NO. 20-3518

In the United States Court of Appeals for the Third Circuit

CHAD PARKER; REBECCA KENWICK-PARKER; MARK REDMAN; and DONNA REDMAN,

Plaintiffs – Appellants,

v.

GOVERNOR OF PENNSYLVANIA; ATTORNEY GENERAL OF PENNSYLVANIA; and SECRETARY PENNSYLVANIA DEPARTMENT OF HEALTH,

Defendants – Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
HONORABLE JOHN E. JONES III
CASE NO. 20-cv-1601

APPELLANTS' REPLY BRIEF

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ARGUMENT IN REPLY

> "*Those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety*."[1]
>
> - Benjamin Franklin

Granting the requested injunction does not prevent Defendants-Appellees ("Defendants") from implementing a *constitutional* contact tracing program nor does it prevent Defendants from *encouraging* people to wear masks—they just can't penalize those, including Plaintiffs-Appellants ("Plaintiffs"), who object to wearing a mask on constitutional grounds. Governor Wolf was exempt from the pandemic order on social gatherings when he marched *en masse* with the Black Lives Matter ("BLM") protestors—a protest which threatened the lives of thousands if not more by spreading COVID-19 (accepting Defendants' assumptions about the dangers of this virus).[2] The Constitution demands that Plaintiffs be granted the same First Amendment exemption.

[1] This quote is engraved by the steps of the Capitol in Harrisburg, Pennsylvania. The irony is not lost on Plaintiffs.

[2] The BLM protests are an interesting case study. The protests were conducted *en mass*, with protestors marching shoulder to shoulder (*i.e.*, no social distancing) and many without masks. Yet, there were no reports of catastrophic deaths from these protests, which occurred not only in Pennsylvania but throughout the country. This prompts several questions. Did government officials lie about such reports (possibly)? Is there a special immunity for BLM protestors (not likely)? Is the virus not that deadly for a certain demographic (*i.e.*, largely young and healthy people who are able to march in a protest—after all, the protests were not held in nursing homes)? If the latter, then this is just more evidence that the challenged restrictions are largely ineffective.

Defendants complain that Plaintiffs' brief is "heavy on hyperbole and rhetoric but light on legal analysis." (Defs.' Br. at 22). That's an interesting complaint coming from government officials who throughout this COVID-19 pandemic have been heavy on hyperbole and fear mongering but light on science and commonsense. In fact, they are clueless, and the citizens of Pennsylvania continue to suffer from the collateral damage caused by these government bureaucrats who are acting like petty tyrants. Indeed, Defendants concede that they don't have a plan for ending the restrictions. (R-35: Hr'g Tr. at 32:10-24, App. 335). They cannot cite *any* objective criteria for ending their control over people's private lives. (*Id*.). That's not hyperbole, and it is a sad and frightening indictment of where we are today. We are long past the time for blindly deferring to government oppression all in the name of "public health." Defendants did not present any medical experts or data to justify their overbroad and oppressive restrictions. Rather, they presented generalities and fear-mongering, expecting this Court to simply rubber-stamp their actions. As Justice Gorsuch warned, "[W]e may not shelter in place when the Constitution is under attack. Things never go well when we do." *Roman Catholic Diocese v. Cuomo*, 208 L.Ed.2d 206, 214 (U.S. 2020) (Gorsuch, J., concurring). This Court should not "shelter in place." Things are not going well in the Commonwealth of Pennsylvania.

I. Plaintiffs Have Standing.

Defendants argue that Plaintiffs lack standing to challenge the contact tracing program. They do *not* argue that Plaintiffs lack standing to challenge the mask mandate. (*See* Defs.' Br. at 17 n.15 ["The Commonwealth Officials do not agree, however, that Parker and Redman lack standing to challenge the mask mandate."]). To accept Defendants' argument, the Court must conclude that the deterrent *effects* of the draconian, state-wide contact tracing program—effects which are felt in a very *real* and *palpable* way by Plaintiffs, as the record demonstrates (*see* Pls.' Br. at 10-15)—are insufficient to have this or any other court of law evaluate the constitutionality of this program. Defendants' argument is wrong as a matter of fact and law.

To begin, we know from the Parkers the contours of this program and the substantial harm it causes. We know that the program mandates a 14-day quarantine (house arrest) *without the government having to prove that anyone is ill or infectious*. We know that the program mandates "social distancing" of family members living in the same household.[3] We know that the program is enforced in an arbitrary

[3] Contrary to Defendants' argument, Plaintiffs have not abandoned their substantive due process challenge to the program. (*See, e.g.*, Pls.' Br. at 37-38 [arguing, *inter alia*, that the social distancing requirement imposed *upon family members living in the same household* illustrates the due process violation and citing *Griswold v. Conn.*, 381 U.S. 479, 485-86 (1965) ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of [close contact between spouses in violation of social distancing mandates]? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.") for support). The

manner (imposing restrictions on people who are not ill), and that it is not narrowly tailored to the government's asserted interests because it imposes restrictions on liberty without any proof that the restrictions are necessary or helpful. And we know that there are no due process safeguards. None.

Consequently, there is nothing hypothetical or speculative about this program or how it operates. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) ("A justiciable controversy is . . . distinguished from a . . . dispute of a hypothetical or abstract character. . . ."). And the questions presented are essentially *legal* questions based on undisputed facts. Defendants have presented no evidence to dispute the contours of this program as set forth in Plaintiffs' submissions. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967) (finding the issues appropriate for judicial resolution because "the issue tendered is a purely legal one"); *Pic-A-State PA, Inc. v. Reno*, 76 F.3d 1294 (3rd Cir. 1996) (finding constitutional challenge to a federal statute justiciable because it presented a purely legal issue); *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1171 (6th Cir. 1983) (finding question of law which requires no further fact-finding fit for judicial resolution).

facts and law are straightforward. This claim doesn't require Plaintiffs to argue needlessly for pages.

Absent judicial relief, the program hangs over the heads of Plaintiffs "like the sword over Damocles, creating a 'here-and-now subservience.'" *See, e.g., Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noises, Inc.*, 501 U.S. 252, 265 n.13 (1991). The inevitable action causing harm—the actual implementation and operation of the challenged program—has arrived. *See generally Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 418 (1942) (noting that the exercise of governmental rule-making power "sets a standard of conduct for all to whom its terms apply, [and i]t operates as such *in advance of the imposition of sanctions* upon any particular individual," observing that "[i]t is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails") (emphasis added). As a result, Plaintiffs are compelled to *change their behavior* to comply with (or, more accurately, to avoid the sanctions of) a government-mandated program that impermissibly burdens their fundamental rights. *See Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 535-36 (6th Cir. 2011) (changing present behavior to comply with the future mandate requirement causes a present injury in fact); *see also Abbott Labs.*, 387 U.S. at 154 (stating that there was "no question that petitioners have sufficient standing" to challenge a regulation that would require "changes in their everyday business practices"). Plaintiffs need not wait for future harm to occur to seek relief from this Court. *See generally*

Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) ("The *threat of sanctions* may deter . . . almost as potently as the actual application of sanctions.") (emphasis added). Plaintiffs have standing because they have alleged a "personal injury" that is "fairly traceable" to the program and is "likely to be redressed by the requested relief." *See Allen v. Wright*, 468 U.S. 737, 751 (1984). The forced disclosure of private associations is alone a cognizable injury sufficient to confer standing. *Salvation Army v. Dep't of Cmty. Affairs*, 919 F.2d 183, 201 (3d Cir. 1990) (acknowledging that "forced disclosure may chill individuals from associating with a group"). Indeed, it wasn't a private entity that demanded Chad Parker to disclose his most intimate associations, including his family members, *it was the government*. Chad Parker and his family were forced into the contact-tracing program and had to suffer its burdensome restrictions because the *government* demanded that his doctor/healthcare provider report Chad's "positive" test result. It wasn't a private entity demanding this information. Plaintiffs will avoid seeing their doctors for ailments such as sinus infections precisely because of the contact tracing program and the harm *it has already caused* to the Kenwick/Parker family. (*Compare* Defs.' Br. at 28 [falsely asserting that Plaintiffs "have not established an uncontroverted showing of past harm"]). To assert, as Defendants do (Defs.' Br. at 24), that there is no state action involved is false. Defendants' witness admitted that the government, through the contact tracing program, *requires* the forced disclosure of

associations, including the disclosure of "family members," "friends," "fellow church worshipers," "business associates," and "political associates." (R-35: Hr'g Tr. at 57:20-25 to 58:1-8, App. 360-61). Defendants completely misapprehend the First Amendment right to association, and they improperly minimize the deterrent effect the contact tracing program has on *protected* associations.

Indeed, in one breath, Defendants claim that Plaintiffs have no reasonable fear of ever falling prey (or falling prey *again*, in the case of the Kenwick/Parker family) to their contact tracing program and its restrictions on liberty, and in the very next breath they claim that "[t]his virus is relentless and continues to infect thousands of Pennsylvanians each day." (Defs.' Br. at 45). Standing is not an issue.

II. The Challenged Restrictions Are Overbroad, Arbitrary, Irrational, and Not Justified by "Science."

Before turning to the substantive claims, we want to highlight again the fact that Defendants have <u>no</u> objective criteria or plan for ending the "one-size-fits-all" restrictions. <u>None</u>. (*See* R-35: Hr'g Tr. at 32:7-9, App. 335; *id*. at 32:10-24, App. 335). Defendants are regulating with a blunt instrument, imposing overbroad, arbitrary, and irrational restrictions that are not justified by "science." For example, the "scientific" data shows that there have been zero (none) reported deaths from COVID-19 in the 0 to 19 age group in Pennsylvania (R-35: Hr'g Tr. at 40:4-16, App. 343), yet Defendants demand that children wear masks *all day long* during the school day. There is no "scientific" data showing that asymptomatic individuals contribute

in any significant or measurable way to this or any other pandemic. None. In fact, the evidence before the Court demonstrates otherwise. (*See* R-18-2: Redman Decl. ¶ 64 [quoting Dr. Fauci and the technical lead for the World Health Organization on the COVID-19 pandemic as confirming that an epidemic is not caused by asymptomatic carriers and that secondary transmissions from asymptomatic individuals are "rare"], App. 83). And there is no "scientific" data showing that people who have had the virus (such as Chad Parker) contribute in any significant or measurable way to this pandemic. (*See, e.g.*, *id*., *see also* R-35: Hr'g Tr. at 45:25 to 47:1-2 [admitting that for at least 80 days after having contracted COVID-19 there is zero likelihood of contracting the virus again or spreading it to someone else]).[4] Yet all of these people are required, under penalty of law, to wear a mask. (*Id*.). They are also *not* exempt from the contact tracing program.

As the evidence adduced at the hearing shows, Defendants have no idea what cycle threshold is used to determine a "positive" result from the "gold standard" PCR test. (R-35: Hr'g Tr. at 64:13-25 to 66:1-18, App. 367-69). And Defendants use the flawed and much maligned antigen test to trigger the contact tracing program. (*Id*. at 37:1-16; 63:8-10 ["Q. Do you accept positive antigen tests to be the basis for sending out these close contact letters? A. We could, yes."], App. 340, 366). There

[4] If there isn't immunity from having contracted the virus (like virtually every other virus that affects our population), then what good is a vaccine?

is no requirement for the government to verify a "positive" test nor is there a procedure under the current program for someone ordered to quarantine based on the "positive" test to challenge it. None. Our Constitution demands more. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2605 (2020) (J. Alito, dissenting) ("As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.").

In sum, it is not Plaintiffs' burden to justify their liberty, it is Defendants' burden to justify the restrictions they impose upon Plaintiffs' liberty. In support of their motion for preliminary injunction, Plaintiffs submitted sworn declarations and evidence. In support of their opposition, Defendants submitted nothing. The district court gave Defendants an "out" by permitting them to present the testimony of a witness during the hearing. (*See* R-28: Order on Prelim. Inj. Hr'g). Rather than present the testimony of a medical or science expert who could attempt to justify the challenged restrictions based on "science" and data, Defendants instead chose as their witness a government bureaucrat with no medical or scientific expertise.[5]

[5] Defendants assert, "At the time of her testimony, Sarah Newman Boateng was an Executive Deputy Secretary with the Pennsylvania Department of Health. App.308. Although not a doctor, Boateng noted that the Department was led by former-Secretary Rachel Levine, who is a doctor. Moreover, the Department is comprised of epidemiologists, public health physicians, and more than 200 community nurses. App.386-87." (Defs.' Br. at 6). However, <u>*none*</u> of these medical "experts" testified or provided other admissible evidence (such as a declaration) to support the challenged restrictions.

Apparently, Defendants did not want their "science" or data subject to scrutiny under cross-examination because doing so would have revealed that the emperor has no clothes.

At the end of the day, Defendants are hoping that this Court, like the district court, will "shelter in place" and rubber stamp these draconian restrictions on liberty. But things won't go well if it does. *Roman Catholic Diocese*, 208 L.Ed.2d at 214 (Gorsuch, J., concurring).

III. The Contact Tracing Program Is Unlawful.

The contact tracing program *directly* and *substantially* interferes with protected associations. Defendants *admit* that the program *requires* the forced disclosure of associations, including the disclosure of "family members," "friends," "fellow church worshipers," "business associates," "political associates," and essentially "anyone the 'case' . . . has associated with during the alleged period of infection." (R-35: Hr'g Tr. at 57:11-25 to 58:1-8, App. 360-61). The *forced* disclosure of these associations, *which is required by the contact tracing program*, triggers strict scrutiny. *Salvation Army*, 919 F.2d at 197 ("Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and *state action which may have the effect of curtailing the freedom to associate* is subject to the closest scrutiny.") (internal quotations and citation omitted) (emphasis added). The contact tracing program is

state action which has the *effect of curtailing the freedom to associate*, thereby requiring the program to survive strict ("the closest") scrutiny, which it cannot. (*See* Pls.' Br. at 31-35). Defendants do not even attempt to justify the program under this highest level of scrutiny known to constitutional law.

The program fails under intermediate scrutiny as well—a standard that applies to "content-neutral time, place and manner restrictions." (*See* Defs.' Br. at 29). The facts demonstrate that the program is not narrowly tailored, as required under intermediate scrutiny—a standard which is *not* a pushover. *See McCullen v. Coakley*, 573 U.S. 464, 495 (2014) ("To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier."); *McTernan v. City of York*, 564 F.3d 636, 656 (3d Cir. 2009) ("A restriction cannot be 'narrowly tailored' in the abstract; it must be tailored to the particular government interest asserted.").

As the undisputed facts involving the Parkers demonstrate, the threat of spreading the virus among family members had already dissipated by the time the quarantine was ordered. There was no determination made by the government that: (1) Chad Parker's "positive" test was accurate; (2) Chad Parker was infectious (he was not); (3) any of the Parker family members were infectious; (4) anyone was ill (none of them were); (5) anyone posed a threat of spreading the virus (they didn't);

or (6) anyone was a member of the demographic mostly likely to need hospitalization (none of them were). Yet, the entire Parker family was "seized" subject to burdensome restrictions without the government having to justify its actions in any way. The Constitution does not permit Defendants' broad, "one-size-fits-all" restrictions on fundamental liberties. *Aptheker v. Sec. of State*, 378 U.S. 500, 508 (1964) ("Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.").

Defendants assert that "[a] public health official asking Parker and Redman questions about their known recent contacts in order to quell the spread of disease does not implicate their First Amendment associational rights any more than questioning by a police officer in order to solve a crime does." (Defs.' Br. at 28). Defendants are wrong. If a police officer ordered a private citizen under threat of penalty to disclose to him all of the citizen's private associations, the officer would be violating the First Amendment. Moreover, because both (the police officer scenario and contact tracing) are government "investigations," Plaintiffs' constitutional rights are triggered. As stated by the Supreme Court, "Investigation is a part of lawmaking and the First Amendment, as well as the Fifth, *stands as a*

barrier to state intrusion of privacy." *DeGregory v. N.H. Atty. Gen.*, 383 U.S. 825, 829 (1966) (emphasis added); *Gibson v. Fla. Legislative Comm.*, 372 U.S. 539, 560-61 (1963) ("We deal here with the authority of a State to investigate people, their ideas, their activities. . . . When the State or Federal Government is prohibited from dealing with a subject, it has no constitutional privilege to investigate it.") (Douglas, J., concurring); *Barenblatt v. United States*, 360 U.S. 109, 126 (1959) ("The provisions of the First Amendment . . . of course reach and limit . . . investigations."); *Socialist Workers Party v. Att'y Gen.*, 419 U.S. 1314, 1319 (1974) (noting the dangers inherent in investigative activity that "threatens to dampen the exercise of First Amendment rights").

When the government compels disclosure—as is the case with the contact tracing program because the target of the investigation is required under penalty of law to "cooperate" with the contact tracer—the First Amendment is offended, resulting in irreparable harm as a matter of law. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

The program is also unlawful because it results in a *seizure* of a private citizen without the government having to prove that the person is infected or a danger to society, thereby triggering protections under the Fourth and Fourteenth Amendments. It is similar to a seizure without probable cause. Defendants are

wrong to suggest that an order forcing someone to remain in their home under onerous restrictions for 14 days and under threat of criminal penalties for failing to comply with the order is not a seizure within the Fourth Amendment. *See, e.g.*, *Gallo v. City of Phila.*, 161 F.3d 217, 223 (3d Cir. 1998) ("Supreme Court decisions provide that a seizure is a show of authority that restrains the liberty of a citizen."). A forced, involuntary quarantine by the government is a seizure triggering protection under the Fourth and Fourteenth Amendments. *See, e.g., Glass v. Mayas*, 984 F.2d 55, 58 (2d Cir. 1993) (concluding "that the Fourth Amendment applies to involuntary commitment" for health reasons); Wendy E. Parmet, *Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law*, 9 WAKE FOREST J.L. & POLY 1, 4 (2018) ("[T]he extensive body of law that the courts had articulated in the last fifty years expounding upon what due process requires when individuals are civilly committed due to mental illness provided an apt analog to quarantine and made clear that quarantine was subject to substantive and procedural due process restraints.").[6]

The program, in its current form, is unlawful.

[6] Defendants do not have a valid argument against Plaintiffs' claims arising under the Fourth and Fourteenth Amendments so they incorrectly assert that they were waived. That seems to be a trend for them. Once again, Defendants are wrong.

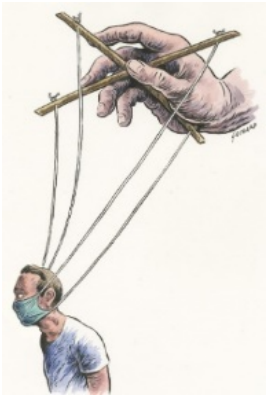
IV. The Mask Mandate Is Unlawful.

Defendants ask this Court to evaluate Plaintiffs' free speech challenge in a vacuum. That approach is wrong as a matter of law. In the First Amendment context, facts matter. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 567 (1995) ("[T]he reaches of the First Amendment are ultimately defined by the facts it is held to embrace. . . .").

The *undisputed facts* demonstrate that wearing a mask has become a symbol during this current and highly politicized pandemic. Plaintiffs contend, and the *evidence supports*, that a mask has become a symbol of government oppression. It is undisputed that Plaintiffs view the mandate as the government forcing them to convey a message with which they disagree. (*See* Pls.' Br. at 7-10).

Contrary to Defendants' argument, the mandate to wear a mask is not the same as the requirement to wear a seatbelt or a swimsuit. (Defs.' Br. at 34). The comparison fails as a matter of fact. Wearing a seatbelt or a swimsuit has not become politicized like the wearing of a mask. It's not even a close call. The Wall Street Journal political cartoon shown below and other news reports / polls cited by Plaintiffs (*see* R-18-2: Redman Decl. ¶¶ 55-59, App. 79-81), as well as Governor Wolf's acknowledgement that wearing a mask for the cameras was "political theater" (*id*. at ¶ 56, App. 80), defeat Defendants' argument, which is not based on

record evidence but on their own *ipse dixit*. There is *nothing* comparable regarding seatbelts or swimsuits.



Indeed, there is nothing necessarily "expressive" about burning a piece of cloth, unless it is an American flag in the midst of a political demonstration. *Tx. v. Johnson*, 491 U.S. 397 (1989). Forcing private citizens (including those who are <u>not</u> infectious) to wear a mask in public during this current pandemic unquestionably conveys a political message. As noted, Governor Wolf, on a hot mic, agreed that wearing a mask was "political theater." Accordingly, the mask mandate is forcing Plaintiffs to "use their private [bodies] as a 'mobile billboard' for the State's ideological message—or suffer a penalty." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). The First Amendment is clearly implicated.

In their response, Defendants rely heavily upon *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). (Defs.' Br. at 28, 34, 36). Their reliance is misplaced. In *Arcara*, an adult bookstore was also operating as a place of prostitution. A series of New York statutes allowed places of prostitution to be closed as a public health

nuisance. The owners of the bookstore argued that closure of their business would violate their First Amendment rights because, in addition to prostitutes, they sold books. The Supreme Court rejected the First Amendment argument because the bookstore owners sought "to use the First Amendment as a cloak for obviously unlawful public sexual conduct by the diaphanous device of attributing protected expressive attributes to that conduct." *Arcara*, 478 U.S. at 705. The Court concluded that the burden on the bookstore was incidental and "booksellers may [not] claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities." *Id.* Additionally, any harm was "mitigated by the fact that [the bookstore owners] remain[ed] free to sell the same materials at another location." Thus, because "[t]he legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity[,] [b]ookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises [and t]he legislature properly sought to protect the environment of the community by directing the sanction at premises knowingly used for lawless activities." *Id*. at 707.

Here, the mask mandate is *directly* affecting Plaintiffs' free speech rights, and it is *compelling* Plaintiffs to convey a message with which they disagree. There is no secondary criminal activity that Defendants seek to remedy. Plainly, Plaintiffs

are not "us[ing] the First Amendment as a cloak for obviously unlawful public sexual conduct" or any other unlawful conduct. *Arcara* is inapposite.

Moreover, because Defendants *willingly* granted a First Amendment exemption for Governor Wolf's public BLM protest (a mass protest that threatened to infect thousands of people with COVID-19) (R-35: Hr'g Tr. at 71:1-10 [acknowledging First Amendment exception for Governor's Wolf's BLM protest], App. 374; R-18-2: Redman Decl. ¶ 14, Ex. E [Admissions], App. 63, 115-22), Defendants have no basis for <u>*not*</u> granting one here for Plaintiffs' anti-mask protest. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("The principle that has emerged from [Supreme Court] cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.") (internal quotations and citation omitted).

Defendants also argue that "wearing a mask is not a forced 'medical procedure,'" asserting that "[i]n the case of *uninfected* or asymptomatic individuals, merely wearing a mask does not address any medical malady of the wearer. Rather, the covering of one's nose and mouth is designed to safeguard other citizens." (Defs.' Br. at 42 [citation omitted]). What this demonstrates is that forcing someone who is <u>*not*</u> infected to wear a mask is simply an exercise of authoritarian, governmental control. How can forcing an *uninfected* individual to wear a mask

"safeguard other citizens"? It doesn't.[7] It's an absurd proposition. At a minimum, this concession shows that the mandate is not narrowly tailored and certainly not the least restrictive means of accomplishing Defendants' asserted interests. And by claiming that a mask is not a form of "medical treatment," Defendants are essentially conceding that there is *no* medical purpose for wearing masks.

In sum, unlike a swimsuit or a seatbelt, a mask is exceedingly intrusive. It makes it difficult to breath. It makes it difficult to communicate, both verbally and non-verbally via facial expressions. It hides our humanity. It identifies us as a servant to our government master. The mandate is unconstitutional.

V. The Equities Favor Protecting Fundamental Rights.

Defendants note that the Court should consider "the requested injunction's impact on other interested parties and the public interest." (Defs.' Br. at 44). They disingenuously claim that Plaintiffs "discuss these important interests in a single paragraph at the end of their brief." (*Id*.). Yet, in their *two* short paragraphs, Defendants *fail* to address the irreparable harm factor (thus conceding the argument), and they *combine* the balance of equities and public interest factors—factors that Plaintiffs addressed in *six* paragraphs. (*See* Pls. Br. at 45-48). Defendants do not refute the fact that the public interest favors granting the injunction because it is

[7] There is no "science or data" to support the novel claim that an uninfected individual can infect another individual with COVID-19. (R-35: Hr'g Tr. at 42:19-22, App. 345).

always in the public interest to uphold fundamental constitutional rights. As stated by this Court, "[N]either the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *ACLU v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003). That includes the restrictions at issue here.

More to the point, Defendants simply restate their parade of horribles without addressing any of Plaintiffs' arguments. The Constitution requires Defendants to regulate with precision and not blunt trauma. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) ("In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' . . . and must be 'tailored' to serve their legitimate objectives. . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'"). When Defendants' witness was pressed on why Defendants did not implement narrowly tailored restrictions *that focus on the harm to be alleviated*, such as "[i]solat[ing] those who have problems, the comorbidities and the elderly, and let the other people free," her response was: "***That was not the policy decision that we made***." (R:35: Hr'g Tr. at 48:21-23, App. 351). In other words, there is no "scientific" justification for the overbroad restrictions at issue here. Defendants have not demonstrated (nor can they) that

their "one-size-fits-all" restrictions are drawn with any measure of precision or that they are narrowly tailored to promote Defendants' asserted interests. As noted, we know, through "science," which demographics are most susceptible to the virus. (*See* R-35: Hr'g Tr. at 41:7-10, App. 344 ["Q. So we do know based on science and data which populations are the most vulnerable, that being the elderly and those with comorbidities. Is that fair to say? A. Yes."]). Yet, Defendants impose broad restriction on everyone. Indeed, why are schoolchildren required to wear masks throughout the entire school day? Where is the science on that? It's not in the record. Indeed, the opposite is true: the record evidence shows that there are no reported deaths from COVID-19 in the 0 to 19 age group in Pennsylvania. (R-35: Hr'g Tr. at 40:4-16, App. 343). Where is the science supporting these broad restrictions on those who are not infected with the virus or who are asymptomatic? It doesn't exist, and it most certainly does not exist in the record before this Court. Indeed, the opposite is true: asymptomatic individuals are not the drivers of this or any other pandemic. (R-35: Hr'g Tr. at 49:9-10, App. 352 [admitting that "individuals who are asymptomatic are not the primary drivers of the pandemic"]). And remember, <u>all</u> of these restrictions are based on the claim that we are suffering a pandemic.

Why are the hundreds of thousands of individuals in Pennsylvania who already had COVID-19 (including Chad Parker) required to wear masks? Why are

they subject to contact tracing? According to the CDC, "[c]ases of reinfection with COVID-19 have been reported, but *remain rare*."[8]

Why were the BLM protestors (including Governor Wolf) granted an exemption for their First Amendment protest but Plaintiffs are not granted an exemption for theirs? Where is the science on this? Of course, it is not based on science—it is pure politics and viewpoint discrimination.

Defendants claim that Plaintiffs are "handwaving away indisputable science surrounding how COVID spreads, and the over 24,652 Pennsylvanians and 553,057 Americans who have died from this disease."[9] (Defs.' Br. at 44). But such hyperbolic and generalized assertions are not legal arguments nor do they explain or justify the overbroad restrictions at issue here. Can Defendants identify the "scientific" data showing how many people did *not* contract the virus because they wore a mask? Can Defendants identify the "scientific" data showing the number of people who died because they didn't wear a mask? They cannot. Instead, they simply handwave with generalizations.

[8] (*See* https://www.cdc.gov/coronavirus/2019-ncov/your-health/reinfection.html, last visited Mar. 29, 2021). Merriam-Webster defines "rare" as follows: "1: seldom occurring or found: UNCOMMON." (https://www.merriam-webster.com/dictionary/rare, last visited Mar. 29, 2021).

[9] "In comparison, the number of people who died from heart disease in 2017 in Pennsylvania was ***32,312***, and the number of people who died from cancer that year in Pennsylvania was ***28,387*** according to the CDC." (R-18-2: Redman Decl. ¶ 63, App. 82 [emphasis added]).

At the end of the day, Defendants have no regard for the Constitution, and this is most evident in their argument regarding the balancing of equities. Nowhere in their argument do they give *any* weight to freedom, liberty, and fundamental constitutional rights. They place their thumb on the scale, hoping that this Court will "shelter in place" and allow the tyranny to continue unabated. The Constitution demands much more.

CONCLUSION

The Court should issue the requested injunction.

Respectfully submitted,

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COMBINED CERTIFICATIONS

Certification of Word Count

I certify that pursuant to Fed. R. App. P. 32 that the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 5,443 words, excluding those sections identified in Fed. R. App. P. 32(f).

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I hereby certify that on April 5, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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