No. 20-3518

# In the United States Court of Appeals
## for the Third Circuit

CHAD PARKER; REBECCA KENWICK-PARKER; MARK REDMAN; DONNA REDMAN,
*Appellants*

v.

GOVERNOR OF PENNSYLVANIA; ATTORNEY GENERAL PENNSYLVANIA; SECRETARY PENNSYLVANIA DEPARTMENT OF HEALTH,
*Appellees*

**On Appeal from the United States District Court**
**for the Middle District of Pennsylvania**
**Case No. 1-20-cv-01601**

**BRIEF OF APPELLANTS**
**AND APPENDIX VOL. I OF II, Pages App. 1 – App. 49**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and L.A.R. 26.1.0, Plaintiffs-Appellants certify that there is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

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## INTRODUCTION

"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." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2605 (2020) (J. Alito, dissenting). The Orwellian contact tracing program and the mask mandate do not "carefully account for constitutional rights." Rather, the "one-size-fits-all" restrictions operate as blunt instruments on the fundamental freedoms of all Pennsylvanians, including Plaintiffs.

In *Roman Catholic Diocese v. Cuomo,* 208 L.Ed.2d 206 (U.S. 2020), Justice Gorsuch put to rest the overreliance on *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), in cases challenging restrictions imposed during this current pandemic. As stated by Justice Gorsuch, "*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so." 208 L.Ed.2d at 213 (Gorsuch, J., concurring). He concludes with a sober warning:

> Why have some mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic? In the end, I can only surmise that much of the answer lies in a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack. *Things never go well when we do*.

*Id.* 214 (Gorsuch, J., concurring) (emphasis added).

As the record shows, Governor Wolf was exempt from the pandemic orders when he was marching *en masse* with the Black Lives Matter ("BLM") protestors—a protest which threatened to cause a *catastrophic* spread of COVID-19. Ordinary citizens, such as Plaintiffs, should, at a minimum, be granted the same First Amendment protections as the ruling class.[1] Our Constitution demands it.

Plaintiffs have standing to advance their claims, and the district court erred by denying their request for an injunction. This Court should reverse and remand this case, directing the district court to issue the requested injunction.

## STATEMENT OF JURISDICTION

On September 3, 2020, Plaintiffs filed this action, alleging violations of the First, Fourth, and Fourteenth Amendments to the United States Constitution, the Guaranty Clause, and 42 U.S.C. § 1983. (R-1: Compl.). The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§ 1331 and 1343.

On October 6, 2020, Plaintiffs filed a motion for preliminary injunction. (R-17: Pls.' Mot. for Prelim. Inj.). On December 11, 2020, the district court denied the motion. (R-34: Mem. & Order, App. 4-49). That same day, Plaintiffs filed a timely

[1] This is not the only example of Defendants' hypocrisy. (*See, e.g.*, https://dailycaller.com/2020/05/13/coronavirus-pennsylvania-rachel-levine-mother-nursing-home/ [last visited Jan. 23, 2021] [Secretary Levine reportedly moved her mother out of her care facility at the same time she ordered COVID patients back into the nursing homes, resulting in a significant death rate among that population] https://www.newsweek.com/pennsylvania-health-secretary-moved-mother-out-nursing-home-coronavirus-death-toll-increased-1503853 [last visited Jan. 23, 2021] [same]).

notice of appeal. (R-35: Notice of Appeal, App. 1-3).

The Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1292.

## STATEMENT OF THE ISSUES FOR REVIEW

I. Whether Plaintiffs' constitutional challenge to the contact tracing program and mask mandate presents a justiciable case or controversy such that the district court erred as a matter of law when it denied Plaintiffs' request for a preliminary injunction on justiciability grounds.

II. Having erred as a matter of law on the justiciability question, whether the district court erred by nonetheless denying Plaintiffs' motion for a preliminary injunction on its merits when Plaintiffs demonstrated factually and legally that: (1) they have a strong likelihood of succeeding on the merits of their constitutional claims; (2) they are suffering irreparable harm; (3) the balance of interests weighs in their favor; and (4) the public interest favors granting the injunction as a matter of law.

III. Whether the contact tracing program violates the First, Fourth, and Fourteenth Amendments.

IV. Whether the mask mandate violates the First and Fourteenth Amendments.

## RELATED CASES AND PROCEEDINGS

Plaintiffs filed a motion for injunction pending appeal with this Court. The motion was denied without an opinion on January 19, 2021. (Doc. No. 16).

## STATEMENT OF THE CASE

### A. Relevant Facts.

#### 1. No End Date, Objective Criteria, or Expert Testimony.

There is no end date for the mask mandate. (R-35: Hr'g Tr. at 32:7-9, App. 335). There are no objective criteria, nor a plan, for ending the challenged restrictions. (*Id*. at 32:10-24, App. 335). Defendants offered no expert testimony to support the challenged restrictions. Defendants only witness is not an epidemiologist nor an infectious disease expert. (R-35: Hr'g Tr. at 23:19-20; 24:1-6, App. 326-27). She is a "healthcare administrator." (*Id*. at 23:13-15, App. 326). In other words, she is a government bureaucrat.

#### 2. Contact Tracing Program.

"Contact tracing is the process of identifying, notifying, and monitoring anyone who came in close contact with an individual who tested positive for COVID-19 while they were infectious." (*Id*. at 52:1-7, App. 355; R-18-2: Redman Decl. ¶ 24, App. 67-68). "Within 24 hours of receiving the positive result, trained public health staff conduct an interview with the case *to obtain a list of close contacts* they had while infectious. . . ." (*Id*. ¶ 35, App. 72). 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 57:20-25 to 58:1-8, App. 360-61).

There are serious problems with the COVID-19 testing relied upon by Defendants. The antigen test has known and serious flaws, yet DOH still relies on it for its 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). The *New York Times* reported that "[t]he standard tests are diagnosing huge numbers of people who may be carrying relatively insignificant amounts of the virus." (R-18-2: Redman Decl. ¶ 18, App. 66; *see also* ¶¶ 18-20, 64, App. 65-66, 83). Yet, DOH's only witness testified that she does not know the cycle threshold used for determining a positive PCR test, which she described as the "gold standard"—indeed, she didn't know what a PCR cycle threshold was. In other words, DOH has no standard.[2] (R-35: Hr'g Tr. at 64:13-25 to 66:1-18, App. 367-69). And there is certainly no transparency on the part of these government officials, who are using "positive" tests to impose severe restrictions on liberty.

Despite the known problems with test results,[3] there is no requirement that

[2] The World Health Organization recently issued guidance confirming the point that the number of cycle thresholds is critical when relying on the validity of a PCR test (the "gold standard" per DOH). *See* https://www.who.int/news/item/20-01-2021-who-information-notice-for-ivd-users-2020-05 (last visited Jan. 22, 2021).

[3] The district court was wrong when it stated that the only evidence presented by Plaintiffs that there are serious flaws in testing is a *New York Times* article. (R-34: Mem. & Order at 25, n.11, App. 28). Aside from the fact that Defendants did not refute what the *New York Times* reported, Defendants only witness confirmed that the antigen test, relied upon by the program, has serious flaws. (*See infra* text).

DOH verify whether a "positive" test that subjects a person to the contact tracing program, including its quarantine directive and other mandates, is a true positive or a false positive. (*See id*.). And there is no way for an individual subject to the quarantine directive to challenge the validity of the test or its result. (R-18-3: Parker Decl. ¶ 20, App. 268).

Pursuant to the contact tracing program, private citizens and their closest associates, including family members, are *ordered* to quarantine for 14 days under burdensome conditions and threats of further adverse consequences for failing to comply with the program.[4] (*Id*. at ¶¶ 13-21, App. 266-69). Pursuant to this program, family members must remain 6 feet apart from each other while they are in their own home. (R-18: Parker Decl. ¶ 17, Ex. B [DOH Letter], App. 267, 278). Additionally, businesses are now required to keep records, which they must provide to DOH if requested. (R-35: Hr'g Tr. at 55:13-25 to 57:1-10, App. 358-60). Pursuant to an order issued by Governor Wolf this past November, businesses must:

> identify employees and customers, to the extent possible, who are in close contact, within about six feet, for about 15 minutes with a person with COVID-19 from the period 48 hours before symptoms onset or 48 hours prior to test date if asymptomatic to the time at which the patient isolated and, upon request, provide those names and contact information to the Pennsylvania Department of Health or local Health Department.

[4] This is not a "voluntary" quarantine. The DOH directive is explicit: "[t]he Secretary of Health is *directing* you as a close contact of a person that has COVID-19 to self-quarantine in your home." (R-18-3: Parker Decl. ¶¶ 15, 18, Ex. B [DOH Letter] [emphasis added], App. 284-85, 294-96). Law enforcement will ensure compliance. (*See id*. at Ex. B [DOH Letter], App. 296).

(*Id*. at 56:12-19, App. 358).

The contact tracing program is enforced within the schools. DOH requires each school to "[t]ake measures that allow for exposed individuals to be more easily traced." (R-18-2: Redman Decl. ¶ 38, Ex. S [Public School Guidance], App. 73-74, 239).

**3. Mask Mandate.**

On July 1, 2020, Secretary Levine issued an order mandating "universal face coverings," requiring *all* persons in Pennsylvania to wear a face mask when leaving their home. (R-18-2: Redman Decl. ¶¶ 53-54, Ex. U, App. 78-79, 245-49; *see also* R-35: Hr'g Tr. at 6:8-12, App. 309). This mandate was updated on November 17, 2020. (*Id*. at 10:4-10; R-29-1 [updated mask mandate], App. 297-303, 313). State Police have authority to enforce the mandate. (*Id*. at 26:13-18, App. 329; *see also* 71 Pa. Stat. § 732-206(a) ("The Attorney General shall be the chief law enforcement officer of the Commonwealth.").

For many individuals, including Plaintiffs, a mask has become a symbol of government oppression during this current pandemic. (R-18-2: Redman Decl. ¶ 55, App. 79; R-18-3: Parker Decl. ¶ 7, App. 265; R-18-4: Kenwick-Parker Decl. ¶ 7, App. 282). For Governor Wolf, wearing one is "political theater." (R-18-2: Redman Decl. ¶ 56, App. 80). The Wall Street Journal political cartoon (below) and other news reports cited by Plaintiffs (*see* R-18-2: Redman Decl. ¶¶ 55-59, App. 79-81) affirm

this point.

The mask mandate presumes that all people are diseased and thus makes the wearer contribute to a false public statement that all people are in fact diseased. The mask mandate compels Plaintiffs to engage in a form of expression and to convey a message with which they disagree. Plaintiffs also object to the mandate because it violates their privacy interests, including their right to bodily integrity and personal autonomy. (R-18-2: Redman Decl. ¶¶ 57-60, App. 80-81; R-18-3: Parker Decl. ¶¶ 8-11, App. 265-66; R-18-4: Kenwick-Parker Decl. ¶¶ 8-11, App. 282-83).

A mask is required for everyone, even though the vast majority of individuals are healthy. *It is required for individuals who are not even infectious*, including the hundreds of thousands of Pennsylvanians who already had the virus. (R-35: Hr'g Tr. at 45:25 to 47:1-2; 79:10-18, App. 348-50, 382). The mandate presumes that all citizens are diseased unless proven healthy.[5] The mandate is forcing every

[5] An exception to the mandate is provided for those with respiratory issues.

Pennsylvanian, including Plaintiffs, to become the government's patient without the citizen's consent. (R-18-2: Redman Decl. ¶ 61, App. 81-82; R-18-3: Parker Decl. ¶ 12, App. 266; R-18-4: Kenwick-Parker Decl. ¶ 12, App. 283).

Science and data do not support the mask mandate. Defendants did not present any expert witness testimony to support the mandate. (*See* R-35: Hr'g Tr. at 22:19-15 to 24:1-6, App. 325-27). A study posted on the CDC website in May 2020, concluded, *inter alia*, that "[t]here is limited evidence for [the] effectiveness [of masks] in preventing influenza virus transmission either when worn by the infected person for source control or when worn by uninfected persons to reduce exposure." (R-18-2: Redman Decl. ¶ 71, App. 86-87). The mandate went into effect on July 1, 2020, when the "curve" had flattened and hospitalizations decreased, *calling into question its need*. And the mandate was in effect during the November surge, *calling into question its efficacy*. (R-35: Hr'g Tr. at 38:2-25 to 39:1-18, App. 41-42).

On August 17, 2020, Defendants ordered all students attending primary and secondary schools to wear a mask, even if social distancing can be maintained. (R-18-2: Redman Decl. ¶ 72, App. 87-88). However, according to DOH, children in the 0-19 age range make up less than 8% of the COVID-19 cases, and there are no listed deaths in this age demographic. (*See* R-35: Hr'g Tr. at 40:7-16, App. 343).

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Consequently, masks are not required to be worn by individuals who are *most* susceptible to COVID-19, a virus that attacks the respiratory system. (R-18-2: Redman Decl. ¶ 53, Ex. U, App. 78-79, 245-49; R-29-1 [Revised Mandate], App. 297-303).

Defendants have not conducted any investigation into the adverse effects of wearing a mask,[6] including an investigation into such adverse effects on children who are required to wear one for the entire day while in school. (*Id*. at 50:6-15, App. 353).

**4. Irreparable Harm to Plaintiffs.**

On July 14, 2020, Chad Parker believed he had a sinus infection and so he sought medical treatment. On July 19, he was tested for COVID-19, and on July 24, his test came back positive. Chad works for the State of Pennsylvania. He was cleared on July 24, and *he returned to work on July 25*. (R-18-3: Parker Decl. ¶ 13, App. 266).

On July 25, Chad was contacted by a contact tracer. The contact tracer asked probing questions, including the identity and ages of those living with Chad, the names of any businesses or other places he recently visited, and the names and contact information of any people he recently visited or had contact with. Chad was disturbed by the intensive questioning by this government investigator and by the investigation itself, which sought personal and private information regarding his personal and private contacts and associations. (*Id*. ¶ 14, App. 266).

Shortly following the probing phone call, the "Parker/Kenwick Family" received a letter in the mail from DOH *dated July 25, 2020* ("DOH Letter"). (*Id*. ¶ 15,

[6] Science and data show that masks have negative consequences for the wearer. (R-18-2: Redman Decl. ¶ 73 [citing Journal of Infectious Diseases and Epidemiology], App. 88-89).

Ex. B [DOH Letter], App. 267, 276-79). The letter made explicit that "[t]he Secretary of Health is *directing* you as a close contact of a person that has COVID-19 to self-quarantine in your home." (*Id*., Ex. B [DOJ Letter] [emphasis added], App. 277).

During the mandated quarantine, the DOH Letter also "directed" the "Parker/Kenwick Family" to, *inter alia*, "[m]aintain social distancing of at least 6 feet *from family members*" and to "[c]ooperate with the monitoring and other contacts of the Department or its representatives." Thus, Chad and his wife, Rebecca Kenwick-Parker, had to remain separated from each other by 6 feet for 14 days, and they had to remain separated from their minor children by 6 feet for 14 days. (*Id*. ¶ 17, Ex. B [DOH Letter] [emphasis added], App. 267, 278).

The DOH Letter concludes with a stern warning: "You *must* immediately adhere to this quarantine directive and all disease control measures included in it. If you do not cooperate with this directive, the Secretary of Health may petition a court to have you *confined* to an appropriate place *chosen by the Department*. . . . *You will be kept there until the Department determines it can release you from quarantine*. *Law enforcement may be called upon, to the extent necessary, to ensure your compliance with this directive*." (*Id*. ¶ 18, Ex. B [DOH Letter] [emphasis added], App. 267-68, 279).

There is nothing "voluntary" about this quarantine (house arrest). Contrary to the district court's conclusion (*see* R-34: Mem. & Order at 6 ["[S]hould DOH

determine that an *involuntary* quarantine is necessary, the DOH must first petition a court."], App. 9), this is the government using its authority and power to *force* private citizens to quarantine. It is, in fact, *involuntary*. The threat to petition a court is a threat to have the government *isolate* you from your home if you *fail to obey* the DOH directive. In other words, this threat is just another form of coercion to force compliance.

Pursuant to 28 Pennsylvania Code Chapter 27, a violation of a DOH directive could result in criminal penalties (§ 27.8). Chapter 27 also gives DOH very broad, plenary, and punitive powers to enforce the contact tracing program. For example, DOH has the power, *inter alia*, to:

- isolate, quarantine, segregate, and surveil individuals without a warrant or consent (§ 27.60(a));
- define the conditions of the quarantine (§ 27.65);
- put a placard/sign in front of a person's home if DOH believes that the person is not "fully" compliant (§ 27.66);
- restrict physical movement, requiring the quarantine to "take place in an institution where the person's movement is physically restricted" (§ 27.88(a));
- "treat" minors without parental consent (§ 27.97);
- isolate a person if he or she refuses treatment (§ 27.87(a));

- enter a home without a warrant or consent (§ 27.152(b)); and,
- review confidential medical records without a warrant or consent (§ 27.152(c)).

Indeed, DOH has the authority to remove minor children from their homes and place them in an isolated quarantine location without parental consent pursuant to the contact tracing program (R-18-2: Redman Decl. ¶ 44, App. 76)—a frightening scenario for any parent.

At all relevant times, the "Parker/Kenwick Family" lived in close contact with each other in the same household. Accordingly, their exposure to COVID-19 via Chad had begun well before July 14, and yet none of the family members demonstrated any symptoms. Nonetheless, the Parkers and their children were forced to quarantine for 14 days *beginning* on July 25. (R-18-3: Parker Decl. ¶ 19, App. 268).

There was no process in place to challenge this forced quarantine nor were Defendants required to demonstrate probable cause that it was necessary. In fact, it was *not* necessary as the period of infection had expired prior to the imposed quarantine period. (*Id*. ¶ 20, App. 268).

From July 25, 2020, to on or about August 24, 2020, Chad received approximately 14 texts a day from DOH. The incessant text messages required responses to a "Daily Self-Report." Pursuant to the DOH Letter, the Parkers were

required to "cooperate" and thus respond. (*Id*. ¶ 21, App. 268-69).

Because the Parkers are now in Defendants' contact tracing database, they reasonably fear that they will be subjected once again to a quarantine. (*Id*. ¶ 22, App. 269; R-18-4: Kenwick-Parker Decl. ¶ 22, App. 286).

Plaintiff Rebecca Kenwick-Parker homeschools her three biological children, giving them the option to attend public school once they reach the 8th grade. Rebecca's 14-year-old son (her oldest biological child) attended public school last year (8th grade) and was planning on attending public high school (9th grade) in 2020. However, due to the contact tracing program and the mask mandate, the Parkers were forced to keep him home, causing them to scramble to find a high school curriculum for homeschooling and thus incurring additional costs for that curriculum. So long as the contact tracing program and mask mandate remain in effect, the Parkers will not send Rebecca's biological children to public school. (*Id*. ¶ 23, App. 286).

The Redmans' two children are 11th grade students at Delaware Valley High School in Pennsylvania. Because of the challenged contact tracing program, the Redmans were forced to have their children attend school remotely rather than attending in person. The children are disadvantaged by not attending school in person. The decision not to send their children to school was very difficult, but the Redmans had no choice. The Redmans also object to the government forcing their children to wear masks throughout the entire school day, even when social distancing

could be achieved. (R-18-2: Redman Decl. ¶¶ 46-49, App. 76-77).

As a result of the COVID-19 restrictions, the Redmans' usual house of worship requires pre-registration in order to attend in-person services within the church. Because of the challenged contact tracing program, the Redmans have curtailed attending religious services to avoid providing data or information that Defendants may acquire or seize to quarantine them, their children, or others with whom they associate. (*Id*. ¶ 51, App. 78).

Because of the contact tracing program, Plaintiffs will avoid seeking medical treatment (particularly in light of what happened to the Parkers as a result of Chad Parker seeking treatment for a simple sinus infection), and they will avoid businesses, restaurants, and other public or social events that may keep rosters, lists, video or other ways to document persons who entered the business establishment or attended the event. (*Id*. ¶¶ 51-52, App. 78; R-18-3: Parker Decl. ¶ 24, App. 269-70).

Because of the challenged restrictions, Plaintiffs are suffering irreparable harm. (R-18-2: Redman Decl. ¶ 80, App. 93; R-18-3: Parker Decl. ¶ 25, App. 270; R-18-4: Kenwick-Parker Decl. ¶ 25, App. 287).

**B. Procedural History.**

Plaintiffs filed this action on September 3, 2020. (R-1: Compl.). On October 6, 2020, Plaintiffs filed a motion for preliminary injunction. (R-17: Mot. for Prelim. Inj.). A hearing on Plaintiffs' motion was held on November 24, 2020. (*See* R-35:

Hr'g Tr., App. 304-434). On December 11, 2020, the district court denied Plaintiffs' motion. (R-34: Mem. & Order, App. 4-49). That same day, Plaintiffs filed their Notice of Appeal. (R-36: Notice of Appeal, App. 1-3). This appeal follows.

**C. Ruling Presented for Review.**

The district court denied Plaintiffs' request for a preliminary injunction, holding that Plaintiffs' claims were not justiciable. (*See* R-34: Mem. & Order, App. 4-49). More specifically, the court "ultimately conclude[d] that, because [Plaintiffs] lack standing to enjoin enforcement of either the Contact Tracing Program or the Mask Mandate, the Motion must be denied."[7] (*Id*. at 17, App. 20). The court rejected Plaintiffs' standing to challenge the contact tracing program by fabricating an unreasonable chain of events and thus concluding that the harm to Plaintiffs was speculative. (*Id*. at 22, App. 25). As the situation with Plaintiff Chad Parker demonstrates, a simple trip to a doctor due to symptoms of a sinus infection can result in your entire family being placed under house arrest for 14 days. And while the DOH must first petition a court to get an "involuntary quarantine" order (*see id*. at 25 n.12, App. 28), a violation of the contact tracing directive itself is punishable by criminal fines and other penalties (*see* 28 Pa. Code § 27.8). Moreover, as stated by the directive, "*Law enforcement may be called upon, to the extent necessary, to ensure your compliance with this directive*." (R-18-3: Parker Decl. ¶ 18, Ex. B [DOH Letter]

[7] Not surprising, Defendants never raised standing in their opposition.

[emphasis added], App. 267-68, 279; *see also* R-34: Mem. & Order at 5, App. 8). The district court concluded that it was far too speculative that any Plaintiff would be subjected (*again*, in the case of the Parkers) to a quarantine order in the future under the contact tracing program, yet the court described the COVID-19 pandemic as a "crisis which . . . has infected 463,175 Pennsylvanians." (*See id.* at 2, App. 5). This is the paradox Defendants (and the district court) face. They argue that this draconian restriction on liberty is entirely necessary because COVID-19 is *extraordinarily* contagious and dangerous. Yet, the district court concludes that Plaintiffs' concerns about being swept up or harmed by this program are unreasonable. And despite Defendants' claim that the contact tracing program is essential for protecting the public health, the district court concludes that there is no concern for Plaintiffs because Defendants don't actually enforce it. (*See, e.g., id.* at 25, n.12, App. 28).

As the record shows, if *anyone* with whom Plaintiffs associate, whether it be at a church service, in a public school, at a doctor's office, at a social event, or at a business establishment, has a positive test (regardless of whether it is a false positive—Defendants do nothing to confirm the result), the program is triggered. In light of the stated "crisis," the harm caused by the challenged program is reasonably foreseeable, as the situation with the Parkers starkly illustrates. (*See supra* Statement of the Case, § A.4.).

Regarding Plaintiffs' challenge to the mask mandate, the district court stated, "Plaintiffs' standing to request an injunction enjoining enforcement of the Mask Mandate is a closer call." (R-34: Mem. & Order at 32, App. 35). The court is wrong in this respect: it's not close at all—Plaintiffs have standing to challenge a government mandate that subjects them to fines and penalties for violating. The court was correct, however, when it concluded "that Plaintiffs have stated a concrete, *de facto* injury." (*Id*. at 33, App. 35). The court was also correct when it concluded as follows:

> Based on the breadth of the Mask Mandate—citizens must wear a face covering essentially whenever they are in public spaces, or even in their own homes if others outside the family are present—we also have no trouble finding the alleged injury is "actual or imminent." We likewise conclude that the alleged injury is traceable to Defendants, who either instituted the Mask Mandate or who likely bear at least some responsibility for enforcing it.

(*Id*. at 34, App. 37). The court erred, however, by ultimately concluding that Plaintiffs failed to "meet the 'particularity' or 'redressability' requirements for standing." (*Id*.). Contrary to the court's conclusion, Plaintiffs are not advancing an "undifferentiated" grievance. Many people do not object to wearing masks and some, perhaps most, would wear one *regardless* of whether there were *criminal and civil penalties* for not wearing one. Not everyone agrees that wearing a mask conveys a political message as Plaintiffs strongly do. Likewise, not everyone agrees with the message conveyed by the BLM protests. Yet, those who joined the BLM protests, including Governor Wolf, were free to do so *without* the threat of fines or penalties. However, those who want

to join Plaintiffs' protest of the mask mandate by not wearing one are not free to do so without the threat of fines or penalties. The fact that a private business or entity might not let someone enter who is not wearing a mask (*see id*. at 37, App. 40) does not change the fact that the government mandate carries with it criminal and civil penalties. Plaintiffs' constitutional dispute is, appropriately so, with the government—it is not with private businesses. In short, the injury is particularized and may be redressed by enjoining the *government* mandate.

In the final analysis, standing is not an issue, and it will be discussed in further detail below.

In a footnote, the court stated that "[e]ven if Plaintiffs had standing to seek an injunction prohibiting Defendants from operating the Contact Tracing Program and enforcing the Mask Mandate, they have not established a likelihood of success on the merits of their claims." (R-34: Mem. & Order at 44 n.20, App. 47). The court made clear that it would have (incorrectly) relied upon *Jacobson* to deny the motion, stating that "both the Contact Tracing Program and the Mask Mandate have a real and substantial relation to public health, and neither shocks the conscience." (*Id*.). Nonetheless, the court concludes:

> But even if we declined to displace ordinary tiers of scrutiny for this *Jacobson*-derived deference to governmental action during public heath emergencies, we are confident that Plaintiffs would *still* not succeed on the merits of their claims. Aside from hurdling rational basis or strict scrutiny review, Plaintiffs would also have needed to convince us that

> the balance of equities weighs in their favor and that an injunction would be in the public interest. . . . That they have not done.

(*Id*.). The district court is wrong as a matter of fact and law.

## SUMMARY OF THE ARGUMENT

Plaintiffs have standing to challenge the contact tracing program and the mask mandate. Plaintiffs have set forth personal injuries fairly traceable to Defendants' conduct and likely to be redressed by the requested relief. Cognizable injuries caused by the contact tracing program include: (1) the chilling effect caused by forced disclosures; and (2) changes in behavior compelled by the program. This program and its draconian restrictions hang over the heads of Plaintiffs like the sword over Damocles, creating a here-and-now subservience. These injuries are fairly traceable to Defendants, and they are likely to be redressed by the requested injunctive relief. Likewise, compelling Plaintiffs to wear a mask against their will under threat of penalty is a cognizable injury that is fairly traced to Defendants' conduct and likely to be redressed by the requested injunctive relief.

A preliminary injunction should issue because (1) Plaintiffs are likely to succeed on the merits of their constitutional claims; (2) they are currently suffering irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest.

Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. This includes the right to associate with

others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. State action which may have the *effect* of *curtailing* the freedom to associate, such as the contact tracing program, is subject to strict scrutiny. Under strict scrutiny, the government must show that the regulation is necessary to serve a compelling state interest, and the regulation must be the least restrictive means of achieving the interest. The contact tracing program fails this most demanding test known to constitutional law.

Additionally, the quarantine mandated under the contact tracing program constitutes a seizure under the Fourth Amendment. The program permits this seizure without any proof or verification that individuals subject to this quarantine are sick. The power to subject a citizen to quarantine is subject to both procedural and substantive due process restraints. At a minimum, these include the requirement that the quarantine be imposed only when it is necessary for public health (or is the least-restrictive alternative) and only when it is accompanied by procedural due process protections, including notice, the right to a hearing before an independent decision-maker either before or shortly after confinement, the right to counsel, and the requirement that the state prove its case with clear and convincing evidence. None of these exist under the contact tracing program. The program is so arbitrary in its creation, scope, and administration that it fails any level of constitutional scrutiny.

The First Amendment right to freedom of speech includes the right not to speak.

And the Fourteenth Amendment protects a private citizen's personal autonomy and bodily integrity from government interference. The mask mandate fails constitutional scrutiny under the First and Fourteenth Amendments. At a minimum, a First Amendment exception should be permitted for this mandate, just as Governor Wolf and Secretary Levine granted a First Amendment exception for the BLM protests. The First Amendment prohibits the government from favoring some viewpoints over others.

The loss of constitutional rights, particularly rights protected by the First Amendment, constitutes irreparable harm as a matter of law. The deprivation of a constitutional right is contrary to the public interest, and the harm to others, even if substantial, does not outweigh this deprivation. Moreover, Defendants' claimed interest in public health can be advanced by more narrowly tailored restrictions. Simply asserting an interest in public health does not justify overbroad restrictions that infringe fundamental liberties, such as the restrictions at issue here. The injunction should issue.

## STANDARD OF REVIEW

The Court generally "employ[s] a tripartite standard of review for refusals to issue preliminary injunctions. [It] review[s] the District Court's findings of fact for clear error. Legal conclusions are assessed de novo. The ultimate decision to grant or deny the injunction is reviewed for abuse of discretion." *Sypniewski v. Warren Hills*

*Reg'l Bd. of Educ.*, 307 F.3d 243, 252 (3d Cir. 2002).

Accordingly, the district court's conclusions related to standing are reviewed de novo. *See Shalom Pentecostal Church v. Acting Sec'y, United States Dep't of Homeland Sec.*, 783 F.3d 156, 161 (3d Cir. 2015) ("We review the legal conclusions related to standing de novo."); *Freedom from Religion Found. Inc. v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 475 n.4 (3d Cir. 2016) ("We exercise de novo review over legal conclusions concerning standing . . . ."); *see also LaCroix v. Lee Cty.*, 819 F. App'x 839, 841 (11th Cir. 2020) (reviewing de novo a denial of a preliminary injunction on grounds that the plaintiff lacked standing to bring the action under the First Amendment).

Because this case implicates First Amendment rights, this Court must closely scrutinize the record "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557, 567 (1995). Thus, this Court is required to "conduct an independent examination of the record as a whole, without deference to the trial court" on the First Amendment issues. *Id.*; *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (same).

## ARGUMENT

### I. The District Court Erred by Concluding that Plaintiffs' Claims Are Not Justiciable.

The district court's conclusion that Plaintiffs' claims are not justiciable is clearly erroneous as a matter of fact and law.

Article III of the Constitution confines the federal courts to adjudicating actual "cases" or "controversies." U.S. Const. art. III, § 2. As stated by the Supreme Court:

> A justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

*Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937) (citations omitted).

Here, there is nothing hypothetical, abstract, academic, or moot about the legal claims advanced. We know precisely how the contact tracing program works, as evidenced by how it was applied to the Parkers. And the contours of the mask mandate, which applies to Plaintiffs, are clear—the restriction is set forth in a written order. Thus, this case presents a real and substantial controversy between parties with adverse legal interests, and this controversy can be resolved through a decree of a conclusive character. *Id*. It will not require the Court to render an opinion advising what the law would be upon a hypothetical state of facts. *Id*.

In sum, the Court has the power to hear and decide this case. It can determine whether the challenged measures infringe Plaintiffs' fundamental rights. The Court could then enter an appropriate order. This case presents a justiciable controversy in which the judicial function may be appropriately exercised. *Id.*; *see also Jacobson*, 197 U.S. at 31 (stating that it is the "duty of the courts to so adjudge" the constitutionality of an emergency order).

Moreover, the questions presented are essentially *legal* questions based on undisputed facts. Courts routinely find such claims justiciable. *See, e.g., 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).

In an effort to give meaning to Article III's "case" or "controversy" requirement, the courts have developed several justiciability doctrines, including standing. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). "The doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Id.* (internal quotations and citation omitted). "In essence the question of standing is whether the

litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To invoke the jurisdiction of a federal court, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

A cognizable injury includes the chilling effect caused by forced disclosures. *See 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"). Absent judicial relief, the contact tracing program hangs over the heads of Plaintiffs "like the sword over Damocles, creating a 'here-and-now subservience,'" *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noises, Inc.*, 501 U.S. 252, 265 n.13 (1991), thereby chilling these associations and causing irreparable harm.

The inevitable action causing harm—the actual implementation and operation of the challenged program and mask mandate—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) these government-mandated programs/restrictions that impermissibly burden 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,* 468 U.S. at 751.

Through the contact tracing program, the government uses its authority to inquire into and search out the private associations of individuals. The breadth of government power under this program is forcing Plaintiffs to keep their children from attending public schools in person (the public schools are required to follow the contact tracing program and report contacts); to avoid seeking medical treatment (medical facilities are required to report); and to avoid businesses, restaurants, and

other public or social events that may keep rosters, lists, video or other ways to document persons who entered the business establishment or attended the event. The keeping of this contact information by businesses is required by the Governor's most recent order. (*See* R-35: Hr'g Tr. at 55:13-25 to 57:1-10, App. 358-60). The program is also forcing the Redmans to avoid worship services, and it required the Parkers to maintain social distancing among family members living in the same household.

Plaintiffs are also injured by the mask mandate. They must currently comply with the mandate or face a penalty. That is, as residents of Pennsylvania, Plaintiffs are subject to this regulatory burden.[8] It's not optional.

Consequently, Plaintiffs easily satisfy the standing requirement. Here, "the challenged exercise of governmental power [is] regulatory, proscriptive, or compulsory in nature, and the complainant[s are] either presently or prospectively subject to the regulations, proscriptions, or compulsions that [they are]challenging." *Laird v. Tatum*, 408 U.S. 1, 11 (1972). Moreover, "it is not necessary that [Plaintiffs] first expose [themselves] to actual arrest or prosecution to be entitled to challenge [an order imposing criminal penalties] that [they] claim[] deters the exercise of [their] constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). And "courts

[8] To argue that there is no *threat* of enforcement because Defendants have yet to fully enforce the challenged measures doesn't undermine standing. (*See, e.g.*, R-34: Mem. & Op. at 25, n.12, App. 28; R-35: Hr'g Tr. at 9:3-6, App. 312). Rather, it undermines Defendants' claimed interests. How important can these programs be if Defendants find no need to enforce them?

have routinely found sufficient adversity between the parties to create a justiciable controversy when suit is brought by the particular plaintiff subject to the regulatory burden imposed by a" law, as in this case. *See Nat'l Rifle Assoc. of Am. v. Magaw*, 132 F.3d 272, 282 (6th Cir. 1997). The district court erred by concluding that Plaintiffs' claims are not justiciable.

## II. The District Court Erred by Denying Plaintiffs' Request for a Preliminary Injunction.

As noted, while the district court ultimately denied Plaintiffs' request for a preliminary injunction on justiciability grounds, the court also made it clear in its Memorandum and Opinion that it would, alternatively, deny Plaintiffs' request on its merits. (R-34: Mem. & Order at 44, n.20, App. 47). We turn now to the merits of Plaintiffs' request for a preliminary injunction.

### A. Standard for Issuing a Preliminary Injunction.

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Fulton v. City of Phila.*, 922 F.3d 140, 152 (3d Cir. 2019) (same); *see also AT&T v. Winback & Conserve Program*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994) ("As a practical matter, if a plaintiff demonstrates both a likelihood of success

on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff.").

### B. Plaintiffs' Likelihood of Success on Their Constitutional Claims.

#### 1. Contact Tracing Program.

##### a. Right to Association.

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." *Healy v. James*, 408 U.S. 169, 181 (1972); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("[I]mplicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."). This Circuit adopted this fundamental understanding, stating,

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. 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*."

*Salvation Army v. Dep't of Cmty. Affairs*, 919 F.2d 183, 197 (3d Cir. 1990) (quoting *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958)) (emphasis added); *Grove v. City of York*, No. 1:05-CV-02205, 2007 U.S. Dist. LEXIS 1837, at *40 (M.D. Pa. Jan. 10, 2007) ("The close nexus between these rights is also evidenced by

the fact that an individual's freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

This right of association protects two distinct aspects: "In one aspect, it protects an individual's choice to enter into and maintain certain intimate human relationships, which is a fundamental element of personal liberty. Its other aspect recognizes a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Fraternal Order of Police, Lodge No. 5 v. City of Phila.*, 812 F.2d 105, 119 (3d Cir. 1987) (internal quotation marks, alterations, and citations omitted). The right of individuals to associate as a family without government interference is paramount. *See Roberts*, 468 U.S. at 619-20 (stating that "[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life" which has "led to an understanding of freedom of association as an intrinsic element of personal liberty").

As stated by the Supreme Court, "state action which *may have the effect of curtailing* the freedom to associate is subject to the *closest scrutiny*." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. at 460-61 (emphasis added). The contact tracing program

has "the effect of curtailing the freedom to associate." In fact, this is a primary effect of the program—an effect felt by Plaintiffs in a very real way, causing them to curtail their freedom and private associations because of its existence. Accordingly, the program must satisfy strict scrutiny ("closest scrutiny"), and it plainly cannot. *See, e.g.*, *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020) ("All of this requires the [pandemic] orders to satisfy the strictures of strict scrutiny. They cannot.").

The contact tracing program grants the government extraordinary power to impose draconian restrictions on individuals that infringe upon their fundamental liberties and private associations. Through this program, the government uses its authority to inquire into and search out the private associations of individuals. The breadth of government power under this program is forcing Plaintiffs to keep their children from attending public schools in person; to avoid seeking medical treatment; and to avoid businesses, restaurants, and other public or social events that may keep rosters, lists, video or other ways to document persons who entered the business establishment or attended the event. The program is also forcing the Redmans to avoid worship services. Moreover, in the case of the Parkers, it required them to maintain social distancing among family members living in the same household. Because the program curtails the freedom of association, it must satisfy strict scrutiny.

"Under strict scrutiny the government faces a more difficult burden, it must show that the regulation is *necessary* to serve a *compelling* state interest, and the

regulation must be the *least restrictive means* of achieving the interest." *Greater Phila. Chamber of Commerce v. City of Phila.*, 949 F.3d 116, 140 n.167 (3d Cir. 2020) (internal quotations and citations omitted) (emphasis added). This is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

As evidenced by the way in which the contact tracing program was enforced against the Parkers, the program cannot survive this "most demanding test." While the government has a substantial (some would argue compelling) interest in protecting public health against the virus, the contact tracing program is not "necessary" nor the "least restrictive means" of doing so. As the facts involving the Parkers demonstrate, the threat of spreading the virus among family members had already dissipated by the time the quarantine was ordered (indeed, Plaintiff Parker had already been cleared to return to work by his state government employer). There was no determination made by the government (nor any effort or requirement to make such a determination) that: (1) the "positive" test of Plaintiff Parker was accurate or properly administered; (2) that Plaintiff Parker was infectious (which he obviously was not); (3) that any of the Parkers were infectious (or had antibodies for that matter); (4) that anyone was, in fact, ill (none of them were); (5) that anyone posed a threat of spreading the virus (they didn't); or (6) that anyone was a member of the demographic mostly likely to need hospitalization (none of them were). Yet, the entire Parker family was placed

under house arrest subject to burdensome restrictions without the government having to justify its actions in any way. Additionally, the fact that Defendants claim that they do not enforce this restriction is fatal to their position. (*See* R-34: Mem. & Order at 25, n.12 ["It is also noteworthy that, while the quarantine directive letter threatens enforcement of its instructions, to date DOH has not actually enforced any COVID-19 quarantine directives."], App. 28; see also R:35: Hr'g Tr. at 9:3-6, App. 312). The district court is correct in that it is "noteworthy" that there is no enforcement, but not for the reasons the court cites. How can the government interest be so compelling if the government itself claims that it hardly, if ever, enforces the restriction? The simple answer: it is not. The program is unconstitutional.

The Constitution requires the government to regulate with precision. As stated by the Supreme Court:

> 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."

*Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *see also 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.") (quoting *NAACP v. Ala.*, 377 U.S. 288, 307-08 (1964)).

Here, Defendants are regulating with the blunt force of a sledgehammer rather than the precision of a scalpel. The program is unconstitutional.

**b. Fourth and Fourteenth Amendments.**

The quarantine mandated by the contact tracing program is the equivalent of a house arrest. *See generally United States v. Traitz*, 807 F.2d 322, 325 (3d Cir. 1986) (noting that when the defendant is required to "abide by specified restrictions on his personal associations, place of abode, or travel," this is a "house arrest"). It severely restricts the liberty of individuals who have committed no crimes and who are not even ill, thereby triggering the Fourth Amendment and other constitutional protections. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (stating that a Fourth Amendment "seizure" occurs when "a reasonable person would have believed that he was not free to leave"); *Gallo v. City of Phila.*, 161 F.3d 217, 224, 225 (3d Cir. 1998) (noting that the Third Circuit has adopted "a broad approach in considering what constitutes a seizure," concluding "that the combination of restrictions imposed upon Gallo, because they intentionally limited his liberty, constituted a seizure"); *see also Monday v. Oullette*, 118 F.3d 1099, 1102 (6th Cir. 1997) ("The Fourth Amendment requires an official seizing and detaining a person for a psychiatric evaluation to have probable cause to believe that the person is dangerous to himself or

others."); *Glass v. Mayas*, 984 F.2d 55, 58 (2d Cir. 1993) (concluding "that the Fourth Amendment applies to involuntary commitment" for health reasons).

State quarantine power, "although broad, is subject to significant constitutional restraints." 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). The power to subject a citizen to quarantine is subject to both procedural and substantive due process restraints. *Id*. ("[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.").

> At a minimum, these include the requirement that quarantine be imposed only when it is necessary for public health (or is the least-restrictive alternative) and only when it is accompanied by procedural due process protections, including notice, the right to a hearing before an independent decision-maker either before or shortly after confinement, the right to counsel, and the requirement that the state prove its case with clear and convincing evidence.

*Id*. at 4-5.

Defendants' contact tracing program imposes quarantines that include none of these basic constitutional safeguards, in violation of the Fourth and Fourteenth Amendments.

In addition to lacking any procedural safeguards, the program violates substantive Due Process. The social distancing requirement imposed *upon family members living in the same household* (as was the case with the Parkers) further illustrates and exemplifies this violation. *See, e.g., 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.").

"[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (internal quotations omitted). "[B]y barring certain government actions regardless of the fairness of the procedures used to implement them, . . . it serves to prevent governmental power from being used for purposes of oppression." *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (internal citation and quotations omitted). As stated by the Supreme Court, "We have emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government, . . . whether the fault lies in a denial of fundamental procedural fairness, . . . or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845-

46 (1998) (internal citations and quotations omitted). The challenged program fails here as well.

As outlined above, the contact tracing program is so arbitrary in its creation, scope, and administration that it fails any level of constitutional scrutiny.

**2. Mask Mandate.**

The right to freedom of speech includes the right not to speak. And the free speech right includes symbols as a form of expression. Additionally, the Fourteenth Amendment protects our personal autonomy and bodily integrity from government interference. The mask mandate fails constitutional scrutiny under the First and Fourteenth Amendments.

**a. First Amendment.**

In *Wooley v. Maynard,* 430 U.S. 705, 715 (1977), a case in which the government prohibited individuals from covering the State motto on their license plates, the Court held that the First Amendment is implicated when the government requires an individual to

> use their private property as a "mobile billboard" for the State's ideological message—or suffer a penalty . . . . As a condition to driving an automobile—a virtual necessity for most Americans—the [plaintiff] must display "Live Free or Die" to hundreds of people each day. The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.

*Id*. at 715. Accordingly, compelled speech, such as the government's mandate to wear what has become a political symbol in a highly-politicized pandemic, implicates the right to freedom of speech. Defendants are forcing Plaintiffs to use their bodies as "mobile billboards" for Defendants' pandemic message in violation of the First Amendment. Indeed, Defendants are forcing Plaintiffs to participate in their "political theater."

In *United States v. O'Brien*, 391 U.S. 367, 376 (1968), a case in which the defendant was advancing a First Amendment challenge to his conviction for burning his draft card, the Court stated "that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." The Court held that the statute prohibiting the destruction of draft cards was constitutional both on its face and as applied. *Id*. at 382. *O'Brien* is inapposite. It was not a compelled speech case. It involved a statute that was designed to protect government-issued certificates that were necessary for the proper functioning of the Selective Service. The statute did not infringe on the personal autonomy and bodily integrity of individuals. It didn't mandate an individual to purchase or construct an item (such as a face covering). And as the Court noted, "We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which

prohibits their willful mutilation or destruction." *Id*. at 381. Here, assuming face masks are as effective as Defendants allege (and they are not),[9] an alternative and more narrow means of accomplishing the government's alleged interest is to limit the requirement to those who are positively infected or who are the most susceptible (the elderly or persons with comorbidities). The broad mandate doesn't satisfy any constitutional standard.

Indeed, there is nothing necessarily "expressive" about burning a piece of cloth, unless, or course, it is an American flag in the midst of a political demonstration. *Tex. v. Johnson*, 491 U.S. 397 (1989). Here, wearing a mask pursuant to the challenged mandate in this current political climate is forcing the wearers (Plaintiffs) to convey a message with which they disagree. There is no question that the First Amendment is implicated here.

The mask mandate does not survive under *Wooley, O'Brien*, or *Johnson*.

But most important is the fact that Defendants refuse to provide a First Amendment exception for those who oppose the mandate. Yet, they willingly provided a First Amendment exception when it satisfied their personal political objectives. On June 3, 2020, Governor Wolf, in an admitted violation of his own

[9] The fact that almost anything will suffice as a "face covering" and the fact that there is no requirement that the covering be of any medical grade or particular quality (in fact, Defendants discourage the use of medical protective equipment so as to reserve the equipment for health workers) further demonstrate the ineffectiveness of the mandate and thus further undermine the government's alleged interest.

executive orders, marched in a BLM protest. Governor Wolf joined hundreds of demonstrators as they marched through Harrisburg, Pennsylvania to protest the police killing of George Floyd—some of the protestors were not wearing masks, and social distancing was not practiced. Secretary Levine defended the Governor's actions, claiming that regardless of the pandemic order, "people have the right to protest, and to demonstrate, and the right to free speech." Secretary Levine stated further that Governor Wolf is "not restricting people's right to protest," adding that "[t]here are all obviously significant social issues that are present, that people feel that they need to have a voice, and so the governor is always supportive of that and is participating." (R-18-2: Redman Decl. ¶¶ 12-14, App. 61-63). Here, Plaintiffs feel the "need to have a voice" by not wearing the mandated mask. Defendants are willing to overlook the potential spreading of the virus via *mass* BLM public protests and grant a First Amendment exception (R-35: Hr'g Tr. at 71:1-10 [acknowledging First Amendment exception for Governor's Wolf's BLM protest], App. 374; Redman Decl. ¶ 14, Ex. E [Admissions], App. 63, 115-22) because they consider the message to be about "significant social issues." Plaintiffs' protest is similarly about a significant social issue—the protection of liberty from government tyranny. Allowing one protest message (with attendant dangers of spreading the virus), but prohibiting Plaintiffs' protest (with an *alleged* danger of spreading the virus) is a viewpoint-based restriction—the most egregious form of content discrimination. *Rosenberger v.*

*Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination.").

"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." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (internal quotations and citation omitted). The mask mandate cannot survive strict scrutiny. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws . . . are presumptively unconstitutional."). The exemption allowed for BLM protests (protests in which Governor Wolf himself participated) is fatal for Defendants.[10] *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (internal quotations and citation omitted). The mandate violates the First Amendment.

**b. Fourteenth Amendment—Right to Privacy.**

> No right is held more sacred, or is more carefully guarded, by the common law, 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. As well said by

[10] This exemption also exposes Defendants' exaggeration of the risk of the virus. If this virus was as deadly as Defendants claim it to be, there would be no viewpoint exceptions, and Governor Wolf would not have marched in the BLM protest.

> Judge Cooley, "The right to one's person may be said to be a right of complete immunity: to be let alone." Cooley on Torts, 29.

*Union P. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). The U.S. Supreme Court recognizes a "right to privacy" that derives from the "penumbras, formed by emanations from" the Bill of Rights. *Griswold*, 381 U.S. 484. "There are at least two types of privacy protected by the Fourteenth Amendment: the individual interest in avoiding disclosure of personal matters, and the right to autonomy and independence in personal decision-making." *Doe v. Delie,* 257 F.3d 309, 316 n.5 (3d Cir. 2001) (internal citations omitted). As stated by the Second Circuit, "It is well established that the individual right to privacy is protected by the Due Process Clause of the Fourteenth Amendment. The privacy right takes two somewhat different forms: the right to personal autonomy (*i.e.*, the right to make certain choices free of unwarranted government interference) and the right to confidentiality (*i.e.*, the right to hold certain information private)." *O'Connor v. Pierson*, 426 F.3d 187, 201 (2d Cir. 2005) (citations omitted).

The Fourteenth Amendment similarly protects against any unwanted medical treatment as an invasion of personal autonomy and bodily integrity. As the court in *Davis v. Hubbard*, 506 F. Supp. 915 (N.D. Ohio 1980), relying on well-established tort law, properly observed:

> Closely related to a person's interest in body is his interest in making decisions about his body. In the law of torts, this interest is reflected in the concept of consent. For example, in the context of medical

> treatment, treatment by a physician in a non-emergency that is rendered without the patient's informed consent, or exceeds the consent given, is actionable as a battery. [citing cases]. The principle which supports the doctrine of informed consent is that *only the patient* has the right to weigh the risks attending the particular treatment *and decide for himself what course of action is best suited for him.*

*Id.* at 931-32 (citations omitted) (emphasis added); *see also United States v. Husband*, 226 F.3d 626, 632 (7th Cir. 2000) (quoting *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278 (1990)) ("Because any medical procedure implicates an individual's liberty interests in personal privacy and bodily integrity, the Supreme Court has indicated that there is 'a general liberty interest in refusing medical treatment.'").

The wearing of a mask is a form of "medical treatment." Defendants' stated basis for enforcing the mandate is for medical/public health reasons. Under the mask mandate, every Pennsylvanian has become the government's "patient" and thus compelled to accept this treatment regardless of whether the person is sick, infectious, or falls within a category of persons most susceptible to the virus. In fact, those most susceptible to this respiratory illness (*i.e.*, people with respiratory problems) are exempt from the mandate.

Because the mandate infringes upon Plaintiffs' fundamental right to bodily integrity, the restriction must survive strict scrutiny, which it cannot. The exemption for persons with respiratory issues alone is fatal for the government as is the exemption to other "mitigation" orders provided for the BLM protestors. *See Church*

*of Lukumi Babalu Aye*, 508 U.S. at 547. Moreover, compelling healthy people who have virtually no risk of contracting or spreading the virus is not necessary nor can it be considered the least restrictive means available to the government (and this is further illustrated by the fact that almost anything qualifies as a "face covering" and the government urges private citizens not to use medical-grade face coverings). This is particularly true regarding the requirement that children (a demographic that is nearly immune from the virus) wear masks at all times in school even if social distancing is maintained. This is not the precision required when the government seeks to infringe upon fundamental liberties. The mandate fails constitutional scrutiny.

**C. Irreparable Harm.**

"Deprivation of a constitutional right alone constitutes irreparable harm as a matter of law, and no further showing of irreparable harm is necessary." *Beattie v. Line Mt. Sch. Dist.*, 992 F. Supp. 2d 384, 396 (M.D. Pa. 2014); *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."); *see also Buck v. Stankovic*, 485 F. Supp. 2d 576, 586 (M.D. Pa. 2007) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.") (internal quotations and citations omitted); *Statharos v. N.Y.C. Taxi & Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir. 1999) ("Because

plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary."). Nevertheless, the irreparable harm to Plaintiffs is set forth clearly in the record as a matter of undisputed fact. (*See supra* Statement of the Case, § A.4.).

In sum, Plaintiffs have demonstrated irreparable harm as a matter of law and as a matter of fact.

**D. Balance of Equities.**

The likelihood of harm to Plaintiffs without the injunction is substantial because the deprivation of constitutional rights constitutes irreparable injury, and Plaintiffs are suffering irreparable harm as a matter of fact. (*See supra* § II.C.). Defendants have failed to demonstrate how their alleged harm outweighs the harm suffered by Plaintiffs (and the public, which has a compelling interest to prevent the violation of constitutional rights). Defendants' public health interests can be advanced by more narrowly crafted restrictions, such as protecting the known demographic that is most susceptible to the virus or putting in place the proper constitutional safeguards for the current contact tracing program. The challenged restrictions are grossly overbroad and unnecessary. They lack the precision required of regulations that infringe upon fundamental liberties. Moreover, Defendants' assertion that they don't actually enforce the challenged restrictions undermines any serious interest that they may have. In short, the balance of equities favors the granting of the requested injunction. *See*

*Reilly v. City of Harrisburg*, 336 F. Supp. 3d 451, 472 (M.D. Pa. 2018) ("It goes without saying, however, that a deprivation of a constitutional right is contrary to the public interest and the harm to others . . . although substantial, does not outweigh such a denial.").

**E. Public Interest.**

"'[I]it is always in the public interest to prevent the violation of a party's constitutional rights.'" *Buck*, 485 F. Supp. 2d at 586-87 (quoting *G & V Lounge, Inc. V. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)). "[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); *K.A. v. Pocono Mt. Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013) ("[T]he enforcement of an unconstitutional law vindicates no public interest."); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is always contrary to the public interest."); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws").

At a minimum, the public interest will be served by granting a First Amendment exception for the mask mandate, similar to how Governor Wolf and Secretary Levine granted a First Amendment exception for the BLM protests. Moreover, the public interest is promoted by ensuring that the government has in place proper constitutional

safeguards before they place private citizens on house arrest (quarantine). In sum, the public interest strongly favors granting the requested injunction.

## CONCLUSION

In the final analysis, enjoining the mask mandate does not prevent individuals who want to wear masks from doing so, nor does it prevent Defendants from encouraging people to wear masks—they just can't mandate it under penalty of law. Also, enjoining the contact tracing program as it currently operates does not mean that Defendants cannot implement a program that has the proper constitutional safeguards in place, unlike the current, unlawful program.

The Court should reverse and remand this case, directing the district court to issue the requested injunction.

Respectfully submitted,

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## COMBINED CERTIFICATIONS

### Certification of Bar Membership

I hereby certify that I am admitted to and a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit. I was admitted on January 22, 2001.

### 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 11,734 words, excluding those sections identified in Fed. R. App. P. 32(f).

### Certificate of Service

I hereby certify that on February 1, 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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