**VERMONT SUPERIOR COURT**
**WASHINGTON UNIT**
**CIVIL DIVISION**

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| AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VERMONT,<br><br>Plaintiff,<br><br>v.<br><br>DR. MARK LEVINE, COMMISSIONER, VERMONT DEPARTMENT OF HEALTH; VERMONT DEPARTMENT OF HEALTH; and OPIOID SETTLEMENT ADVISORY COMMITTEE,<br><br>Defendants. | Civil Action No. _____ |

## COMPLAINT

The American Civil Liberties Union Foundation of Vermont (ACLU-VT) hereby complains against Dr. Mark Levine, in his official capacity as Commissioner of Health and nonvoting Chair of the Opioid Settlement Advisory Committee; the Department of Health; and the Opioid Settlement Advisory Committee for violations of Vermont's Open Meeting Law, 1 V.S.A. §§ 310 *et seq.*, and Vermont's Public Records Act, 1 V.S.A. §§ 315 *et seq*.

## NATURE OF THE CLAIM

1. ACLU-VT files this action for declaratory and injunctive relief to vindicate the public's right to know and right to participate in governmental matters of critical importance to Vermonters.

2. Specifically, the General Assembly created a public body, the Opioid Settlement Advisory Committee (Committee), to provide expert advice regarding Vermont's use of settlement moneys received from opioid distributors, marketers, and manufacturers.

3. Consistent with its mandate to prioritize life-saving interventions, the Committee has overwhelmingly supported the funding of designated overdose prevention centers (OPCs)—supervised consumption facilities where trained

staff can connect individuals to services and intervene in the event of an overdose or medical emergency.

4. Governor Phil Scott, however, does not support OPCs.

5. At its final public meeting in 2023, the Committee expressed consensus support for OPCs and made clear that it wished to recommend OPC funding to the General Assembly as one of its top priorities.

6. Dr. Mark Levine, Commissioner of Health and nonvoting chair of the Committee, assured the Committee that its recommendations would appear in a codified document for the legislature and that the Committee would have the chance to review specific language detailing its expert recommendations.

7. But following the final meeting of 2023, Dr. Levine contacted the Governor's Office regarding the Committee's recommendations. The Department of Health has refused to disclose these discussions or communications to the public, citing executive privilege.

8. Public records reveal, however, that the Governor's Office requested at least one specific change to the recommendations.

9. Following those conversations with the Administration, the Department of Health, in private, removed specific funding for OPCs from the Committee's recommendations, reallocating approximately $2.6M to other initiatives.

10. The supposed explanation for this change was that then-pending—but not enacted—legislation, H.72, could provide alternative funding for OPCs. At the December 2023 meeting, however, Dr. Levine and others advised that the Committee should not focus on specific funding amounts or specific funding sources, instead emphasizing that it was the substantive recommendation for OPCs itself that mattered.

11. The Governor, moreover, was opposed to legislation like H.72—which he ultimately vetoed in June 2024.

12. The Commissioner shared the Administration's changes to the recommendations with the Committee via email before sending the recommendations to the legislature in the Committee's name, over several Committee members' objections.

13. The Commissioner's memo to the legislature represented that the recommendations—which excluded OPCs—were on behalf of the Committee and reflected its expert consensus, even though the Committee had never approved the recommendations and one of its critical priorities had been unilaterally removed.

14. The Department then posted to the Committee's official website the revised recommendations along with minimal—and late—minutes for the December 2023 meeting, again suggesting that the Administration's changes had reflected the Committee's work in open meeting.

15. Confronted with their actions, the Administration and Department have vehemently denied wrongdoing or political interference—but continue to withhold their deliberations and communications from the public.

16. Because the nonvoting chair and the Administration's actions violated Vermont's Open Meeting Law and the Public Records Act, Plaintiff ACLU-VT now sues to vindicate the public's right to hold their officials accountable for their actions, and to remedy the Administration's usurpation of the Committee's expert harm-reduction mandate.

## PARTIES

17. Plaintiff American Civil Liberties Union Foundation of Vermont (ACLU-VT) is a non-profit 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases and educates the public about civil rights and civil liberties issues across Vermont. ACLU-VT is headquartered in Montpelier, Vermont.

18. Defendant Dr. Mark Levine is Vermont's duly appointed Commissioner of Health. In that role, he directs the Department of Health, including in all decisions regarding public records. As Commissioner, he also serves as the nonvoting chair of the Opioid Settlement Advisory Committee. *See* 18 V.S.A. § 4772(b)(1)(A).

19. Defendant Department of Health is a "public body" within the meaning of 1 V.S.A. § 310(4) and a "public agency" within the meaning of 1 V.S.A. § 317(a)(2).

20. Defendant Opioid Advisory Settlement Committee is a "public body" within the meaning of 1 V.S.A. § 310(4) and a "public agency" within the meaning of 1 V.S.A. § 317(a)(2).

## JURISDICTION AND VENUE

21. This court has jurisdiction over the subject matter of this dispute and is an appropriate venue pursuant to 1 V.S.A. § 314(c) and 1 V.S.A. § 319(a).

## FACTUAL ALLEGATIONS

### A. Seeking to center those most affected by the opioid crisis, the General Assembly creates the Opioid Settlement Advisory Committee.

22. Opioid use and opioid overdoses have ravaged Vermont communities for roughly the last decade. *See, e.g.*, The State of the Opioid Crisis in Vermont Today, University of Vermont (Dec. 8, 2023), https://www.uvm.edu/sites/default/files/Department-of-Political-Science/vlrs/Health/The_State_of_the_Opiate_Crisis.pdf.

23. To hold the architects of this public health crisis accountable, Vermont joined numerous other states and localities in suing many of the largest opioid manufacturers, marketers, and distributors. *See*, *e.g.*, Vermont Attorney General's Executive Summary of Opioid Distributors and J&J Settlements (Sept. 14, 2021), https://ago.vermont.gov/sites/ago/files/wp-content/uploads/2021/09/9-13-21-Executive-Summary-final.pdf.

24. In 2021 and 2022, Vermont—along with other plaintiffs—reached settlement agreements with over a dozen entities, whereby defendants would pay billions of dollars to states devastated by the opioid crisis. *See* Frequently Asked Questions about the 2022 National Opioid Settlements with Teva, Allergan, Walmart, Walgreens, and CVS, https://nationalopioidsettlement.com/wp-content/uploads/2023/02/2022-National-Opioids-Settlements-FAQs-02-02-2023.pdf.

25. To ensure that the settlement money reached Vermonters with the greatest need, the General Assembly created an Opioid Abatement Special Fund to receive these funds, as well as an Opioid Settlement Advisory Committee to inform how these funds should be spent. *See* H.711 (2022).

26. As made clear in its enabling legislation, the Opioid Settlement Advisory Committee is intended to harness a diverse—and specific—range of views in addressing Vermont's opioid crisis. In deciding how the State should allocate its settlement money, the statute calls for a particular composition of legislators, researchers, an assistant judge, multiple individuals with public health experience, two individuals with lived experience of opioid use disorder, and representatives from across Vermont. 18 V.S.A. § 4772(b). The statute makes clear that, in furthering the Committee's critical work, the Department of Health shall provide "administrative, technical, and legal assistance." *Id*. § 4772(d). The Commissioner of Health, however, shall serve only as a "nonvoting" chair. *Id.* § 4772(b)(1)(A).

27. Against that diverse backdrop of views, the enabling legislation repeatedly emphasizes that the Committee exists to center the voices of Vermonters directly affected by the opioid crisis. The statute mandates, for example, that

the Committee should "ensure inclusion of individuals with lived experience of opioid use disorder and their family members whenever possible," *id.* § 4772(b)(1), and is required to "demonstrate broad ongoing consultation with individuals living with opioid use disorder about their direct experience with related systems," ranging from medication assisted treatment, recovery services, harm reduction infrastructure, and more, *id.* § 4772(c).

28. In creating the Committee and the Fund, the legislature further emphasized its intent that settlement money reach those most at-risk: the "[p]riority for expenditures from the Opioid Abatement Special Fund," the legislation spells out, "shall be aimed at reducing overdose deaths." *Id.* § 4774(c).

29. The enabling legislation also dictates how the Committee is to do its work of providing expert advice. Each year, the Committee is directed to "present its recommendations . . . to the Department of Health" and "concurrently submit its recommendations in writing to the House Committees on Appropriations and on Human Services and the Senate Committees on Appropriations and on Health and Welfare." *Id.* § 4772(e). The Department and the legislature, in other words, would receive the Committee's expert recommendations simultaneously.

30. But the advisory committee is just that: advisory. Since only the Department of Health is authorized to request and receive expenditures, the enabling legislation clarifies that, having received the Committee's suggestions at the same time as the legislature, the Department must then "submit a spending plan to the General Assembly, informed by the recommendations of the Opioid Settlement Advisory Committee," asking for specific sums to be remitted from the fund. *Id.* § 4774(a)(2).

31. Under this dual structure, the legislature clearly intended for any disagreement or deviation between the views of the Department and the views of the Committee to be made apparent: the legislature would first receive the Committee's suggestions at the same time the Department receives them, *see id.* § 4772(e), and could then compare those suggestions to any official spending request ultimately made by the Department, *see id.* § 4774(a)(2). That way, there would be clear accountability as to where a specific funding request originated or whether the Department or Commissioner had deviated from the Committee's expert advice in any way.

32. Finally, the legislature made clear that the Committee's decisions—including its legislative submissions—should be public and transparent. The enabling legislation expressly incorporates Vermont's Open Meeting Law, *see id.* § 4772(f)(4), and dictates that the Committee "adopt procedures to govern its proceedings and organization, including voting procedures," *id.* § 4772(f)(3).

**B. Effecting its mandate to prioritize life-saving interventions, the Opioid Settlement Advisory Committee overwhelmingly supports using settlement funds for overdose prevention centers during its December 22, 2023, meeting.**

33. Over the course of 2023, the Committee heard and considered numerous proposals for allocating settlement funds. Implementing its statutory mandate to "[p]riorit[ize] . . . reducing overdose deaths," *id.* § 4774(c), the Committee devoted substantial time and attention to exploring funding overdose prevention centers—supervised consumption facilities where trained staff can connect individuals to services and intervene in the event of an overdose or medical emergency, *see, e.g.*, Minutes, Opioid Settlement Advisory Committee (May 23, 2023), https://www.healthvermont.gov/sites/default/files/document/dsu-osac-minutes-05.23.23.pdf; Brandon DL Marshall, *The Science Behind Overdose Prevention Centers (OPCs): Testimony to Vermont Opioid Settlement Advisory Committee* (May 23, 2023), https://www.healthvermont.gov/sites/default/files/document/DSU-OSAC-Testimony%20-05.23.23.pdf.

34. The Committee's last annual meeting of 2023 was intended to finalize its recommendations for the legislature for financial year 2025. In advance of the December 22, 2023, meeting, Department of Health employee Sarah Gregorek circulated a document to the Committee members laying out the various funding proposals under consideration.

35. The document included dozens of individual initiatives broken out by category, including "Harm Reduction/Intervention," "Prevention," "Treatment," "Recovery," and "Program Administration." Gregorek asked members to "[p]lease use the last column to rank each recommendation from 1, highest priority, 2 in between and 3 lowest priority" and return their recommendations in advance of the December 22 meeting, where "[w]e will be discussing your recommendations." Exhibit 1 (Copy of Email + Recommendations Matrix Sent to Committee Members).

36. The very first item listed in the matrix was "Overdose Prevention Centers." As the entry explained, the proposal called for "$2,632,000 annually for two fixed sites," which "include[d] funding for staffing, facility, medical supplies, equipment, program, and miscellaneous costs."

37. As reflected in the individual Committee responses submitted to Gregorek and memorialized in an internal document titled "Opioid Settlement Committee Recommendations_2025_Final_scores_tally," Committee members overwhelmingly threw their support behind this proposal. Of the thirteen responses received, ten Committee members ranked OPCs as the

highest-tier priority, and OPCs received the second-highest total support of any proposal overall. Exhibit 2 (Final Unweighted Tally); *see also* Exhibit 19 (Final Weighted Tally Submitted to Legislature).

38. The $2.6M allocated to OPCs constituted roughly half of the total funding expected to be available for initiatives.

39. At the December 22 meeting itself, Dr. Levine—sitting as nonvoting chair of the Committee—began the meeting by opening discussion regarding OPCs, noting the "clear agreement" among committee members that funding for overdose prevention centers should be included in the recommendations to the legislature.

40. Similarly, at the end of the meeting, Dr. Levine summarized the Committee consensus by noting there were several initiatives "with the highest votes. . . . way out of proportion to anything else." The first initiative mentioned was, again, OPCs.

**C. During the meeting, the nonvoting chair repeatedly emphasizes that the Committee should focus on the substantive recommendation for OPCs—not the funding specifics.**

41. Throughout the meeting, Dr. Levine—both in framing the discussion and in responding to individual Committee members—made clear that the Committee should not focus on specific funding amounts or specific funding sources, instead emphasizing that it was the substantive recommendation for OPCs itself that mattered.

42. For example, Dr. Levine began his remarks by emphasizing he did not want the Committee "to get hung up on money today," given that any funding was subject to legislative adjustment. Instead, he called for "an orderly framing of our recommendations" in the form of a letter that made clear "what we recommend the money be spent *on*."

43. Several Committee members asked about the specific breakdown of proposed OPC funding, particularly given that the General Assembly was then considering a bill—H.72—that would authorize funding for OPCs. In response, Committee members emphasized that any additional legislative funding should supplement—not supplant—the Committee's recommendation to fund OPCs through the settlement fund. Committee Member Scott Pavek, for example, suggested that H.72 could provide funding for OPCs an additional year; Committee Member Jess Kirby agreed.

44. In response, Sen. Ruth Hardy (also a Committee Member) again advised that the Committee leave any ultimate funding breakdown to the legislature. She suggested that because the legislature was looking at different funding

sources, the Committee should "have our list . . . with our top" recommendations and have the legislature "work out a lot of the funding sources." Throughout Sen. Hardy's response, Dr. Levine interjected to confirm that was his understanding—repeatedly saying "yes" and "yep" as she was speaking.

45. Kirby expressly asked whether duplicate funding streams should change the Committee's recommendations and whether the Committee should account for alternate uses; Dr. Levine advised: "I wouldn't worry about that." Sen. Hardy again suggested that the Committee should "just make a list, and even if it's seven or eight million dollars"—that is, more money than the settlement abatement fund contained for FY 2025—the *legislature*, not the Committee, would "move things around and use their prerogative as legislators" to "figure out how to fund" the Committee's recommendations. Dr. Levine confirmed: "that's the goal."

46. Dr. Levine heavily implied that the Committee would later have the opportunity to formalize its recommendations. For example, he asked if any "votes" would change based on the Committee's discussion; Pavek interjected to confirm the Committee had not yet taken formal action or a vote. Dr. Levine responded "right" and clarified that the rankings were "not a vote," but a "a first go around" where the Committee would "set [its] priorities and see if there was consensus."

47. There was: Dr. Levine reiterated that three Committee members' tallies remained outstanding but again emphasized the consensus around OPCs.

48. Similarly, when Kirby asked: "what is the process plan?" and "are we going to vote?" Dr. Levine responded:

> When we have the final tally, through email we will connect with everybody on the Committee; make sure there's still consensus for what's being listed—and we'll list them in order—and then formulate that magical letter again and have people really look at the way we're framing it.

49. He also explained that, while there was every intention to submit the Committee's recommendation to the legislature "very early in the legislative session, it doesn't have to be day one." Kirby noted that she had heard that the House Appropriations Committee would be considering H.72—the overdose prevention site legislation—on the first day of the legislative session, and "having them understand that we've recommended an overdose

prevention site would be helpful [for them] to know." Dr. Levine responded: "[B]elieve me, they will know based on this meeting."

50. Apparently, after the public meeting ended, Dr. Levine provided further assurances that formal Committee action would take place at an early 2024 meeting. Exhibit 3 (Email from Scott Pavek) (Jan. 19, 2023).

51. On January 8, 2024, Pavek followed up with Dr. Levine over email, asking: "Will consolidated rankings be distributed to members before the next meeting? And is it your plan that we would vote on final recommendations during said meeting, or before via email?" Sarah Gregorek responded: "We are in the process or [sic] preparing the legislative memo and will send it to the committee soon. . . . The order of the rankings will be apparent by what is in the memo, and we don't need another meeting for voting." Exhibit 4 (Email from Scott Pavek re: Next Steps) (Jan. 11, 2023).

**D. The nonvoting chair privately shares the Committee's recommendations with Governor Scott's staff, who—despite having no formal role—provide undisclosed changes.**

52. Following the December 22, 2023, Opioid Settlement Advisory Committee meeting, Dr. Levine and his staff exchanged a series of emails with members of Governor Scott's staff regarding the Committee's recommendations generally, and OPCs specifically.

53. Before producing these emails in response to Plaintiff's public records request, the Department redacted them almost entirely and has refused to disclose their contents.

54. These public records reveal, however, that the Governor's staff apparently provided input and suggested revisions to Dr. Levine's draft of the Committee's recommendations.

55. For example, Monica Hutt—Governor Scott's chief prevention officer and also a Committee member—sent Dr. Levine an email with the subject "Summary of opioid recommendations" on December 28, 2023, cc-ing Shayla Livingston and Brendan Atwood, two of the Governor's staff. Dr. Levine responded at length. Exhibit 5 (Redacted Dec. 28 email).

56. Again, on January 3, 2024, Dr. Levine, Hutt, and Livingston exchanged several redacted emails entitled "Re: for substance use briefing." Exhibit 6 (Redacted Jan. 3 email).

57. The following day, Dr. Levine sent Hutt a message entitled "High level OPC discussion.docx" along with an attachment. Exhibit 7 (Redacted Jan. 4 email).

58. Dr. Levine then sent a "draft OSAC memo" to Hutt on January 9, to which Hutt responded at length on January 12, cc-ing Jenny Samuelson, another member of the Governor's staff. The email—which, again, is redacted in its entirety—appears to suggest specific changes to the Committee's recommendations at the Governor's request. Forwarding Hutt's email to Deputy Health Commissioner Kelly Dougherty, Gregorek wrote: "The Governor had some feedback on the attached memo, where should I insert the highlighted sentence below." Exhibit 8 (Redacted Jan. 12 chain with highlight). Dougherty then responded with a draft purporting to show the insertion—though the highlighted sentence in the memo is visibly shorter than the redacted multi-line highlighted request in Hutt's email. *See id.*

59. Neither the Governor nor his appointees have discretion to alter the Committee's recommendations. According to the Committee's enabling legislation, the "Commissioner of Health or designee" shall serve only "as a nonvoting chair." 18 V.S.A. § 4772(b)(1)(A). And while the Committee includes the administration's Chief Prevention Officer, *see id.* § 4772(b)(1)(B), that individual participates as one of the fifteen advisory members, not in any leadership role.

**E. After consultation with the Governor's staff, the nonvoting chair reallocates millions of dollars away from OPCs in the Committee's recommendations—and removes all references to harm reduction.**

60. Dr. Levine emailed the Committee members that same day—the Friday before a long weekend—stating: "Attached please find the letter to the Appropriations Committees containing our committee's final recommendations." Exhibit 9 (Jan. 12 cover email to Committee re: "final" recommendations).

61. The Committee had not been given the opportunity to take a formal vote or review any prior drafts of the submission.

62. In the email containing the "final" proposal that allegedly memorialized the Committee's recommendations, Dr. Levine stated that "OPCs are not included as a spending request." The reasoning, according to the email, was ostensibly "because H.72"—legislation that had yet to be enacted or signed into law—"contains a provision for an alternate financing mechanism."

63. As noted above, Dr. Levine had cautioned Committee members not to rely on or consider specific funding alternatives—including H.72—during the December 22 meeting. He had also expressly endorsed suggestions to include funding for OPCs as a recommendation despite the possibility of alternative funding mechanisms and had told at least one Committee member "I wouldn't worry about" reallocating duplicate funding.

64. Moreover, Governor Scott had been vocal in his opposition to OPCs and even in late 2023 was considered likely to veto H.72. Indeed, he later did so—as expected.

65. Nevertheless, Dr. Levine's email explained that the removal of OPCs based on H.72 "free[d] up $2.6 million." The email stated:

> I looked at the remaining initiatives that had a high number of Tier 1 and Tier 2 votes. It was quite clear that there were 3 items that stood out far ahead of all the others. They were VCJR, ongoing and expanded funding of contingency management, and primary prevention in the form of expanding Student Assistance Professionals and school-based services. These conveniently and almost perfectly fit into the $2.6M available – I only had to decrease the prevention dollars from the $1.58M requested to $1.429M, which the sponsor of the initiative stated would not pose any problem.

66. "All of the above" recommendations, the email noted, "enjoy support from the Governor."

67. In addition to reallocating the $2.6M of OPC funding endorsed by the Committee, the recommendations reflected other—undisclosed—choices by the Commissioner and/or the Administration. *See* Exhibit 10 (Recommendations submitted to legislature).

68. For example, the "final" recommendations removed all references to harm reduction. Although the first category of initiatives ranked by Committee members had been "Harm Reduction/Intervention," the final recommendations simply listed "Treatment/Intervention" as one combined category. *Compare* Exhibit 2 *with* Exhibit 10.

69. The final recommendations also reflected substantive choices about which alternative initiatives to fund. For example, despite Dr. Levine's representation that "that there were 3 items that stood out far ahead of all the others," there was an additional item the Committee ranked as a higher priority than two of the three items listed that appears nowhere in the recommendations: funding for a Harm Reduction Public Health Specialist. *See* Exhibit 2. Despite its high score, the recommendation appears nowhere in the final submission.

70. Dr. Levine's email closed by noting "[o]ur next meeting will most likely be in March," and proposed various topics for discussion—none of which were the Committee's recommendations.

71. Within an hour, Committee Member Shayne Spence responded asking for clarification about H.72 and expressly noting: "I am very uncomfortable with removing OPCs from our recommendations without being completely sure that they will be funded from another stream."

72. Committee Member Pavek expressed similar misgivings, writing: "I believe multiple members expressed interest in continued support for OPCs. I would've recommended a different a [sic] buildout of other harm reduction, treatment and recovery services if I knew millions were being redirected based on a bill which may change in the Senate. . . . We need deliberative meetings and formal votes. I was not under the impression that 12/22 had a vote, only a first consideration of consolidated rankings." *See* Exhibit 3.

73. Dr. Levine did not respond to either committee member before submitting the recommendations to the legislature, ostensibly on the Committee's behalf.

**F. The Department submits its revised recommendations to the legislature, representing them as the Committee's own.**

74. Instead, the nonvoting chair simply sent the revised recommendations to the legislature the following business day.

75. The cover letter for the recommendations, signed by Commissioner Levine, was titled "Opioid Settlement Funding Recommendations for Fiscal Year 2025." Exhibit 10.

76. Its opening line stated: "I am pleased to provide the recommendations of the *Opioid Settlement Committee* to the VT General Assembly for fiscal year 2025." *Id.* (emphasis added).

77. Until the final paragraph, the letter spoke in the Committee's voice and on the Committee's behalf. It stated, for example, that "[t]he committee continues to adhere to the set of five principles," and wrote "[w]e are also delighted to direct settlement funds this year to further expansion of primary prevention programming." *Id.*

78. The letter noted the omission of OPCs but suggested—incorrectly—that the decision to remove OPCs was one made by the Committee as a whole.

79. It stated:

> One of the highest tier priority recommendations from the committee that does not appear in this letter is for the funding of two overdose prevention centers. It is clear that the legislature plans to fund these centers from a non-settlement source. Therefore, in keeping with principle one, *we* have excluded this from the current set of recommendations for use of settlement funds so as to maximize our ability to support a broad array of initiatives. *The committee* heard testimony on and/or directly discussed over 30 proposals . . . .
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> *Id*. (emphases added).

80. No reader of the cover letter would have had any indication whatsoever that the decision to omit OPCs as a specific recommendation originated from either Dr. Levine or the Administration, as opposed to the Committee as a whole.

**G. After materially altering the Committee's consensus, the Department belatedly posts public minutes for its final 2023 meeting suggesting—incorrectly—that the Committee supported the Commissioner's unilateral actions.**

81. The Department of Health did not post minutes reflecting the Committee's December 22, 2023, meeting for weeks following the meeting.

82. There were no minutes available when Dr. Levine submitted recommendations to the legislature on January 16, 2024.

83. Instead, for weeks, the only document posted on the Department of Health-maintained website for the Committee's December 22 meeting was a link to the "final" recommendations Dr. Levine submitted on January 16. In fact, no minutes appeared publicly until Plaintiff submitted a public records request for the Department's minutes.

84. When the Department belatedly posted minutes for its December 22 meeting, the minutes simply stated: "The entire meeting was an open discussion about the funding proposals. Consensus on the recommendations the committee rated highest priority was achieved." Exhibit 11 (Dec. 22 Minutes).

85. Next to those minutes, the Department continues to post its altered submission to the legislature—suggesting, incorrectly, that those recommendations reflect the consensus achieved at the December 22 meeting.

86. At the time of this filing, there is no publicly posted link to the recording of the December 22 meeting.

**H. The Department provides no explanation, then inapplicably cites attorney-client privilege, then claims executive privilege, to shield its communications with the Administration from the public.**

87. At the suggestion of Ed Baker, an independent harm reduction activist and advocate who had attended the December meeting and noticed the omission of OPCs from Dr. Levine's submission to the legislature, Plaintiff ACLU-VT submitted a records request on January 29, 2024, seeking:

    - All bylaws, rules, regulations, or procedures of the Opioid Settlement Advisory Committee promulgated under 18 V.S.A. § 4772(f)(3), including but not limited to voting procedures;
    - All materials, attachments, or handouts made available to the Committee Members in preparation for and during the December 22, 2023 Committee Meeting;
    - All drafts, edits, and final versions of minutes for the December 22, 2023 Committee Meeting; and
    - All records and correspondence between, among, or including Committee Members regarding the Committee's Funding Recommendations for Fiscal Year 2025, including attachments.
        - This request includes, but is not limited to, any records or correspondence concerning prior versions of what ultimately became the Funding Recommendations for Fiscal Year 2025 submitted to the General Assembly on January 16, 2024.

88. The Department responded with a production on February 7, including six heavily redacted email exchanges. Upon withholding documents, the Department simply stated in its cover letter, "[p]ursuant to 1. V.S.A [sic] § 317(c)(4), redactions have been applied to six documents" but did not specify any reasons or supporting facts for denial or even identify what "statutory of common law privilege" was ostensibly implicated.

89. ACLU-VT then asked for a statutorily required certification providing, in writing, (1) "the statutory basis for denial" and (2) "a brief statement of the reasons and supporting facts for denial." 1 V.S.A. § 318(b)(2). The Department responded by simply stating: "Portions of six documents were redacted due to attorney/client privilege"— but again without specifying any reasons or supporting facts as to why.

90. Plaintiff responded by pointing out that attorney-client privilege could not possibly apply—the emails plainly did not contain confidential legal advice from an attorney to a client; it did not even appear that an attorney was included on any of the communications, let alone that they contained confidential legal advice.

91. The Department then pivoted to a new explanation: the documents were allegedly withheld under "executive privilege." But, again, the Department did not provide any "reasons [or] supporting facts" substantiating why those communications, in particular, fell within the asserted privilege, nor did it provide any information on who asserted the privilege. The Department simply stated: "The Health Department is not the holder of the executive privilege, and questions regarding executive privilege should be addressed to the Governor's office." Exhibit 12 (Emails re: PRA request and withholdings).

92. Plaintiff appealed. *See* Exhibit 13 (PRA Appeal). In response, Commissioner Levine partially lifted the redactions for two emails but upheld redactions as to the remaining communications. In support, he produced an affidavit, dated March 6, 2024, explaining the supposed basis for executive privilege. Despite the Department's earlier claim that it did not hold the privilege, Dr. Levine signed the affidavit in his own name as Commissioner, stating:

> I have reviewed the redacted correspondence and can attest that the email communications and attachments are subject to Executive Privilege because they are confidential communications between myself and members of the executive branch acting in an advisory capacity to the Governor for the purpose of formulating policy and making decisions regarding opioid prevention, intervention, treatment, recovery and harm reduction service for which the Vermont Department of Health is responsible.
>
> Exhibit 14 (Appeal Response + Dr. Levine Affidavit asserting Executive Privilege).

93. But executive privilege does not apply here. "Executive privilege," the Vermont Supreme Court has explained, "is limited to communications with the Governor of Vermont." *Trombley v. Bellows Falls Union High Sch. Dist. No. 27*, 160 Vt. 101, 107 n.5 (1993). None of the communications withheld by the Department were addressed to or included the Governor, and the Governor has no role in formulating the Committee's recommendations to the legislature.

## I. Confronted with their actions, the Department and Administration deny wrongdoing and defend the Chair's unilateral actions.

94. Under Vermont's Open Meeting Law (OML), any person aggrieved must submit a written notice of specific violations to the public entity in violation. 1 V.S.A. § 314(b)(1). Accordingly, as required by statute, Plaintiff sent Dr. Levine a letter alleging violations of Vermont's OML on February 15, 2024.

95. The letter alleged three separate OML violations stemming from Dr. Levine's actions as nonvoting chair of the Opioid Settlement Advisory Committee. Exhibit 15 (ACLU letter re: OML violations).

96. *First*, it noted that Dr. Levine's substantive changes to the Committee's recommendations—including the reallocation of specifically earmarked settlement funds—constituted a "matter over which the [Advisory Committee] has supervision, control, jurisdiction, or advisory power," *id.* § 310(1), and therefore was required to be "open to the public," *id.* § 312.

97. *Second*, the letter stated that Dr. Levine's January 12 email to the entire Committee explaining that unilateral change was a communication to a quorum of members "for the purpose of discussing the business of the public body"—and therefore was required to be a publicly noticed meeting of its own. *Id.* § 310(3)(A).

98. *Third*, and finally, the letter explained that the Department's failure to post accurate and timely minutes of its December 22, 2023, meeting was an independent violation of the OML. *See* § 312(b)(1).

99. Before responding to Plaintiff's notice, the Scott Administration issued a public press release entitled "Facts Matter: Health Commissioner Mark Levine, MD, Makes Opioid Settlement Recommendations within Legal, Statutory Authority." *See* Exhibit 16 (Press Release), https://governor.vermont.gov/press-release/facts-matter-health-commissioner-mark-levine-md-makes-opioid-settlement.

100. The press release did not contest any facts raised by the letter. Instead, it argued that "the law does not limit Dr. Levine's discretion in making his final recommendations to the Governor for his budget proposal or to the Legislature."

101. As explained above, it is true that the law directs the Department of Health to make budgetary requests to the legislature. *See* 18 V.S.A. § 4774(a)(2). But that process is separate from the *Committee's* duty to submit its recommendations. *See id.* § 4772(e). The press release did not address that the January 16 submission to the legislature was titled as the Committee's recommendations; was made in the Committee's name; and spoke in the Committee's voice.

102. Nor did the press release address the Open Meeting Law violations identified in Plaintiff's letter. Instead, it carefully stated that "the change to the Committee recommendations, which *were* discussed in public session in

accordance with the Open Meeting law, *was* transparently disclosed." (emphasis added).

103. As that sentence appears to admit, while the Committee's *recommendations* themselves were discussed in open session, the unilateral *change* to the Committee's recommendations—the act at the heart of Plaintiff's letter—was not. Instead, it was simply disclosed to the Committee—privately and after the fact.

104. On February 26, Dr. Levine formally responded to Plaintiff's written notice of OML violations. As the response explained, the Department "determined that no violation has occurred and that no cure is necessary." Exhibit 17 (Department of Health Response).

105. According to Dr. Levine's response, the January 16 submission to the legislature was "not an act of the Advisory Committee or governed by 18 V.S.A. § 4772," and was instead "from me as Commissioner of the Department of Health"—not from Dr. Levine as nonvoting chair on behalf of the Committee. His response went on to argue that "the Department's budget recommendations are not subject to a vote of the Advisory Committee" nor—as a unilateral act of the Commissioner—"governed by the Open Meeting Law." He further stated that "[n]othing in 18 V.S.A. § 4774 requires the Department to adopt the recommendations of the Advisory Committee."

106. But as explained above, there are separate processes for submitting the Department's budget and for submitting the Committee's recommendations. And the January 16 submission to the legislature purported to speak for the Committee—not for the Department nor as Dr. Levine acting as Commissioner. The email to Committee members stated: "Attached please find the letter to the Appropriations Committees containing *our committee's* final recommendations." (emphasis added). The recommendations themselves were titled "Opioid Settlement Funding Recommendations for Fiscal Year 2025." And the recommendations' opening sentence stated: "I am pleased to provide the recommendations of the *Opioid Settlement Committee* to the VT General Assembly for fiscal year 2025." (emphases added).

107. To be sure, a single paragraph requested funds on behalf of the Department, citing 18 V.S.A. § 4774. But—consistent with the above representations—the rest of the submission purported to speak in the Committee's voice, stating, for example, "[t]he committee continues to adhere to the set of five principles," and "[w]e are also delighted to direct settlement funds this year to further expansion of primary prevention programming."

**J. The General Assembly enacts H.72 over the Administration's opposition—and ultimately overrides the Governor's veto—but the Department still refuses to remedy its violations of law.**

108. On March 25, 2024—the first Committee meeting of the year—Committee members discussed Plaintiff's OML notice, with several confronting the nonvoting chair about the unilateral changes. In defending his actions, Dr. Levine argued that the January 16 letter "represented and was informed by the recommendations of the committee," but simultaneously contended that "the framing of the letter [was] the Department of Health Commissioners [sic] letter to the appropriations committees." Exhibit 18 (Mar. 25 minutes).

109. In response, the Committee voted to submit a follow-up letter to the legislature, in its own name, making clear that, despite Dr. Levine's January 16 letter, the Committee's expert recommendation was that $2.6M be allocated for OPCs from the settlement abatement fund, regardless of any alternative funding mechanism in H.72 or elsewhere. *See* Exhibit 19 (OSAC Letter to Legislature with Recommendations and Vote Tally).

110. Following the Committee's submission, the Senate amended H.72 to fund any site through the settlement abatement fund, rather than alternative funding sources. *See* Senate Calendar (Apr. 23, 2024), p. 2713 (Reporting H.72 "favorably with recommendation of proposal of amendment by Senator Lyons for the Committee on Health and Welfare.")

111. The General Assembly subsequently passed H.72, which was delivered to the Governor's desk on May 24, 2024.

112. Less than a week later, the Governor vetoed H.72, as expected. *See* Exhibit 20 (Gov. Scott May 30 Veto Letter).

113. On June 17, 2024, the Vermont House of Representatives and Senate both overrode the Governor's veto by a two-thirds majority, meaning that H.72 became law notwithstanding the Governor's veto. *See* Senate Calendar (June 17, 2024), p. 2905.

114. While the passage of H.72 represents an ultimate victory for advocates of OPCs, the Department has not acknowledged, let alone cured, its open meeting violations. Nor has the Department or the Administration released the communications improperly withheld under executive privilege. Accordingly, Plaintiff now turns to this Court for relief.

## CAUSES OF ACTION

### Count 1—Violation of Vermont's Open Meeting Law, 1 V.S.A. §§ 310 *et seq.* (Three instances)

115. Plaintiff incorporates the foregoing paragraphs as though fully contained herein.

116. This claim is brought against the Department of Health and, through the actions of its nonvoting chair, the Opioid Settlement Advisory Committee.

117. Vermont's Open Meeting Law breathes life into Chapter 1, Article 6, of the Vermont Constitution, which states that "all power being originally inherent in and co[n]sequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them." *See* 1 V.S.A. § 311(a) ("[T]he legislature finds and declares that public commissions, boards, and councils and other public agencies in this State exist to aid in the conduct of the people's business and are accountable to them pursuant to Chapter I, Article VI of the Vermont Constitution.").

118. The OML requires that "[a]ll meetings of a public body are declared to be open to the public at all times," and that "[n]o resolution, rule, regulation, appointment, or formal action shall be considered binding except as taken or made at such open meeting." *Id.* § 312(a)(1).

119. The Opioid Settlement Advisory Committee's enabling legislation expressly incorporates Vermont's OML. *See* 18 V.S.A. § 4772(f)(4).

120. Plaintiff alleges three separate instances of OML violations.

121. *First*, changing the specific recommendations of the Committee outside of the December 22 meeting—including the reallocation of specifically earmarked settlement funds for OPCs—constituted a "matter over which the [Advisory Committee] has supervision, control, jurisdiction, or advisory power." 1 V.S.A. § 310(1). Any substantive decision, including finalizing recommendations for the legislature, therefore was required to be "open to the public." *Id.* § 312.

122. *Second*, Dr. Levine's January 12 email to the entire Committee containing the final recommendations and explaining the unilateral change was a communication to a quorum of members "for the purpose of discussing the business of the public body"—and therefore was required to be a publicly noticed meeting of its own. *Id.* § 310(3)(A).

123. *Third*, and finally, the failure to post accurate and timely minutes of the Committee's December 22, 2023, meeting also violated the OML. *See* § 312(b)(1).

124. Plaintiff exhausted its remedies by timely submitting a written notice of specific violations, as required by 1 V.S.A. § 314(b)(1), on February 15, 2024. The Department denied the allegations in a written response on February 26, 2024.

125. To date, neither the Department nor the Committee has cured the OML violations or adopted specific measures to actually prevent future violations. *Id.* § 314(b)(4).

**Count 2—Violation of Vermont's Public Records Act, 1 V.S.A. §§ 315 *et seq*.**

126. Plaintiff incorporates the foregoing paragraphs as though fully contained herein.

127. This claim is brought against Commissioner Mark Levine in his official capacity as Commissioner and as the custodian of records for the Department of Health, as well as against the Department of Health itself as a "public agency" within the meaning of 1 V.S.A. § 317(a)(2).

128. Like the Open Meeting Law, the Public Records Act (PRA) effectuates Vermont's constitutional promise of open and accountable republican government. "To that end, the provisions of [the PRA] shall be liberally construed to implement this policy, and the burden of proof shall be on the public agency to sustain its action." *Id.* § 315(a).

129. The Department has improperly withheld records under the PRA.

130. Specifically, the Department improperly claimed "executive privilege" under § 317(c)(4).

131. "Executive privilege," the Vermont Supreme Court has explained, exists solely "to protect and facilitate the Governor's consultative and decisional responsibilities." *Herald Ass'n, Inc. v. Dean*, 174 Vt. 350, 355–56 (2002). The privilege, therefore, "is limited to communications with the Governor of Vermont." *Trombley*, 160 Vt. at 107 n.5.

132. None of the communications withheld by the Department were communications with the Governor. They were, instead, communications between the Commissioner of Health, acting as nonvoting chair of the Opioid Settlement Advisory Committee, and policy staff, including another member of the Committee. *Cf. Jud. Watch, Inc. v. Dep't of Just.*, 365 F.3d 1108, 1116

(D.C. Cir. 2004) ("[T]he privilege should not extend to staff outside the White House in executive branch agencies.").

133. Moreover, the communications are "not sufficiently related to gubernatorial policymaking or deliberations to qualify for confidential treatment under the executive privilege." *Dean*, 174 Vt. at 357. The communications contain specific changes to the Committee recommendations, drafted by the Governor's staff. But the Governor has no authority over the Committee's expert recommendations, and the privilege is therefore inapplicable. *See In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997) (executive privilege "should never serve as a means of shielding information regarding governmental operations that do not call ultimately for direct decisionmaking by the [executive]").

134. Finally, even to the extent that executive privilege could apply to any of the documents, it was improperly asserted. "The executive must specifically identify the documents for which the privilege is claimed, and must explain why the documents are protected by the privilege." *New England Coal. for Energy Efficiency & Env't v. Off. of Governor*, 164 Vt. 337, 344 (1995). Dr. Levine, who signed the affidavit asserting executive privilege only after Plaintiff appealed the initial withholding, lacks authority to assert the privilege over his own outgoing communications.

135. Plaintiff exhausted its administrative remedies by filing an administrative appeal on February 27, 2024. The Department granted in part and denied in part the appeal on March 6, 2024, but largely upheld the redactions asserted under executive privilege.

## PRAYER FOR RELIEF

WHEREFORE, ACLU-VT prays that the Court issue the following relief:

a. A declaratory judgment that the Department and, through the acts of its nonvoting chair, the Opioid Settlement Advisory Committee, violated the OML on three occasions;

b. An injunction requiring that the Department and, through the acts of its nonvoting chair, the Opioid Settlement Advisory Committee, cure the OML violations and adopt specific measures to actually prevent future violations;

c. A declaratory judgment that executive privilege is limited to communications directly with the Governor in the course of deliberations furthering authorized gubernatorial acts;

d. An injunction requiring the Department to release all withheld communications without redactions;

e. An award of reasonable attorneys fees under the OML and PRA; and

f. Allow any further relief to which Plaintiff may be entitled.

Respectfully submitted,

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