that currently have more political significance at this time. Had Congress wished to assign this question fraught with deep economic and political significance to CMS, “it surely would have done so expressly.” *See King v. Burwell*, 576 U.S. 473, 486 (2015). “It is especially unlikely that Congress would have delegated this decision to [CMS], which has no expertise in crafting” vaccine mandates. *Id.*

2. ***Because this mandate significantly alters the balance between federal and state power, only a clear authorization from Congress would empower CMS.***

*Second*, Congress must use “exceedingly clear language if it wishes to significantly alter the balance between federal and state power.” *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (quoting

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<sup>6</sup> Medicare and Medicaid programs “touch[] the lives of nearly all Americans” and are two of the “largest federal program[s]” in the country. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1808 (2019). Even “minor changes” to the way those programs are administered “can impact millions of people and billions of dollars in ways that are not always easy for regulators to anticipate.” *Id.* at 1816.

*United States Forest Service v. Cowpasture River Preservation Assn.*, 140 S. Ct. 1837, 1850 (2020)); *see also United States v. Bass*, 404 U.S. 336, 349 (1971). The regulation at issue alters that balance because it requires vaccination, which CMS has never attempted to do, for millions of individuals who would otherwise be outside the reach of the federal government. This concern is “heightened” since CMS’s “administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.” *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001). It has long been the states’ power to legislate health—including vaccination. *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824) (noting “health laws of every description” belong to the states); *BST Holdings, L.L.C. v. Occupational Safety & Health Admin.*, 17 F.4th 604, ---, 2021 WL 5279381, at \*7 (5th Cir. 2021) (citing *Zucht v. King*, 260 U.S. 174, 176 (1922) (noting that precedent had long “settled that it is within the police power of a state to provide for compulsory vaccination”)). Sometimes “the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent” for an agency’s action. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012). With such a history of exclusive state power, the Court is far from certain that Congress intended the *Center for Medicare and Medicaid Services* to require mandatory vaccinations for millions of Americans. *See Bond v. United States*, 572 U.S. 844, 858 (2014) (noting “it is incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides the usual constitutional balance of federal and state powers” (internal quotations omitted)).

Truly, the impact of this mandate reaches far beyond COVID.<sup>7</sup> CMS seeks to overtake an area of traditional state authority by imposing an unprecedented demand to federally dictate the

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<sup>7</sup> Of course, this situation is novel and messy in that COVID has created a “unique pandemic scenario,” 86 Fed. Reg. at 61,568, but equally problematic is that it remains unclear that COVID-19—however tragic and devastating the pandemic has been—poses the kind of grave danger that justifies the federal government trampling on sovereign state

private medical decisions of millions of Americans. Such action challenges traditional notions of federalism, as discussed above. “The independent power of the States [] serves as a check on the power of the Federal Government: by denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.” *NFIB*, 567 U.S. at 536 (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)). This is especially true, since “a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

**3. *In the absence of a clear indication that Congress intended for CMS to invoke such significant authority, the Court will not infer congressional intent.***

*Third*, “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power,” Congress must provide “a clear indication that [it] intended that result.” *Solid Waste*, 531 U.S. at 172. This “requirement” stems from the “prudential desire not to needlessly reach constitutional issues.”<sup>8</sup> *Id.* And this requirement is “heightened” here since CMS’s claim “alters the federal-state framework by permitting federal encroachment upon a traditional state power.” *Id.* Whether Congress itself could impose the vaccination requirement is a tough question, cf. *BST Holdings*, 17 F.4th at ---, 2021 WL 5279381, at \*7 (Duncan, J., concurring), one that CMS would force to its crisis. But even if Congress has the power to mandate the vaccine

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rights. Regardless, disrupting this balance of power must have been expressly authorized by Congress, and as discussed, Congress has not.

<sup>8</sup> A court—especially a district court—should be reluctant to opine on an unsettled constitutional issue when the court can resolve a case on an alternative ground. See *Xiong v. Lynch*, 836 F.3d 948, 950 (8th Cir. 2016) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445, 108 (1988)) (“A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.”). And, at the very least, the Court should “pause to consider the implications of the [State’s] arguments” when confronted with such new conceptions of federal power. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 550 (2012) (quoting *Lopez*, 115 S. Ct. at 1624).

and the authority to delegate such a mandate to CMS—topics on which the Court does not opine today—the lack of congressional intent for this monumental policy decision speaks volumes.

In conclusion, even if Congress’s statutory language was susceptible to CMS’s exceedingly broad reading—which it is most likely not—Congress did not clearly authorize CMS to enact the this politically and economically vast, federalism-altering, and boundary-pushing mandate, which Supreme Court precedent requires.

ii. **CMS improperly bypassed notice and comment requirements.**

Even if CMS has the authority to implement the vaccine mandate—which the Court finds is unlikely, as discussed above—the mandate is likely an unlawful promulgation of regulations. Both the Administrative Procedure Act (“APA”) and the Social Security Act ordinarily require notice and a comment period before a rule like this one takes effect.<sup>9</sup> 5 U.S.C. § 553; 42 U.S.C. § 1395hh(b)(1). Failure to allow notice and comment, where required, is grounds for invalidating the rule. *Iowa League of Cities v. EPA*, 711 F.3d 844, 876 (8th Cir. 2013) (vacating a rule based on an administrative agency’s failure to abide by the APA’s notice and comment procedure). The notice and comment requirements do not apply if “good cause” establishes that they “are impracticable, unnecessary, or contrary to the public interest” under the circumstances. 5 U.S.C. § 553(b)(B). The exception is read narrowly and only used in “rare” circumstances. *Nw. Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1321 (8th Cir. 1981) (noting that the good cause exception should be “narrowly construed and only reluctantly countenanced”); *Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 764 (3d Cir. 1982) (noting “circumstances justifying reliance on [the good cause] exception are indeed rare and will be accepted only after the court has examined closely proffered rationales justifying the elimination of public procedures” (internal quotations omitted)).

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<sup>9</sup> The parties do not dispute that the notice and comment requirements applied to the mandate. 86 Fed. Reg. at 61,583.

CMS concedes it did not follow these requirements but attempts to justify its omission under the “good cause” exception. 86 Fed. Reg. at 61,583. Here, Plaintiffs are likely to succeed in their argument that CMS unlawfully bypassed the APA’s notice and comment requirements.

1. *CMS’s own delay undermines its “emergency” justification for bypassing notice and comment requirements.*

Use of the “good cause” exception is “limited to emergency situations” and is “necessarily fact-or context-dependent.” *Thrift Depositors of Am., Inc. v. Off. of Thrift Supervision*, 862 F. Supp. 586, 591 (D.D.C. 1994). Here, CMS’s delay in requiring mandatory vaccination undermines its contention that COVID is an emergency such that it has the “good cause” necessary to dispense with notice and comment requirements. In justifying the good cause exception, CMS stated that “[t]he data showing the vital importance of vaccination” indicates that it “cannot delay taking this action” to protect peoples’ health and safety. 86 Fed. Reg. at 61,583. Yet, CMS’s good cause claim is undermined by its *own* delay in promulgating the mandate. *See United States v. Brewer*, 766 F.3d 884, 890 (8th Cir. 2014) (“[C]oncern for public safety further is undermined by [the Attorney General’s] own seven-month delay in promulgating the Interim Rule.”); *Chamber of Com. v. United States Dep’t of Homeland Sec.*, 504 F. Supp. 3d 1077, 1089 (N.D. Cal. 2020) (finding an agency’s six-month delay in promulgating rules relating to COVID precluded presumption of urgency); *Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 115 (2nd Cir. 2018) (“Good cause cannot arise as a result of the agency’s own delay, because otherwise, an agency unwilling to provide notice or an opportunity to comment could simply wait until the eve of a statutory, judicial, or administrative deadline, then raise up the ‘good cause’ banner and promulgate rules without following APA procedures.” (internal quotations and



alterations omitted)). The CMS mandate was announced nearly two months<sup>10</sup> before the agency released it, and the mandate itself prominently features yet another one-month delay. Moreover, two vaccines were authorized under Emergency Use Authorization (“EUA”)<sup>11</sup> more than ten months before the CMS mandate took effect, and one vaccine was fully licensed by the FDA well over two months before.<sup>12</sup> It is also worth mentioning that since the onset of COVID, CMS has issued five IFC mandates, such as the one here; the most recent on May 13, 2021. 86 Fed. Reg. at 61,561. One could query how an “emergency” could prompt such a slow response; such delay hardly suggests a situation so dire that CMS may dispense with notice and comment requirements<sup>13</sup> and the important purposes they serve.

The COVID pandemic is an event beyond CMS’s control, yet it was completely within its control to act earlier than it did. *See* 86 Fed. Reg. at 61,583 (“CMS initially chose, among other actions, to encourage rather than mandate vaccination[.]”); *see id.* (explaining CMS had authority to impose vaccination requirements even when the only vaccines available were those authorized under EUAs in December 2020). The mere desire or need to have the mandate does not suffice for good cause. *Nat’l Ass’n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 621 (D.C. Cir. 1980) (“[G]ood cause to suspend notice and comment must be supported by more than the bare need to have regulations.”); *United States v. Cain*, 583 F.3d 408, 421 (6th Cir. 2009) (“A desire to provide

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<sup>10</sup> On September 9, 2021, the President announced his intention to promulgate federal vaccinate mandates, including the CMS vaccine mandate challenged here.

<sup>11</sup> The FDA issued vaccines under Emergency Use Authorization (“EUA”) for two COVID vaccines on December 11, 2020 and December 18, 2020. According to CMS, the agency *could have* imposed a vaccine requirement, even when the only vaccines available are those authorized under EUAs. *See* 86 Fed. Reg. at 61,583.

<sup>12</sup> On August 23, 2021, the FDA licensed the first COVID vaccine.

<sup>13</sup> The Court also takes note that CMS reviewed several communications from stakeholders in *favor* of the mandate. Thus, CMS apparently found it quite possible to consult with the interested parties it selected. *See, e.g.*, 86 Fed. Reg. at 61,565.

immediate guidance, without more, does not suffice for good cause.”). And good cause is not automatically created based on an agency’s conclusion that bypassing the notice and comment requirements is necessary to protect public safety.<sup>14</sup> *See Brewer*, 766 F.3d at 889 (finding agency’s stated reason of “protecting the public safety” was insufficient to waive notice and comment requirement); *Sorenson Commc’ns Inc. v. FCC*, 755 F.3d 702, 706 (D.C. Cir. 2014) (“To accord deference to an agency’s invocation of good cause would be to run afoul of congressional intent.”). COVID cannot be a compelling justification forever, *Does 1-3 v. Mills*, --- S. Ct. ---, 2021 WL 5027177, at \*3 (U.S. Oct. 29, 2021) (Gorsuch, J., dissenting), and CMS’s evidence shows COVID no longer poses the dire emergency it once did. *See, e.g.*, 86 Fed. Reg. at 61,583 (noting “newly reported COVID-19 cases, hospitalizations, and deaths have begun to trend downward at a national level”). Notably, today, there are three widely distributed vaccines. Additionally, there are several therapeutics and treatments, and as CMS states, more are on the horizon. *See, e.g., id.* at 61,609. Thus, CMS’s purported “emergency”<sup>15</sup>—one that the entire globe has now endured for nearly two years, and to which CMS itself demonstrated ease in responding to—is unavailing. *United States v. Reynolds*, 710 F.3d 498, 512–13 (3rd Cir. 2013) (“Most, if not all, laws passed . . . are designed to eliminate some real or perceived harm. If the mere assertion that such harm will continue while

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<sup>14</sup> Other circuits, like the Eighth, have held that protecting the public, without more, is insufficient to waive procedural requirements. *United States v. Reynolds*, 710 F.3d 498, 509 (3rd Cir. 2013); *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011); *United States v. Valverde*, 628 F.3d 1159, 1168 (9th Cir. 2010); *United States v. Cain*, 583 F.3d 408, 421–24 (6th Cir. 2009).

<sup>15</sup> CMS also asserted that there is an “emergency” *now* (such that CMS must immediately implement the mandate) because “the 2021–2022 influenza season” will soon begin. 86 Fed. Reg. at 61,584. CMS offered this justification while simultaneously admitting that “the intensity of the upcoming 2021–2022 influenza season cannot be predicted” and that “influenza activity during the 2020–2021 season was low throughout the U.S.” *Id.* For a “risk of future harm” to “justify a finding of good cause,” the “risk must be more substantial than a mere possibility.” *Brewer*, 766 F.3d at 890. Thus, CMS did not find a concrete “threat” to remedy but rather speculated as to a mere possibility of harm, and there is a “difference between addressing present legal uncertainty and addressing the possibility of future legal uncertainty.” *Id.* Notably, CMS did not mandate flu vaccines, despite mentioning that the flu has been daunting the healthcare system, that recent studies show approximately half of healthcare workers refuse the flu vaccine, *id.* at 61,568, and that CMS has evidence that influenza vaccination of health care staff is directly associated with declines in nosocomial influenza in hospitalized patients and nursing home residents. *Id.* at 61,557.

an agency gives notice and receives comments were enough to establish good cause, then notice and comment would always have to give way.”).

**2. CMS failed to meet its “good cause” burden, especially in light of the unprecedented, controversial, and health-related nature of the mandate.**

CMS also failed to meet its burden based on the unprecedented, controversial, and health-related nature of the mandate. *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984) (holding that the inquiry into an agency invoking “good cause proceeds case-by-case, sensitive to the totality of the factors at play”). CMS had the burden “to establish that notice and comment need not be provided.” *Nat. Res. Def. Council*, 894 F.3d at 113–14. In a situation like here, where there is significant and known opposition to the mandate, “good cause” is even more important than usual. *See, e.g., Asbestos Information Ass’n of N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 426 (5th Cir. 1984) (explaining that rules “may be more uncritically accepted after public scrutiny, through notice-and-comment rulemaking, especially when the conclusions it suggests are controversial”). The fact that this mandate effects issues relating to health<sup>16</sup> increases the importance even further. *See Nat’l Ass’n of Farmworkers*, 628 F.2d at 621 (“Especially in the context of health risks, notice and comment procedures assure the dialogue necessary to the creation of reasonable rules.”); *Cnty. Nutrition Inst. v. Butz*, 420 F. Supp. 751, 754 (D.D.C. 1976) (noting that “when a health-related standard such as this is involved, the good cause exemption may not be used to circumvent the legal requirements designed to protect the public”). Accordingly, CMS’s argument that undertaking normal notice and comment requirements would be “contrary to the public interest” based on delaying the mandate, *id.* at 61,586, is unavailing in light of the circumstances. *Alcaraz*, 746 F.2d at 612. Rather, these requirements “serve the public

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<sup>16</sup> CMS acknowledges that “[s]erious adverse reactions [] have been reported following COVID-19 vaccines.” 86 Fed. Reg. at 61,565.

interest by providing a forum for the robust debate of competing and frequently complicated policy considerations having far-reaching implications and, in so doing, foster reasoned decision making.” *Id.* They are far from “mere formalities.” *Id.*

Moreover, the failure to take and respond to comments feeds into the very vaccine hesitancy CMS acknowledges is so daunting. 86 Fed. Reg. at 61,559, 61,568. Besides fostering reasoned decision making, notice and comment “provide a ‘surrogate political process’ that takes some of the sting out of the inherently undemocratic and unaccountable rulemaking process.” *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1929 n.13 (Thomas, J., dissenting). Requiring already hesitant individuals to get the vaccine—without giving them an opportunity to be heard—undermines the democratic process that the APA’s procedural safeguards are intended to protect and exacerbates the underlying hesitancy problem. *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980) (according notice and comment great importance because it “reintroduce[s] public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies”). Far from being “good cause” for circumventing the normal rulemaking requirements, the unprecedented and controversial mandate affecting personal health constitutes a compelling reason to utilize those procedures, and CMS failed to provide the good cause necessary to overcome these factors.

In conclusion, because CMS’s “emergency” does not justify use of the “good cause” exception, see *Thrift*, 862 F. Supp. at 591, and the unprecedented, controversial, and health-related mandate requires more good cause than CMS provided, *Alcaraz*, 746 F.2d at 612, Plaintiffs are likely to succeed in establishing that CMS improperly invoked the 5 U.S.C. § 553(b)(B) “good cause” exception.

iii. **The mandate is arbitrary and capricious.**

Finally, Plaintiffs are likely to succeed in establishing that the CMS vaccine mandate is arbitrary or capricious. Under the APA, a court must “hold unlawful and set aside agency action” that is “arbitrary” or “capricious.” 5 U.S.C. § 706(2)(A). The APA’s arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. *Fed. Comm’n Comm’n v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021) (“A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision.”). Under this “narrow” and deferential standard of review, a court may not substitute its own policy judgment for that of the agency. *Id.* Rather, the court must ensure there is a “rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

1. *The mandate is arbitrary and capricious because the record is devoid of evidence regarding the covered healthcare facilities.*

CMS lacks evidence showing that vaccination status has a direct impact on spreading COVID in the mandate’s covered healthcare facilities. CMS acknowledges its lack of “comprehensive data” on this matter but attempts to “extrapolate” the abundant data that it does have on Long Term Care Facilities (“LTCs”), generally referred to as nursing homes, to the other dozen-plus Medicare and Medicaid facilities covered by the mandate. 86 Fed. Reg. at 61,585. However, CMS’s path of analysis appears misguided and the inferences it produced are questionable. *State Farm*, 463 U.S. at 43 (finding that in an arbitrary and capricious challenge, the court will “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned”). As CMS’s own record shows, COVID disproportionately devastates LTC facilities.

Residents of LTC facilities—who make up less than 1-percent of the U.S. population—accounted for more than 35-percent of all COVID deaths during the first twelve months of the pandemic. 86 Fed. Reg. at 61,566. Equally staggering is that “[o]f the approximately 656,000 Americans estimated to have died from COVID through September 10, 2021, 30-percent are estimated to have died during or after an LTC facility stay.” *Id.* at 61,601. Thus, CMS’s decision to extrapolate LTC data to justify its lack of data regarding the other fourteen facilities covered is likely not reasonable. *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (requiring agencies to engage in “reasoned decision making”); *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 220 (2016) (“[A]n agency must give adequate reasons for its decisions.”). While a wide-sweeping mandate might make sense in the context of LTCs, based on CMS’s evidence, CMS presents no similar evidence for imposing a broad-sweeping mandate on the other fourteen covered facilities. *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (“If [a] finding is not sustainable on the administrative record made, then the [agency’s] decision must be vacated[.]”). Although the Court appreciates its deferential review, the Court’s duty is not to “rubber-stamp” administrative decisions devoid of reasonableness. *Alaska Oil and Gas Ass’n v. Jewell*, 815 F.3d 544 (9th Cir. 2016) (“A court must not substitute its judgment for that of the agency, but also must not “rubber-stamp” administrative decisions.”).

In general, the overwhelming lack of evidence likely shows CMS had insufficient evidence to mandate vaccination on the wide range of facilities that it did. Looking even beyond the evidence deficiencies relating to the specific facilities covered, the lack of data regarding vaccination status and transmissibility—in general—is concerning. Indeed, CMS states that “the effectiveness of the vaccine[s] to prevent disease transmission by those vaccinated [is] not

currently known.”<sup>17</sup> 86 Fed. Reg. at 61,615.<sup>18</sup> CMS also admits that the continued efficacy of the vaccine is uncertain. *See, e.g., id.* at 61,612 (“[M]ajor uncertainties remain as to the future course of the pandemic, including but not limited to vaccine effectiveness in preventing ‘breakthrough’ disease transmission from those vaccinated, [and] the long-term effectiveness of vaccination[.]”). No one questions that protecting patients and healthcare workers from contracting COVID is a laudable objective. But the Court cannot, in good faith, allow CMS to enact an unprecedented mandate that lacks a “rational connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43; *see also Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006) (“Under the APA . . . the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.”). The reasoned explanation and evidentiary requirement “of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public.” *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019). If judicial review is to be more than an “empty ritual,” the Court here must demand something more than the explanation offered for the action taken by CMS here. *Id.*

**2. *The mandate is arbitrary and capricious because CMS improperly rejected alternatives to the mandate.***

CMS failed to consider or rejected obvious alternatives to a vaccine mandate without evidence. For example, CMS rejected daily or weekly testing—an option that even OSHA approved in its ETS—without citing any evidence for such a conclusion. 86 Fed. Reg. at 61,614.

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<sup>17</sup> “As explained in various places within this RIA and the preamble as a whole, there are major uncertainties as to the effects of current variants of SARS-CoV-2 on future infection rates, medical costs, and prevention of major illness or mortality. For example, the duration of vaccine effectiveness in preventing COVID-19, reducing disease severity, reducing the risk of death, and the effectiveness of the vaccine to prevent disease transmission by those vaccinated are not currently known.” 86 Fed. Reg. at 61,615.

<sup>18</sup> Also, CMS has no data showing forced vaccinations in the healthcare industry has stopped the spread of COVID in hospitals.

Rather, it assured that it “reviewed scientific evidence on testing” but “found that vaccination is a more effective infection control measure.” *Id.* at 61,614. As discussed elsewhere, this conclusion comes despite its admission that it lacks solid evidence<sup>19</sup> regarding transmissibility of COVID by the vaccinated. *Id.* at 61,615, 61,612. Although it is not the Courts duty to ask whether CMS’s decision was “the best one possible” or even whether there were “better [] alternatives,” *Federal Energy Regulatory Commission v. Electric Power Supply Ass’n*, 136 S. Ct. 760, 782 (2016), the Court must ensure there exists a “rational connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43.

As another example, CMS rejected<sup>20</sup> mandate alternatives in those with natural immunity by a previous coronavirus infection. 86 Fed. Reg. at 61,614 (noting “many uncertainties” about the immunity in those previously infected “compared to people who are vaccinated”). But, elsewhere, it plainly contradicts itself regarding the value of natural immunity. *Id.* at 61,604 (“[A]bout 100,000 a day have recovered from infection . . . . These changes reduce the risk to both health care staff and patients substantially, likely by about 20 million persons a month *who are no longer sources of future infections.*”) (emphasis added). Such contradictions are tell-tale signs of unlawful agency actions. *See State Farm*, 463 U.S. at 43 (finding agency action arbitrary and capricious if the agency explained its decision in a way that “runs counter to the evidence before the agency”); *see also Bethesda Health, Inc. v. Azar*, 389 F. Supp. 3d 32, 41 (D.D.C. 2019) (setting aside as arbitrary and capricious agency action that contradicts its own regulations).

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<sup>19</sup> Far from being reasonable to prohibit alternatives to vaccination, this constitutes a compelling reason to utilize, rather than reject, other alternatives before subjecting the public to a never-before CMS vaccine mandate.

<sup>20</sup> CMS also rejected natural immunity, despite an intense public debate and a trove of scientific data on the strength and durability of natural immunity from COVID-19—alone and compared to vaccine-induced immunity. *State Farm*, 463 U.S. at 43 (noting “the agency must examine the relevant data”).



3. *The mandate is arbitrary and capricious because of its broad scope.*

The broad scope of healthcare facilities covered by the mandate renders it arbitrary. The mandate applies equally to the varying healthcare facility types it covers, such as Psychiatric Residential Treatment Facilities (“PRTFs”) for individuals under age twenty-one, *see* 86 Fed. Reg. at 61,576, and LTCs, *see id.* at 61,575. But, at the same time, CMS acknowledges that the risk of COVID to those in the former age group is markedly smaller. *See, e.g., id.* at 61,610 n.247 (recognizing that “risk of death from infection from an unvaccinated 75-to 84-year-old person is 320 times more likely than the risk for an 18- to 29-years old person”); *id.* at 61,601 (“Among those infected, the death rate for older adults age 65 or higher was hundreds of time higher than for those in their 20s during 2020.”); *id.* at 61,566 (noting those aged 65 years and older account for more than 80-percent of U.S. COVID-19 related deaths). What is more, besides applying to all facilities equally, the mandate applies to all facilities’ staff equally, “*regardless of . . . patient contact.*” *Id.* at 61,570 (emphasis added). The mandate goes so far as to cover a third-party vendor’s “crew working on a construction project” whose members use the same bathrooms “during their breaks.” *Id.* at 61,571. CMS provides no reasoned<sup>21</sup> explanation for this overbroad approach, and it further belies its asserted interest in protecting patients from COVID.<sup>22</sup> *Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999) (“Where the agency has failed to provide a reasoned explanation, or where the record belies the agency’s conclusion, [the court] must undo its action.”).

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<sup>21</sup> As explained in *infra* note 24, upping vaccination nation-wide is not a “reasonable” reason for CMS to enact its mandate because the agency’s powers are limited to Medicare and Medicaid—not federalizing healthcare and reaching the general public. Rather, the overbroad approach indicates the pretextual nature of this mandate.

<sup>22</sup> The Court also notes that recently, on November 12, 2021, CMS itself revised its pandemic guidance for nursing home visitation, specifically opening facility visitation “*for all residents at all times*” by family and friends who are not required to be vaccinated. This also belies CMS’s asserted interest in protecting patients from COVID, and instead, shows that the mandate’s overbreadth is to increase the national vaccination rate by any means necessary.

4. *The mandate is arbitrary and capricious due to CMS's sudden change in course.*

CMS failed to adequately explain its contradiction to its long-standing practice of encouraging rather than forcing—by governmental mandate—vaccination. For years, CMS has promulgated regulations setting the conditions for Medicare and Medicaid participation; *never* has it required any vaccine for covered facilities' employees—despite concerns over other illnesses and their corresponding low vaccination rates.<sup>23</sup> As recent as this May, CMS adopted an IFC requiring education on COVID vaccines but again decided against forced vaccination.

It is generally “arbitrary or capricious” to depart from a prior policy *sub silentio*; when agencies contradict a prior policy, they must show “good reasons for the new policy.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *accord EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 510 (2014) (holding that agency “retained discretion to alter its course [under a regulation] provided it gave a reasonable explanation for doing so”). Here, CMS’s purported reason for changing its policy is to force those unwilling or hesitant to receive the vaccine into receiving it, all under the guise of protecting recipients of Medicare and Medicaid. *See* 86 Fed. Reg. at 61,583 (noting “CMS initially chose . . . to encourage rather than mandate vaccination” but “vaccine uptake among health care staff [was not] as robust as hoped for”); *id.* at 61,569 (noting that despite healthcare worker hesitation about the vaccine, “mandates have already been successfully initiated in a variety of health care settings, systems, and states”); *id.* at 61,560 (noting it was “compelled to require staff vaccinations for COVID-19” given its “responsibility to protect the health and safety of individuals . . . receiving care and services from for Medicare- and

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<sup>23</sup> In the Mandate, CMS discusses how influenza is a major problem plaguing the healthcare industry. Nonetheless, CMS states that half of healthcare workers resist the seasonal influenza vaccine nationwide, 86 Fed. Reg. at 61,568, but that it continues to “recommend” influenza vaccination rather than mandate it. *Id.* Even though CMS has evidence that influenza vaccination of health care staff is associated with declines in nosocomial influenza in hospitalized patients and nursing home residents. *Id.* at 61,557.

Medicaid-certified providers and suppliers”). But even if forcing the administration of a specific vaccine, into the otherwise unwilling, in an effort to protect the recipients of these programs could be a reasonable explanation to justify the extraordinary action—action that long has been the province of the states, see *Zucht*, 260 U.S. at 176 (noting that precedent had long “settled that it is within the police power of a state to provide for compulsory vaccination”); *Jacobson v. Massachusetts*, 197 U.S. 11, 25–26 (1905) (similar)—CMS has not shown that it is reasonable in this instance.<sup>24</sup> Rather, it specifically notes that the vaccines’ effectiveness to prevent disease transmission by those vaccinated is not currently known. 86 Fed. Reg. at 61,615 (noting “the duration of vaccine effectiveness in preventing COVID-19, reducing disease severity, reducing the risk of death, and the effectiveness of the vaccine to prevent disease transmission by those vaccinated are not currently known”).

***5. The mandate is arbitrary and capricious because CMS failed to consider or properly weigh necessary reliance interests.***

Because CMS changed course, it was required to “be cognizant that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’” *Fox Television*,

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<sup>24</sup> The inadequacy of the explanation for the reversal is especially true since Plaintiffs will likely succeed in demonstrating it is a pretextual rationale. See *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2575–76 (2019); *id.* at 2583 (Thomas, J., concurring in part and dissenting in part) (noting Court “opened a Pandora’s box of pretext-based challenges in administrative law”); *id.* at 2597 (Alito, J., concurring in part and dissenting in part). While a court may not set aside an agency’s policymaking decision “solely because it might have been influenced by political considerations or prompted by an Administration’s priorities,” *Department of Commerce*, 139 S. Ct. at 2573, an agency’s change in course “cannot be solely a matter of political winds and currents.” *North Carolina Growers’ Association, Inc. v. United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring). Plaintiffs have demonstrated that they could likely show pretext. See, e.g., Doc. [9] at 4 (citing Joseph Biden, Remarks at the White House (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/> (decrying “nearly 80 million Americans who have failed to get the shot” while announcing “a new plan to require more Americans to be vaccinated” and explaining that “[i]f you’re seeking care at a health facility, you should be able to know that the people treating you are vaccinated. Simple. Straightforward. Period.”); see also 86 Fed. Reg. at 61,601 (“the protective scope of this rule is far broader than the health care staff that it directly affects”); see also *id.* at 61,612 (“Staff vaccination will also provide significant community benefits when staff are not at work.”). The Court “cannot ignore the disconnect between the decision made and the explanation given.” *Dep’t of Com.*, 139 S. Ct. at 2575.

556 U.S. at 515. Ignoring reliance interests is necessarily arbitrary and capricious. *Id.* Yet, it appears this is what CMS did. An agency is required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns. *Regents*, 140 S. Ct. at 1915.

In concluding that the mandate's benefits outweigh the risks to the healthcare industry, CMS did not properly consider *all* necessary reliance interests of facilities, healthcare workers, and patients. 86 Fed. Reg. at 61,607–10. CMS looked only at evidence from interested parties in favor of the mandate, while completely ignoring evidence from interested parties in opposition. *Consumers Union of U. S., Inc. v. Consumer Prod. Safety Comm'n*, 491 F.2d 810, 812 (2d Cir. 1974) (noting agency “must not ignore evidence placed before it by interested parties”). In fact, CMS foreclosed these parties’ ability to provide information regarding the mandate’s effects on the healthcare industry, while simultaneously dismissing those concerns based on “insufficient evidence.” 86 Fed. Reg. at 61,569. But facts do not cease to exist simply because they are ignored, and “[s]tating that a factor was considered<sup>25</sup> is not a substitute for considering it.” *Texas v. Biden*, 10 F.4th 538, 556 (5th Cir. 2021) (internal quotations and alterations omitted); *Sierra Club*, 459 F. Supp. 2d at 100 (“Merely describing an impact and stating a conclusion of non-impairment is insufficient[.]”); *Gresham v. Azar*, 363 F. Supp. 3d 165, 177 (D.D.C. 2019) (“The bottom line: the Secretary did no more than acknowledge—in a conclusory manner, no less—that commenters forecast a loss in Medicaid coverage.”). Had CMS followed the proper procedural requirements,

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<sup>25</sup> Several times throughout the mandate, CMS acknowledges the countervailing effect it will have on the healthcare industry. *See, e.g.*, 86 Fed. Reg. at 61,607 (“currently there are endemic staff shortages for almost all categories of employees at almost all kinds of health care providers and supplier and these may be made worse if any substantial number of unvaccinated employees leave health care employment altogether”); *id.* at 61,567 (“and the urgent need to address COVID-related staffing shortages that are disrupting patient access to care, provides strong justification as to the need to issue this IFC requiring staff vaccination for most provider and supplier types over which we have authority.”). Yet, despite these acknowledged concerns about intensifying an already-existing healthcare crisis, CMS decided to move forward anyway, without properly considering the totality of interests affected by the mandate, such as rural hospitals.

States, healthcare providers, and healthcare workers would have submitted critical information to CMS—instead of to the Courts<sup>26</sup>—showing that the mandate portends a disaster for the healthcare industry, particularly in rural communities. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816, (2019) (requiring HHS to undertake notice-and-comment rulemaking, in part, because it “neglected to acknowledge the potential countervailing benefits”); *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 168 (2nd Cir. 2013) (explaining APA policies are “to ensure the agency has all pertinent information before it when making a decision”). By dispensing with those requirements, CMS ignored evidence showing that the mandate threatens devastating consequences to healthcare providers, staff, and patients throughout the nation.

Even if CMS did properly consider these reliance issues—which this Court finds it most likely did not—the scant evidence of record shows CMS was unable to adequately balance these reliance interests because it placed a rock on one side of the scale and a feather on the other. *Regents*, 140 S. Ct. at 1914 (failing to weigh reliance interests against competing policy concerns is arbitrary and capricious). And as already explained, these evidence deficiencies are solely a product of its own doing. So, either CMS entirely failed to consider an important aspect of the problem or failed to weigh the interests properly; regardless, either way the pendulum swings, CMS’s actions, or rather, inaction, violates basic tenants of administrative law. *Id.*; *State Farm*, 463 U.S. at 43 (noting that “entirely fail[ing] to consider an important aspect of the problem” is

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<sup>26</sup> It is not the job of this Court to collect evidence and opposition from affected parties; rather, this is the role, actually a duty, of CMS when promulgating a rule. See *District of Columbia v. United States Dep’t of Agriculture*, 496 F. Supp. 3d 213, 228 (D.D.C. 2020) (emphasizing that one purpose of notice and comment rulemaking is to “give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review”); *Hector v. U.S. Dept. of Agriculture*, 82 F.3d 165, 167 (7th Cir. 1996) (“Notice and comment rulemaking . . . facilitates the marshaling of opposition to a proposed rule, and may result in the creation of a very long record that may in turn provide a basis for a judicial challenge to the rule if the agency decides to promulgate it.”).

arbitrary and capricious); *Michigan*, 576 U.S. at 750–52 (noting “agency action is lawful only if it rests on a consideration of the relevant factors” and “important aspects of the problem”).

In conclusion, Plaintiffs likely can show the CMS mandate is arbitrary and capricious because the evidence does not show a rational connection to support implementing the vaccine mandate, the mandate’s broad scope, the unreasonable rejection of alternatives to vaccination, CMS’s inadequate explanation for its change in course, and its failure to consider or properly weigh reliance interests.

Accordingly, Plaintiffs’ challenges to the mandate show a great likelihood of success on the merits, and this fact weighs critically in favor of a preliminary injunction. *Home Instead*, 721 F.3d at 497 (“While no single factor is determinative, the probability of success factor is the most significant.” (internal quotations and citations omitted)).

**b. *Plaintiffs demonstrate irreparable harm.***

The Court must next determine whether Plaintiffs have shown that they are “likely to suffer irreparable harm in the absence of preliminary relief.” *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Plaintiffs must show more than a mere “possibility,” but they need not show a certainty; rather, they need to demonstrate “irreparable injury is *likely* in the absence of an injunction.” *Winter*, 555 U.S. at 22. Plaintiffs have done so here.

The Plaintiff States bring their claims in a number of capacities: sovereign, quasi-sovereign/*parens patriae*, and proprietary. *See, e.g.*, Doc. [1] ¶¶ 5, 7, 9. Through their various interests, they have shown irreparable injury is more than likely in the absence of an injunction.

*First*, Plaintiffs sovereign interests<sup>27</sup> are likely to suffer irreparable harm without a preliminary injunction because they will be unable to enforce their duly enacted laws surrounding vaccination mandates and providing proof of vaccination. *See, e.g.*, Mo. Rev. Stat § 67.265; 2021 Alaska Sess. Laws ch. 2, § 17; Ark. Code § 20-7-143; *see also, e.g.*, Ark. Code § 11-5-118. The mandate notes that it “preempts inconsistent State and local laws as applied to Medicare- and Medicaid-certified providers and suppliers.” 86 Fed. Reg. at 61,568. Generally, this preemption would be unremarkable. *See* U.S. Const. art. VI, § 2. But, as here, where CMS likely did not lawfully enact its mandate, Plaintiffs are harmed because they cannot enforce their duly enacted laws and no lawfully enacted regulation preempts them. The injury that results when a state cannot enforce “statutes enacted by representatives of its people” is irreparable. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *accord Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020) (“Prohibiting the State from enforcing a statute properly passed . . . would irreparably harm the State.”).

*Second*, Plaintiffs quasi-sovereign interests are likely to suffer irreparable harm without a preliminary injunction. Unlike the harm Plaintiffs likely would face to their sovereign interests—which though significant, is more abstract—the harm Plaintiffs likely would face to their quasi-sovereign interests would be observable and appreciable. Indeed, the likely harm would be *harm* in the colloquial sense—pain, suffering, distress. Plaintiffs have a quasi-sovereign interest “in the health and well-being—both physical and economic—of [their] residents, *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982), and Plaintiffs have put forth evidence that this mandate would have a detrimental effect on the health and well-being of their citizens.

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<sup>27</sup> The States also have an interest in seeing their constitutionally reserved police power over public health policy defended from federal overreach, as discussed in depth in section II.B.a.i.2.

Review of the affidavits filed in support of Plaintiffs' motion for preliminary injunction shows the harm to the physical health and well-being of their states' citizens if the mandate is not enjoined. The Plaintiffs' affidavits came from varying healthcare entities and associations in their states impacted by the mandate. The affiants describe existing and significant staffing shortages as well as open and unfilled positions for an extended period of time, some for more than a year. *See, e.g.*, Doc. [9-7] at 3; Doc. [9-11] at 3; Doc. [9-25] at 3; Doc. [9-3] at 4. The affidavits also demonstrate that the mandate will more than likely exacerbate the already-existing staffing problem. Many of the affidavits generally describe the number of individuals employed by the entity and the number or percentage of employees either known or reasonably known to have not been vaccinated.<sup>28</sup> *See, e.g.*, Doc. [9-4] at 3, 4; Doc. [9-3] at 4. Through talks, surveys, and direct conversations with staff, the affiants know the individuals that will leave employment if CMS goes ahead with its mandate. *See, e.g.*, Doc. [9-4] at 3; Doc. [9-5] at 3; Doc. [9-13] at 4; Doc. [9-19] at 3; Doc. [9-20] at 3. Already, in some cases, the mere announcement of CMS's mandate has compelled some to resign. *See, e.g.*, Doc. [9-26] at 2.

Staff reductions due to implementing the mandate, especially in light of the already understaffed healthcare facilities, will cause a cascade of consequences. *See, e.g.*, Doc. [9-16] at 3–6. The mandate's effect of reducing staff will decrease the quality of care provided at facilities, compromise the safety of patients, and place even more stress on the remaining staff. *See, e.g.*, Doc. [9-11] at 4. The mandate "creates a risk in patient safety" and will create "ongoing ripple effects on . . . patients, remaining employees and [the] community for some time in the future." Doc. [9-18] at 5. An affiant noted that "even if we can technically staff services with extra shift and call, we are already doing that, have been doing that for more than a year, and our vaccinated

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<sup>28</sup> CMS itself notes that rural hospitals are less vaccinated than urban. 86 Fed. Reg. at 61,613 (recognizing that "rural hospitals are having greater problems with employee vaccination . . . than urban hospitals").



staff will not be capable of doing it for much longer. At this point, considering it is nearly impossible to recruit clinical staff today, more will resign due to the stress and burnout that will inevitably exist.” Doc. [9-23] at 5.

The loss of certain staffing categories will diminish entire areas of care within a facility that inevitably implicate others. *See, e.g.*, Doc. [9-19] at 3 (warning of the loss of the only remaining anesthesiologist); Doc. [9-21] at 3 (warning of the loss of 80% of imaging department); Doc. [9-14] at 3; Doc. [9-18] at 4; Doc. [9-25] at 4. Facilities in rural locations, already hard-pressed to find qualified applicants regardless of vaccination status, will have to evaluate what healthcare services they could still safely provide, if any at all, in the region they serve. *See, e.g.*, Doc. [9-4] at 4; Doc. [9-7] at 3–4; Doc. [9-9] at 2–5; Doc. [9-12] at 4; Doc. [9-13] at 4; Doc. [9-19] at 3; Doc. [9-23] at 4. As an example, for a general hospital located in North Platte, Nebraska, implementation of the mandate would result in the loss of the *only* remaining anesthesiologist. Doc. [9-19] at 3. Understandably, without an anesthesiologist, there could be no surgeries—at all. Thus, such a loss irreparably causes a cascading effect on the entire facility and a wide-range of patients. Other examples show the mandate’s far-reaching implications not just on the administration of healthcare itself, but the functioning of the facilities in general. For example, the building manager of a nursing home in Memphis, Missouri states he will leave if the choice is between his job or the vaccine. Doc. [9-9] at 3–4. If the mandate takes effect, then, the nursing home would have “no one competent enough to run [the] building and [perform] all the complicated systems and required inspections.” *Id.* Also, this type of position is not the kind that can be filled “quickly, especially with today’s workforce and being in a rural setting.” *Id.* Other affidavits also detail an especially hard impact to emergency services in rural areas. *See, e.g.*, Doc. [9-21] at 2–3 (“If we lose our imaging department we will have to divert many of our emergency

patients to other facilities; the closest one is 45 miles away.”); Doc. [9-11] at 4 (explaining that in the event this hospital closes, the nearest one would be thirty miles away); Doc. [9-12] at 2–3 (similar); Doc. [9-16] at 6 (similar).

Further, the loss of staffing in many instances will result in *no care at all*, as some facilities will be forced to close altogether. For example, the Administrator of the Scotland County Care Center (SCCC), a nursing home located in Memphis, Missouri, notes that out of about sixty-five employees, twenty have indicated that they are opposed to taking the vaccine, and if the mandate is imposed, that they will quit.<sup>29</sup> Doc. [9-9] at 2. A loss of twenty staff members will cause SCCC to “close its doors” and displace residents that have lived in that community their entire lives. *Id.* at 5; *see also* Doc. [9-26] at 4. Thus, if the mandate goes into effect, it will irreparably harm patients<sup>30</sup> by impeding access to care for the elderly and for persons who cannot afford it—directly contrary to Medicare and Medicaid’s core objective of providing proper care. In sum, Plaintiffs’ evidence shows that facilities—rural facilities in particular—likely would face crisis standards of care or will have no choice but to close to new patients or close altogether, both of which would cause significant, and irreparable, harm to Plaintiffs’ citizens. *Kai v. Ross*, 336 F.3d 650, 656 (8th Cir. 2003) (finding “danger to plaintiffs’ health, and perhaps even their lives, gives them a strong argument of irreparable injury”).<sup>31</sup>

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<sup>29</sup> This includes SCCC’s billing and accounting staff members, which would create a “substantial disruption” in SCCC’s business functions, as well as their building plant manager, “that would leave me with no one competent enough to run my building and all the complicated systems and required inspections.” *Id.* at 4.

<sup>30</sup> Medicare and Medicaid programs “touch[] the lives of nearly all Americans” and are two of the “largest federal program[s]” in the country. *See Allina Health Servs.*, 139 S. Ct. at 1808.

<sup>31</sup> “No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). As already explained, CMS most likely does not have the authority to promulgate the mandate, and clear congressional authorization is also lacking. “Irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages.” *Rogers Group, Inc. v. City of Fayetteville, Ark.*, 629 F.3d 784, 789 (8th Cir. 2010) (quoting *Gen. Motors Corp. v. Harry Brown’s, L.L.C.*, 563 F.3d 312, 319 (8th Cir. 2009)). It follows then,

Besides the harm to physical health that Plaintiffs have shown will likely occur absent a preliminary injunction, the mandate also would have a negative effect on the economies in Plaintiff states, especially, once again, in rural areas.<sup>32</sup> While economic injuries normally would be reparable at law, “federal agencies generally enjoy sovereign immunity for any monetary damages.” *Wages & White Lion Invs., L.L.C. v. United States Food & Drug Admin.*, 16 F.4th 1130, 1142 (5th Cir. 2021); *see also* 5 U.S.C. § 702 (providing for an action seeking relief “other than money damages”). Therefore, the economic losses in Plaintiff states would be unrecoverable and thus irreparable. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (“The threat of unrecoverable economic loss, however, does qualify as irreparable harm.”); *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 882 (8th Cir. 2013).

*Fourth*, and finally, Plaintiffs would likely face irreparable harm to their proprietary interests absent a preliminary injunction. Plaintiffs themselves operate healthcare facilities that CMS’s mandate reaches. They therefore would face the same harms any private owner of a facility faces, like the “business and financial effects of a lost or suspended employee, compliance and monitoring costs associated with the Mandate, [or] the diversion of resources necessitated by the Mandate.” *BST Holdings*, 17 F.4th at ---. As just noted, since these costs could not be recovered from the federal government, they are irreparable. *Iowa Utils. Bd.*, 109 F.3d at 426.

For all these reasons, the Court finds that Plaintiffs are likely to suffer significant irreparable harm absent a preliminary injunction.

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that forcing individuals to choose “between their job(s) and their jab(s),” *BST Holdings*, 17 F.4th at ---, substantially burdens the liberty interests of individuals, which cannot be fully compensated through an award of damages.

<sup>32</sup> For example, Callaway District Hospital and Medical Clinics is the largest employer in Callaway, Nebraska and is a “significant driver of the local business and agriculture economy.” Doc. [9-12] at 4. The expected loss of staff would “almost certainly” lead to closure of the facility. *Id.* “Cherry County Hospital is a leader of employment” for its county. Doc. [9-16] at 6. “Kimball County Manor and Assisted Living employs 55 full time staff and as such is one of the largest employers in Kimball County, a rural county located in Nebraska’s western panhandle.” Doc. [9-22] at 3.

*c. The balance of equities tip in favor of Plaintiffs, and the public has an interest in an injunction.*

Finally, the Court must determine whether Plaintiffs have shown that the “balance of equities tips in [their] favor” and that “an injunction is in the public interest.” *Winter*, 555 U.S. at 20. Courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Id.* at 24. When the party opposing the injunction is the federal government, the balance-of-harms factor “merge[s]” with the public-interest factor. *Nken v. Holder*, 556 U.S. 418, 436 (2009).

The public has an interest in stopping the spread of COVID. No one disputes that. But the Court concludes that the public would suffer little, if any, harm from maintaining the “status quo” through the litigation of this case. Defendants argue that “enjoining the rule would harm the public interest by further exposing Medicare and Medicaid patients and staff—and the Medicare and Medicaid programs—to unvaccinated health care workers.” Doc. [23] at 48. But CMS’s own conclusions undercut this argument. *See id.* at 61,615 (“[T]he effectiveness of the vaccine to prevent disease transmission by those vaccinated [is] not currently known.”); *id.* at 61,612. Regardless, the pandemic has continued more than twenty months now. Vaccine rates rise every day, and more therapeutics and treatments for the virus are available than ever before. The status quo today, without the CMS mandate, is still far better than the public faced even just a few months ago.

And while, according to CMS, the effectiveness of the vaccine to prevent disease transmission by those vaccinated is not currently known, what is known based on the evidence before the Court is that the mandate will have a crippling effect on a significant number of

healthcare facilities in Plaintiffs' states, especially in rural areas,<sup>33</sup> create a critical shortage of services (resulting in *no medical care at all* in some instances), and jeopardize the lives of numerous vulnerable citizens. The prevalent, tangible, and irremediable impact of the mandate tips the balance of equities in favor of a preliminary injunction.

To be sure, the Court looks at the principles underlying preliminary injunctions. *Dataphase*, 640 F.2d at 113 n.5 (quoting *Love v. Atchison, T. & S. F. Ry. Co.*, 185 F. 321, 331 (8th Cir. 1911)) ("The controlling reason for the existence of the judicial power to issue a [preliminary] injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated."). Although the parties disagree on the magnitude of the mandate's disruption to the healthcare industry, both agree a disruption is certain and imminent. Thus, the importance of enjoining the mandate, and thus preserving the "status quo," is imperative. *Dataphase*, 640 F.2d at 113 (8th Cir. 1981) ("[T]he question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined."). And "[t]here is clearly a robust public interest in safeguarding prompt access to health care." *Whitman-Walker Clinic, Inc. v. DHS*, 485 F. Supp. 3d 1, 61 (D.D.C. 2020).

The Court finds that in balancing the equities, the scale falls clearly in favor of healthcare facilities operating with some unvaccinated employees, staff, trainees, students, volunteers, and

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<sup>33</sup> The disproportionate impact the mandate will have on rural communities is why CMA's "one-size-fits-all sledgehammer" approach does not work and in fact, undermines CMA's focus on providing proper care. See *BST Holdings*, 17 F.4th at ---. This is why healthcare matters are typically left to the States, because these policy decisions are matters dependent on local factors and conditions, and Federalism allows States to tailor such matters in the best interests of their communities. The Court agrees with Plaintiffs point that whatever might make sense in Chicago, St. Louis, or New York City, could be actually counterproductive and harmful in rural communities like Memphis (MO) or McCook (NE). Doc. [1] at 1–2.

contractors, rather than the swift, irremediable impact of requiring healthcare facilities to choose between two undesirable choices—providing substandard care or providing no healthcare at all.<sup>34</sup>

It is true that the Agency would face irreparable harm *if* it is unable to enforce a *properly authorized* and *enacted* regulation. But, as discussed above, the Court has concluded CMS likely did not enact the mandate at issue lawfully. Thus, any interest CMS may have in enforcing an unlawful rule is likely illegitimate. *See BST Holdings*, 17 F.4th at ---. By this same conclusion, the public would benefit from the preliminary injunction because it would ensure that federal agencies do not extend their power beyond the express delegation from Congress, as already discussed. And while “it is indisputable that the public has a strong interest in combating the spread of COVID-19,” “our system does not permit agencies to act unlawfully even in pursuit of desirable ends.” *Ala. Ass’n of Realtors*, 141 S. Ct. at 2490.

In conclusion, CMS mandate raises substantial questions of law and fact that must be determined, as discussed throughout this opinion. Because it is evident CMS significantly understates the burden that its mandate would impose on the ability of healthcare facilities to provide proper care, and thus, save lives, the public has an interest in maintaining the “status quo” while the merits of the case are determined. *Dataphase*, 640 F.2d at 113; *Love*, 185 F. at 331.

### III. CONCLUSION

For the foregoing reasons, Plaintiffs’ Motion for Preliminary Injunction, Doc. [6], is **GRANTED**.

Accordingly,

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<sup>34</sup> CMS also discusses that the upcoming influenza season will further exacerbate the strain on the healthcare system. However, one would assume that the onset of flu season coupled with COVID would be a reason to *avoid* critical staffing shortages at healthcare facilities—not to exacerbate them.

**IT IS HEREBY ORDERED** that Defendants are preliminarily enjoined from the implementation and enforcement of 86 Fed. Reg. 61,555 (Nov. 5, 2021), the Interim Final Rule with Comment Period entitled “Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination,” against any and all Medicare- and Medicaid-certified providers and suppliers within the States of Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming pending a trial on the merits of this action or until further order of this Court. Defendants shall immediately cease all implementation or enforcement of the Interim Final Rule with Comment Period as to any Medicare- and Medicaid-certified providers and suppliers within the States of Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming.

**IT IS FURTHER ORDERED** that no security bond shall be required under Federal Rule of Civil Procedure 65(c).

Dated this 29th day of November, 2021.

A handwritten signature in black ink, appearing to read 'Matthew T. Schelp', written over a horizontal line.

MATTHEW T. SCHELP  
UNITED STATES DISTRICT JUDGE

## JaMel E. Ways

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**From:** Elina Newman <newmanforlincoln@gmail.com>  
**Sent:** Tuesday, November 30, 2021 4:43 PM  
**To:** Council Packet; Mayor; Pat D. Lopez  
**Subject:** Hesitancy is warranted!

Hi all,

It is never easy for me to write emails like this because the lack of transparency and accountability is so blatant at this point that it's literally impossible to ignore. What are we looking at? The top picture (scroll to the bottom of the email) is a screenshot of an article two days ago ... in Forbes. The bottom picture is the same article today, clicked on the link ... title changed and altered. Has the content been changed? I'm sure. Why? Because it didn't fit the narrative. This is the same way the definitions surrounding this entire pandemic have changed (i.e., definitions of vaccine, herd immunity, doctors' ability to prescribe outside of FDA approval parameters, etc). I have testified in front of you before...that science involves asking questions, yet, people are constantly shot down for asking those questions, made to feel inferior for asking questions, and being called misinformed or disinformed. According to whom? Who decides what's misinformation and what's disinformation? It's obviously a 50/50 split in the medical community.

Why do I care? I care because people continue to be actively misled (i.e., this article). The carrot keeps moving, keeps changing. I care because people can't make informed decisions, the hallmark of our healthcare system. Why should you care? That is something I encourage you to really think about. People have been told "trust us" for the past year and a half. Unfortunately, that trust is wearing thin, extremely thin. It doesn't make it any easier when things like this pop up...blatant disregard, blatant lies, blatant manipulation. Should people mistrust? Absolutely. Should they be hesitant? Why wouldn't they be?

People have been lied to ... manipulated, used, and conned. Back and forth... know, don't know. They've been threatened; their livelihoods impacted. For what? We don't know ... STILL ... 16 variants later. It is this disregard for the fellow human is yet another reason why people mistrust.

I appreciate everything that the Attorney General and the Governor have been doing in this state, the work that their offices have been doing to allow doctors who are on the other side of the fence to continue to take care of their patients in the way that THEY and THEIR PATIENTS deem necessary (AGs 48 page paper about the use of Ivermectin and hydroxychloroquine) and to keep the Federal government at bay. If you haven't read it, I kindly urge that you do so. It's filled with nuggets of information, legitimate information. If you haven't been following closely, I would urge you to also check out the AGs Facebook page and his website. 2 of the 3 Federal mandates are/have been halted for now ... The government has tried to force itself into every aspect of people's lives, including but not limited to what to inject them and their children with, what constitutes a religious exemption, what is an appropriate reason for their exemption, what is an appropriate medical exemption, and the like. All are unethical, unconstitutional actions ... all because they've been allowed to do so ... unconstitutionally.

While I realize you all have no control over Forbes, it is my mission and purpose (from the first day I testified before you) to keep you apprised of what is happening on the outside of the policies and mandates that you may not be aware of. So, when people in front of you label others in this community as "anti-vaxers," "anti-maskers," "murderers," "selfish," among many other nasty names ... I would hope that you would stand up and correct those labels and promote care, concern, and true representation of those in your districts. We are all living our own little version of hell on earth, and no one, I mean no one, deserves to be labeled and name called when the powers that be can't even get it straight, can't get it right, and are downright acting unconstitutionally and illegally.

Elina Newman, PhD, CPhT



# Yes, The Vaccine Your DNA. A Tiny That's A Good Th

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Today 1:05 PM

## Covid Vaccines Don't Alter Your DNA – They Help Choos Cells To Strengthen Your Immune Response



**Steven Salzberg**

Contributor ⓘ

Healthcare

Follow

## JaMel E. Ways

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**From:** Elina Newman <newmanforlincoln@gmail.com>  
**Sent:** Wednesday, December 1, 2021 9:53 PM  
**To:** Council Packet; Mayor; Pat D. Lopez  
**Subject:** PFIZER is NOT interchangeable with COMIRNATY...reason to mistrust once again

Hi again,

Another piece of evidence...a reason to mistrust...a reason to ask questions. This gem was just released today. Trust is earned; it is not given. Once it's lost, it can rarely be regained.

[https://childrenshealthdefense.org/defender/judge-allen-winsor-pfizer-eua-comirnaty-vaccines-interchangeable/?fbclid=IwAR1b\\_jmv9LC74OHwl\\_rTzwBNkcgN6hg-8mVaPhBL4st0pONENnA4rI\\_3c4Q](https://childrenshealthdefense.org/defender/judge-allen-winsor-pfizer-eua-comirnaty-vaccines-interchangeable/?fbclid=IwAR1b_jmv9LC74OHwl_rTzwBNkcgN6hg-8mVaPhBL4st0pONENnA4rI_3c4Q)

The health department should be prepared to vet people's angry concerns over this. Pfizer under EUA (given now) and Comirnaty are NOT interchangeable, meaning they are not the same. So, this entire time, some doctors and nurses have been telling people that it (vaccine given now...Pfizer under EUA) is approved. During Tuesday's COVID updates, people have been told that the Pfizer vaccine (one under EUA) is approved. Companies have forced employees to take it (Pfizer vaccine under EUA) under the pretense that it has been approved. This is what lack of informed consent does.

The article states, "Under law, everyone has the 'right to refuse' EUA product... When the FDA approved Pfizer's Comirnaty COVID-19 vaccine in August, approval was accompanied by a series of confusing documents and equally confusing public statements." For those ignoring true science, can we start paying attention now? Can we start paying attention to legitimate concerns that people have?

Dr. Elina Newman, CPhT

Please update your records to my new email address: [newmanforlincoln@gmail.com](mailto:newmanforlincoln@gmail.com)