IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CHAD PARKER, REBECCA KENWICK-PARKER, MARK REDMAN, and DONNA REDMAN, Plaintiffs, v. TOM WOLF, in his official capacity as Governor for the State of Pennsylvania; JOSH SHAPIRO, in his official capacity as Attorney General of the State of Pennsylvania; and ALISON BEAM, in her official capacity as Acting Secretary of Health, Pennsylvania Department of Health, Defendants.	1:20-cv-01601-JEJ (Hon. John E. Jones III)

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Defendants seek to dismiss this lawsuit *at the pleading stage* by making conclusory arguments that misapprehend the legal claims and ignore the relevant facts. Defendants' motion is ill conceived and should be denied.

At the end of the day, Defendants ask this Court to ignore the Bill of Rights because they claim to know what is best for the people over whom they lord. But that is not how our Constitution works—the judiciary is not an impotent servant that simply rubberstamps government regulations that restrict liberty. *Meyer v. Neb.,* 262 U.S. 390, 400 (1923) ("Determination by the [government] of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts."). The Court's primary role is to safeguard freedom—it would be wrong to surrender that role during this current pandemic. "[Judges] may not shelter in place when the Constitution is under attack. Things never go well when [they] do." *Roman Catholic Diocese v. Cuomo*, 208 L.Ed.2d 206, 214 (U.S. 2020) (Gorsuch, J., concurring).

QUESTIONS INVOLVED

I. Do Plaintiffs have standing to advance their claims when they have alleged personal injuries fairly traceable to Defendants' allegedly unlawful conduct and likely to be redressed by the requested relief?

II. Have Plaintiffs stated a right to association claim under the First Amendment that is plausible on its face?

III. Have Plaintiffs stated a claim under the Fourth Amendment that is plausible on its face?

IV. Have Plaintiffs stated a free speech claim under the First Amendment that is plausible on its face?

V. Have Plaintiffs stated claims under the Due Process Clause of the Fourteenth Amendment (procedural due process and the right to privacy, personal autonomy, and bodily integrity) that are plausible on their face?

VI. Have Plaintiffs stated claims under the Equal Protection Clause of the Fourteenth Amendment that are plausible on their face?

VII. Is the Attorney General in his official capacity a property party where it is plain that he has some connection with the enforcement of the challenged measures?

VIII. Have Plaintiffs stated a claim under the Guarantee Clause that is plausible on its face?

STANDARDS OF REVIEW

A. Rule 12(b)(6).

When reviewing Defendants' motion to dismiss under Rule 12(b)(6), the Court must "accept as true all allegations in the [First Amended Complaint] and all

reasonable inferences that can be drawn from them after construing them in the light most favorable to [Plaintiffs]." *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 154 n.1 (3d Cir. 2014) (quotation marks and citations omitted). Factual allegation need only "be enough to raise a right to relief above the speculative level" and to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). Plaintiffs need only "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. Rule 12(b)(1).

Defendants argue that Plaintiffs lack standing. (Defs.' Br. at 7-8). Defendants' argument is based solely on the Court's prior ruling on Plaintiffs' motion for a preliminary injunction, asserting that this ruling is the "law of the case." (*Id*. at 8). Defendants are mistaken. *See, e.g., Univ. of Tx. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."); *N.J. Hosp. Ass'n v. Waldman*, 73 F.3d 509, 519 (3d Cir. 1995) ("[T]he findings of fact and conclusions of law made in conjunction with the preliminary injunction are indeed preliminary. As such, they do not foreclose any findings or conclusions to the contrary based on the record as developed at final hearing."); *Wilcox v. United States*, 888 F.2d 1111, 1114 (6th Cir. 1989) (holding that the trial court's denial of a

preliminary injunction did not establish the law of the case); *Tech. Publ'g Co. v. Lebhar-Friedman, Inc.*, 729 F.2d 1136, 1139 (7th Cir. 1984) (same).

Moreover, Defendants' challenge to the Court's jurisdiction under Rule 12(b)(1) is a facial attack because Defendants "filed the attack before it filed any answer to the Complaint or otherwise presented competing facts. Its motion [is] therefore, by definition, a facial attack." *Constitution Party v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014) ("The District Court here construed the Aspiring Parties' motion to dismiss as a 'factual attack' and said that, 'to the extent that certain of the plaintiffs' jurisdictional allegations are challenged on the facts, those claims receive no presumption of truthfulness.' . . . . That was error."). Consequently, "[i]n reviewing [this] facial attack, the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the [Plaintiffs]." *Id*. at 358 (internal quotations and citation omitted).

ARGUMENT

I. *Jacobson* Does Not License Defendants' Constitutional Violations.

Defendants' reliance on *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), is misplaced. "*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and *it supplies no precedent for doing so*." *Roman Catholic Diocese*, 208 L.Ed.2d at 213 (Gorsuch, J., concurring) (emphasis added). *See Tandon v. Newsom*, 141 S. Ct. 1294, 1297-98 (2021) ("summarily reject[ing] the

Ninth Circuit's analysis of California's COVID restrictions on religious exercise" and enjoining the restrictions under traditional constitutional analysis); *Agudath Isr. v. Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020) ("[T]he *Jacobson* Court itself specifically noted that 'even if based on the acknowledged police powers of a state,' a public-health measure 'must always yield in case of conflict with . . . any right which [the Constitution] gives or secures.'") (quoting *Jacobson*, 197 U.S. at 25).

Jacobson merely rejected what would now be called a "substantive due process" challenge to a compulsory vaccination requirement. *See Phillips v. City of N.Y.*, 775 F.3d 538, 542-43 (2d Cir. 2015). At the time of *Jacobson*, the constitutional safeguards of the Bill of Rights had not yet been fully incorporated to apply against the states. *See id*. The Supreme Court's constitutional jurisprudence has developed substantially since *Jacobson*. For example, at the time *Jacobson* was decided, there was no Fourteenth Amendment right to privacy as we know it today. *See Griswold v. Conn.*, 381 U.S. 479 (1965) (striking down a state law prohibiting the dispensing or use of birth control devices to or by married couples as a violation of the right to privacy); *Roe v. Wade*, 410 U.S. 113, 155 (1973) (concluding that "the right of privacy, however based, is broad enough to cover the abortion decision"); *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992) (citing *Jacobson* for the proposition that "a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims").

"If [Defendants'] extreme position [that the exercise of their police powers during a pandemic supersedes constitutional rights] could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land . . . ." *Sterling v. Constantin*, 287 U.S. 378, 397–98 (1932). It would be error for the Court to read *Jacobson* as permitting a plenary override of Plaintiffs' constitutional claims.

II. Plaintiffs Have Standing.

Article III of the Constitution confines the federal courts to adjudicating actual "cases" or "controversies." U.S. Const. art. III, § 2. 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*, 573 U.S. 149 (2014). "The doctrine of standing gives meaning to these constitutional limits by identifying those disputes which are appropriately resolved through the judicial process." *Id.* at 157 (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, *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"), as well as the threat of sanctions, *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("The threat of sanctions may deter . . . almost as potently as the actual application of sanctions."). Absent judicial relief, the challenged measures as currently established hang 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 their fundamental rights.

The inevitable action causing harm—the actual implementation and operation of the challenged measures—has arrived. *See 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 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); *Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967) (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 (again) to seek relief from this Court. Plaintiffs have standing because they have alleged a "personal injury" that is "fairly traceable" to the challenged measures and is "likely to be redressed by the requested relief." *See Allen,* 468 U.S. at 751.

Defendants rely on the creation of an unreasonable "chain of possibilities" to conclude that the harm to Plaintiffs is speculative. (Defs.' Br. at 7). They are mistaken. The "fairly traceable" standard is not the same as proximate causation.

> Causation in the context of standing is not the same as proximate causation from tort law, and the Supreme Court has cautioned against "wrongly equat[ing] . . . injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997). Moreover, there is room for concurrent causation in the analysis of standing, *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013) (holding that if a petition witness residency requirement was "at least in part responsible for frustrating [plaintiff's] attempt to fully assert his First Amendment rights in Virginia, the causation element of *Lujan* is satisfied"), and, indeed, "an indirect causal relationship will suffice, so long as there is a fairly traceable connection." *Toll Bros., Inc.* [*v. Twp. of Readington*, 555 F.3d 131,] 142 [(3d Cir. 2009)] (citations omitted) (internal quotation marks omitted).

Constitution Party, 757 F.3d at 366. Here, the challenged measures are "at least in part responsible" for the restrictions on Plaintiffs' liberty and thus the harms Plaintiffs are suffering. The causation element is satisfied.

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 forced 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);[1] 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 government. The program also forced the Redmans to cease attending their regular worship services, and it required the Parkers to maintain social distancing among family members living in the same household. Consequently, 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

[1] Because the Redmans' children were suffering academically and socially by attending school virtually, the Redmans were forced to send their children back to school. Unsurprisingly, one of their children (P.G.) was contact traced and forced to quarantine. (FAC ¶¶ 125-41).

of whether it is a false positive—Defendants do nothing to confirm the result), the program is triggered. And a violation of the contact tracing directive itself is punishable by criminal fines and other penalties. *See* 28 Pa. Code § 27.8. The contact tracing program has also resulted in the government (Defendants) creating a large database of confidential, private, and sensitive information about individuals. This massive database was subject to a serious data breach, thereby compromising the confidential, private, and sensitive information of countless numbers of Pennsylvanians, including Plaintiffs. (FAC ¶ 150). In light of the stated "crisis," the harm caused by the challenged program is real and future harm is reasonably foreseeable, as the situations with the Parkers and more recently the Redmans starkly illustrate. (*See* FAC ¶ 110-53)

Similarly, the challenged vaccine policy is forcing citizens, including Plaintiffs, into a dilemma: they can either choose personal autonomy and freedom (such as the right to breathe freely without wearing a mask, to go out in public without being ostracized by government officials, or to engage in any other basic liberty afforded private citizens without having to show proof of vaccination) *or* get one of the experimental and dangerous COVID-19 vaccines. Neither choice protects liberty. The government is forcing those who object to the vaccines (such as Plaintiffs) to wear a scarlet letter (mask) or to declare themselves "unclean" to the general public and surrender basic liberties. (FAC ¶¶ 82-93).

Plaintiffs are also injured by the mask mandate. They must comply with the mandate or face a penalty. (FAC ¶ 55). That is, Plaintiffs are subject to this regulatory burden. It's not optional.[2] Plaintiffs are not advancing an "undifferentiated" grievance. Some people do not object to wearing masks and some would wear one *regardless* of whether there were penalties for not wearing one. Not everyone objects to the political message conveyed by wearing a mask as Plaintiffs strongly do.[3] Likewise, not everyone agrees with the message conveyed by the Black Lives Matter ("BLM") protests. Yet, those who joined the protests, including Governor Wolf, were free to do so *without* the threat of fines or penalties. (FAC ¶¶ 42-45). However, those who want to join Plaintiffs' protest of the mask mandate by not wearing one (including those with natural immunities to the virus, including Plaintiff Chad Parker) 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

[2] In their brief filed in the Third Circuit, Defendants assert: "The Commonwealth Officials do not agree, however, that Parker and Redman lack standing to challenge the mask mandate." (Br. for Appellees at 17 n.15 [Case No. 20-3518, Doc. No. 23]]). Defendants should be estopped from asserting a contrary position in this Court.

[3] Most people living in New Hampshire, for example, do not object to having the state's motto printed on their license plates, but that doesn't undermine the claim of *an individual* objecting to it on constitutional grounds. In other words, the fact that the requirement applies to all does not make a challenge to it a "generalized grievance." *See Wooley v. Maynard*, 430 U.S. 705 (1977) (concluding that the state could not require an individual and his wife to display the state's motto because the First Amendment protected the right of individuals to hold a point of view different from the majority and to refuse to foster an idea they found objectionable).

wearing a mask 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. Plaintiffs' injuries are particularized and may be redressed by enjoining the *government* mandate.

In sum, 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 penalties] that [they] claim[] deters the exercise of [their] constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

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

Before turning to the specific claims, we briefly pause to highlight the fact that Defendants created <u>no</u> objective criteria or plan for ending the "one-size-fits-all" restrictions. (FAC ¶ 34). Defendants are regulating with a blunt instrument, imposing overbroad, arbitrary, and irrational restrictions that are not justified by "science." *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2605 (2020) ("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.") (J. Alito, dissenting). For example, the "scientific" data shows that there have been no reported deaths from COVID-19 in the 0 to 19 age group in Pennsylvania (FAC ¶ 78), yet Defendants demand that children wear masks *all day long* during the school day and are coercing them to get the dangerous and experimental COVID-19 vaccines. There is no "scientific" basis for concluding that masks—particularly the useless masks permitted under the mandate—have any significant or measurable effect on reducing the spread of COVID-19. (FAC ¶¶ 50-52, 55-59). Indeed, there was a surge in the number of cases when the mandate was in effect. (FAC ¶ 56). There is no "scientific" data showing that asymptomatic individuals contribute in any significant or measurable way to this or any other pandemic. (FAC ¶ 152). 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. Accordingly, there is no "scientific" data that supports Defendants' irrational and inequitable treatment of those who have natural immunities to the virus as compared with those who received the dangerous and experimental COVID-19 vaccines. (FAC ¶¶ 82-93).[4] Everyone with natural immunities is required, under penalty of law, to wear a mask, and they are being coerced to get the dangerous and experimental COVID-19 vaccines. (*Id.*). Those

[4] If there isn't natural immunity from having contracted the virus, then the dangerous and experimental COVID-19 vaccines are worthless. (FAC ¶¶ 90-93).

with natural immunities are *not* exempt from the contact tracing program—a program that was developed during this current pandemic but that will exist well beyond it. (FAC ¶¶ 98-107, 148-50). Defendants have no idea what cycle threshold is used to determine a "positive" result from the "gold standard" PCR test. (FAC ¶ 39). And Defendants use the flawed and much maligned antigen test to trigger the contact tracing program. (FAC ¶ 40). Indeed, there 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. (*See* FAC ¶¶ 120-21). Our Constitution demands more. *See infra*.

IV. The Contact Tracing Program Is Unlawful.

A. The Right to Association.

Defendants assert that "there is no actional burden associated with contact tracing" and that "the Commonwealth is" not, "at all, impeding [Plaintiffs'] ongoing ability to associate with anyone." (Defs.' Br. at 9). Defendants are mistaken.

"When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The risk of a chilling effect on association is enough, because First Amendment freedoms need breathing space to survive." *Ams. for Prosperity Found. v. Bonta*, Nos. 19-251, 19-255, 2021 U.S. LEXIS 3569, at *34 (July 1, 2021) (internal quotations, punctuation, and citation omitted).

The contact tracing program directly and substantially interferes with protected associations. The program forced the Redmans to cease attending religious services at the church which they had been associated with for many years. The Redmans do not want to provide data or information that Defendants may acquire or seize to quarantine them, their children, or others with whom they associate. The program is forcing Plaintiffs to avoid seeking medical treatment (particularly in light of what happened to the Parkers as a result of Plaintiff Parker seeking treatment for what he believed was a simple sinus infection). The program is forcing Plaintiffs 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 forced Plaintiffs to keep their children home from public school. The program *requires* the forced disclosure of associations, including the disclosure of close, intimate family associations. The program even mandates social distancing *among family members living in the same household*. All of these associations, which the contact tracing program directly and substantially burdens, are protected by the First and Fourteenth Amendments. *See 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."). The forced

disclosure of these associations, *which is required by the contact tracing program*, is alone sufficient to trigger constitutional protection. *See Ams. for Prosperity Found.*, 2021 U.S. LEXIS 3569, at *30-34; *Salvation Army*, 919 F.2d at 201 (acknowledging that "forced disclosure may chill individuals from associating with a group"). In fact, it triggers "*exacting scrutiny*." *Ams. for Prosperity Found.*, at *17-18 (July 1, 2021) (striking down disclosure requirement and requiring "a substantial relation between the disclosure requirement and a sufficiently important governmental interest . . . given the deterrent effect on the exercise of First Amendment rights that arises as an inevitable result of the government's conduct in requiring disclosure") (internal citations and quotations omitted); *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 citation omitted).

Defendants counter by arguing that, regardless of whether the program burdens the right to association, it survives intermediate scrutiny as a valid time, place, or manner restriction. (Defs.' Br. at 10). Defendants are mistaken. *See supra; see also Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983) (stating that the Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights

protected by the First Amendment"). To begin, this program is so broad and draconian in its scope that there is no specific or identifiable "time, place, or manner" to evaluate. At best, Defendants assert that "it is a bona fide method to prevent the spread of infectious disease by identifying *those infected* and isolating the disease until the threat to the public has passed." (Defs.' Br. at 10-11 [emphasis added]). The facts demonstrate otherwise. Indeed, the facts demonstrate that the program is not narrowly tailored, as required even 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 [freedom] would fail to achieve the government's interests, not simply that the chosen route is easier.").

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 (in fact, 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) Plaintiff Parker's "positive" test was accurate (many are not); (2) Plaintiff Parker was infectious (he was not); (3) any of the Parkers were infectious (or had antibodies for that matter); (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 placed under house arrest subject to burdensome restrictions without the government having to justify its actions in any way. The situation with the Redmans was similar, except that *no one in their family ever tested positive*. Yet, the Redmans' minor son, P.G., was removed from school and forced to quarantine due to being a "close contact." Thus, if Plaintiffs (or one of their children) appear on someone's "contact" list they will be placed under house arrest under threats of penalty without the government having to prove anything.

The Constitution requires the government to regulate with precision and not with overly broad mandates that infringe upon fundamental freedoms. Defendants assert an interest in "sav[ing] lives and eradicat[ing] a deadly infectious disease." (Defs.' Br. at 9). However, these interests are not advanced by quarantining private citizens who are not infectious (as was the case with the Parkers and the Redmans)—that is not how the narrow tailoring requirement works. *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."). Consequently, regardless of how legitimate Defendants' stated purposes may be for the restrictions, these purposes cannot be pursued by overly broad restrictions on liberty. *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."). The program is unconstitutional.

B. Unlawful Seizure and Due Process.

Defendants assert that "the mandatory quarantine period following close contact with a COVID-19 positive individual [does not] constitute an 'unlawful' seizure." (Defs. Br. at 19). They are mistaken. While Defendants appear to concede, as they must, that this forced confinement is a "seizure," they are wrong to argue that the Constitution permits such seizures based on the government's claim that it is merely exercising its "police powers" or "statutory authority." (*Id.*).

There is no question that confining an individual to his home under threat of arrest and penalties is a "seizure" triggering protection under the Fourth and Fourteenth Amendments. *See United States v. Traitz*, 807 F.2d 322, 325 (3d Cir. 1986) (noting that when a defendant is required to "abide by specified restrictions on his personal associations, place of abode, or travel," this is a "house arrest"); *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) (adopting "a broad approach in considering what constitutes a seizure" and

concluding "that the combination of restrictions imposed upon Gallo, because they intentionally limited his liberty, constituted a seizure"); *Glass v. Mayas*, 984 F.2d 55, 58 (2d Cir. 1993) (concluding "that the Fourth Amendment applies to involuntary commitment" for health reasons).

As a result, the government needs probable cause to effectuate the seizure. *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.").

The quarantine imposed under the challenged program restricts the liberty of individuals who have committed no crimes, and it restricts the liberty of individuals who are not infectious (nor proven to be infectious by the government). Indeed, the program lacks any constitutional safeguards.

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).

"[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, 331-32 (1986) (internal citation and quotations omitted).

Accordingly, 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. The challenged program results in the government "seizing" individuals without any verified proof that the persons are infectious or symptomatic. As such, the quarantine is not necessary, nor is it the least restrictive alternative to stopping the spreading of the disease. Rather, it is an arbitrary and unreasonable exercise of government power. 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 of due process. *See, e.g., Griswold*, 381 U.S. at 485-86 ("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.").

Additionally, there are no procedural safeguards in place that would permit a wrongfully "seized" person and his family members to challenge at a hearing or to timely appeal an improper "seizure" (or exclusion from school) by the government under this program. Our Constitution demands more. *See Goss v. Lopez*, 419 U.S. 565, 581 (1975) ("Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the

authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.").

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

V. The Mask Mandate Unlawfully Compels Speech.

Defendants seek to justify their mask mandate by arguing that it "does not advance a political or ideological message—but, rather, attempts to stop the spread of disease." (Defs.' Br. at 21). They further argue that the mandate is a content-neutral, time, place, and manner restriction. (*Id*. at 22-23). Defendants are mistaken. Their arguments ignore the alleged facts, and they erroneously attempt to evaluate Plaintiffs' free speech claim in a vacuum. *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 *facts* demonstrate that wearing a mask has become a symbol during this current political climate and in light of the politicized nature of the declared pandemic. In fact, a mask has become a symbol of government oppression. (FAC ¶¶ 60-67, 195). Accordingly, Plaintiffs view the mask mandate as the government forcing them to convey a message with which they disagree. (*See id*.). Contrary to Defendants' argument, the mandate to wear a mask is not the same as the

requirement to wear a seatbelt. (Defs.' Br. at 21). The comparison fails as a matter of fact. Wearing a seatbelt has not become politicized like the wearing of a mask. It's not even a close call. Even Defendant Wolf, on a hot mic, agreed that wearing a mask was "political theater." (FAC ¶ 62). 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.

As noted, Defendants incorrectly argue that the mandate is a content-neutral, time, place, and manner restriction. As case law demonstrates, "[a] law need not draw explicit distinctions to be content-based." *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1226 (9th Cir. 2019); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 913 (Ariz. 2019) ("[A] facially content-neutral law may, as applied to a particular plaintiff, operate as a content-based law.") (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–28 (2010)).

On June 3, 2020, Defendant Wolf, in an admitted violation of his own executive orders that were allegedly implemented to stop the spread of COVID-19—the very same "interest" asserted for the challenged mask mandate—marched in a BLM protest, joining hundreds of demonstrators as they marched through Harrisburg, Pennsylvania. No social distancing was practiced, and many protestors were not wearing masks. (FAC ¶¶ 42-45). The former Secretary of Health Levine

defended the governor's actions, claiming that regardless of the current pandemic, "people have the right to protest, and to demonstrate, and the right to free speech." Levine stated further that Defendant Wolf is "not restricting people's right to protest," adding that "[t]here are obviously significant social issues that are present, that people feel they need to have a voice, and so the governor is always supportive of that and is participating in that." (FAC ¶¶ 42-45). Here, Plaintiffs want to protest Defendants' oppressive policies by not wearing the mandated mask in public. Defendants are willing to overlook the potential spreading of COVID-19 via mass BLM public protests because they consider the message to be about "significant social issues." Plaintiffs' protest is similarly about a significant social issue—the protection of liberty. Allowing one protest message (with its associated danger of spreading the virus), but prohibiting Plaintiffs' protest (with its *alleged* danger of spreading the virus) is, at the end of the day, viewpoint discrimination—an egregious form of content discrimination. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("[T]he 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). The exemption allowed for

BLM protests is fatal to the challenged mandate.[5] *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (stating that a law fails strict scrutiny "when it leaves appreciable damage to that supposedly vital interest unprohibited"); *Tandon*, 141 S. Ct. at 1298 ("[S]trict scrutiny requires the State to further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.' . . . That standard 'is not watered down'; it 'really means what it says.'") (internal citation omitted).

VI. The Mask Mandate and Vaccine Policy Violate the Rights to Privacy, Personal Autonomy, Bodily Integrity, and Equal Protection.

A. Privacy, Personal Autonomy, and Bodily Integrity.

The mask mandate and vaccine policy violate the Fourteenth Amendment's right to privacy, personal autonomy, and bodily integrity. This is a "sacred" right that is "carefully guarded"; it has been described as "the right of every individual to the possession and control of his own person, free from all restraint or interference"—"a right of complete immunity: to be let alone." *Union P. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

More to the point, the right to privacy was clearly established by the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), as a fundamental right. *Griswold* was decided long after *Jacobson*. *See also United States v. Husband*, 226

[5] The mask mandate lists multiple exceptions—but it fails to provide a First Amendment exception. (FAC ¶ 71, Ex. 1).

F.3d 626, 632 (7th Cir. 2000) ("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.'") (quoting *Cruzan v. Director, Mo. Dep't of Health,* 497 U.S. 261, 278 (1990)).

Defendants assert that a mask is a "scientifically supported life-saving measure[]" to prevent the *spread of disease*.[6] (Defs.' Br. at 18). But then argue that "the wearing of a mask is not a 'medical procedure,'" asserting (by quoting a Palm Beach County, Florida decision) 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 18 [citation omitted]). This assertion does not support Defendants' position. Rather, it is an *admission* that forcing someone who is <u>not</u> sick or infectious (*i.e.*, the vast majority of Pennsylvanians) to wear a mask is useless—it does not "safeguard other citizens" against anything as a matter of fact.[7] At a minimum, this concession shows that the mandate is not narrowly tailored and certainly not the least restrictive means of accomplishing Defendants' asserted

[6] A mask is more like a vaccine than a seatbelt, the latter of which is designed to limit blunt trauma and not a disease.

[7] There is no "science or data" to support the novel claim that an uninfected individual can infect another individual with COVID-19. (FAC ¶ 152).

interests. (FAC ¶¶ 77-81). Moreover, by claiming that a mask is not a form of "medical treatment," Defendants are conceding that there is no medical purpose for wearing masks.[8] The Court should summarily enjoin this draconian and unconstitutional mandate now and into the future.

Regarding the vaccine policy, the Fourteenth Amendment does not permit the government to coerce healthy persons who have practically no risk of getting seriously ill from COVID-19 or who already have natural immunities to the virus to get a dangerous and experimental vaccine. *See Husband*, 226 F.3d at 632 ("[A]ny medical procedure implicates an individual's liberty interests in personal privacy and bodily integrity. . . ."). Indeed, forcing this dangerous vaccine on people who do not need nor want it does not even satisfy *Jacobson*. *Jacobson*, 197 U.S. at 31 ("[I]f a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.").

[8] Plaintiffs would also object if Defendants mandated every Pennsylvanian to "put[] a Band-Aid on" their mouths or any other part of their bodies. (*See* Defs.' Br. at 8-9 [arguing that "a mask is no more a 'medical procedure' than putting a Band-Aid on an open wound"]). Applying Defendants' Band-Aid argument here, for most people, it would be like forcing them to put a Band-Aid on perfectly healthy skin as healthy individuals are required to wear masks.

B. Equal Protection.

When the government treats an individual disparately "as compared to similarly situated persons and that such disparate treatment . . . burdens a fundamental right, targets a suspect class, or has no rational basis," such treatment violates the equal protection guarantee of the Fourteenth Amendment. *Bible Believers v. Wayne Cnty.,* 805 F.3d 228, 256 (6th Cir. 2015) (en banc) (internal quotations and citation omitted).

By denying a First Amendment exception to the mask mandate, while granting other exceptions to this mandate and granting a First Amendment exception to other COVID-19 restrictions when government officials favor the message being conveyed by the proscribed activity (FAC ¶¶ 42-45, Ex. 1), the mandate violates the First Amendment *and* the equal protection guarantee of the Fourteenth Amendment. *See Police Dep't of the City of Chi. v. Mosley*, 408 U.S. 92, 96 (1972) ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.").

The mask mandate also violates the equal protection guarantee of the Fourteenth Amendment by negatively and thus disparately treating those with natural immunities to COVID-19 as compared with those who have received the vaccine. (FAC ¶¶ 82-93). This disparate treatment not only infringes fundamental

rights, *see supra*, it lacks any rational basis in violation of the Fourteenth Amendment.

The vaccine policy burdens a fundamental right (Fourteenth Amendment right to privacy, personal autonomy, and bodily integrity, *see supra*), and it disparately and negatively treats those with natural immunities to COVID-19 as compared with those who have received the vaccine. This disparate treatment not only infringes fundamental rights, *see supra*, it lacks any rational basis in violation of the Fourteenth Amendment.

In sum, Plaintiffs have stated claims for relief under the Fourteenth Amendment that are "plausible on [their] face."

VII. The Attorney General in His Official Capacity Is a Proper Party.

Defendants argue that the Attorney General, who was sued in his official capacity only, should be dismissed due to a lack of personal involvement on his part. Defendants are mistaken. As stated by the Supreme Court, "In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act." *Ex Parte Young*, 209 U.S. 123, 157 (1908). The Attorney General has the requisite "connection" in this case. He is the State's top law enforcement official. 71 Pa. Stat. § 732-206(a). In that role, the Attorney General has the authority to enforce violations of state law, including violations of the

challenged restrictions.[9] (FAC ¶¶ 23-24). Because Plaintiffs are seeking only prospective declaratory and injunctive relief against this state official in his official capacity and not damages against him in his individual capacity, the Attorney General is a proper party to this action. *See, e.g., 281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011) ("When a statute is challenged as unconstitutional, the proper defendants are the officials whose role it is to administer and enforce the statute.").

VIII. Guarantee Clause Claim.

The Guarantee Clause of the U.S. Constitution "guarantee[s] to every State in [the] Union a Republican Form of Government." U.S. Const. art. IV, § 4. In discussing this Clause, James Madison emphasized the federal government's obligation to ensure that states maintain a republican form of government:

> In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchial innovations. . . . *But a right implies a remedy*; and where else could the remedy be deposited, than where it is deposited by the Constitution?

[9] A violation of the challenged measures is a crime. *See* 28 Pa. Code § 27.8. Per the DOH Letter issued to the Parkers: "If you do not cooperate with this directive [to quarantine], the Secretary of Health may petition a court to have you confined to an appropriate place chosen by the Department. . . . Law enforcement may be called upon, to the extent necessary, to ensure your compliance with this directive." (FAC ¶ 116). The Attorney General represents the Department of Health in courts of law. 71 Pa. Stat. § 732-204(c).

The Federalist No. 43 (James Madison) (emphasis added).

Plaintiffs are aware that the Supreme Court has "several times concluded [] that the Guarantee Clause does not provide the basis for a justiciable claim." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (citing *Pac. States Tel. & Tel. Co. v. Or.*, 223 U.S. 118 (1912)); *but see N.Y. v. United States*, 505 U.S. 144, 185 (1992) (stating that "the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions," noting that "[c]ontemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances," and concluding that "[w]e need not resolve this difficult question today"). Nonetheless, Plaintiffs agree with Professor Erwin Chemerinsky that

> the time is clearly approaching in which the [Supreme] Court may be quite willing to reject the view that cases under the Guarantee Clause should always be dismissed on political questions grounds. . . . [T]he Guarantee Clause should be regarded as a protector of basic individual rights and should not be treated as being solely about the structure of government. Accordingly, judicial interpretation and enforcement is in accord with the preeminent federal judicial mission of protecting individual rights and liberties.

Erwin Chemerinsky, *Cases under the Guarantee Clause Should Be Justiciable*, 65 U. Colo. L. Rev. 849, 851 (1994). Accordingly, the Court should declare that the authority exercised by Defendant Wolf pursuant to his "emergency powers" since the Pennsylvania General Assembly sought to revoke those powers via a concurrent resolution violates the Guarantee Clause.

CONCLUSION

The Court should deny Defendants' motion.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.* (MI P62849)
PO Box 131098
Ann Arbor, Michigan 48113
Tel: (734) 635-3756; Fax: (801) 760-3901
rmuise@americanfreedomlawcenter.org
* Admitted *pro hac vice*

LAW OFFICE OF ANDREW H. SHAW. P.C.

/s/ *Andrea L. Shaw*
Andrea L. Shaw, Esq. (PA 89333)
2011 W. Trindle Road
Carlisle, Pennsylvania 17013
(717) 243-7135

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.8(b)(2), I hereby certify that this brief contains 7,938 words.

I further certify that, in preparation of this document, I used Microsoft Word 2016, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the court's electronic filing system. Parties may access this filing through the court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise, Esq.