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Masking Free Speech: The First Amendment Implications of Masks, Clothing, and Public Health

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Regulations mandating the wearing of face coverings to prevent the spread of COVID-19 have encountered resistance on a variety of grounds. This article analyzes the constitutional status of mask requirements from a free-speech perspective, differentiating between the issue of written words or logos on a mask as a form of speech, and the ability to keep one's face uncovered as a speech right in itself. It examines the similarities and distinctions between challenges to mask mandates and other First Amendment objections to government restrictions related to clothing (or the lack thereof)—from public nudity prohibitions, to motorcycle helmet laws, to regulations limiting the wearing of political messages in polling places. It discusses the conflict between public health, masks, and the First Amendment, and it questions which level of judicial scrutiny is appropriate for mask mandates. Finally, this article will apply United States v. O'Brien *to the current controversy and seek to place the mask-mandate debate in the larger context of constitutional law surrounding wearables and symbolic speech. It concludes that content-neutral time, place, and manner restrictions offer a way to remove the First Amendment as a barrier to reasonable public-health regulations during times of crisis.*

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"Oh yeah, they gonna talk to you, and talk to you, and talk to you about individual freedom. But they see a free individual, it's gonna scare 'em." – George Hanson, EASY RIDER.

Captain America: "You got a helmet?"
George Hanson: "Oh, I've got a helmet." – EASY RIDER.[1]

I. INTRODUCTION

Shortly after COVID-19 hit American shores, state and federal governments scrambled to manage one of the greatest public-health crises in a century. One prominent and controversial measure proposed and instituted across the country was the so-called "mask mandate," a requirement that citizens wear masks or face-coverings in public or to gain access to public places. Face-covering or mask requirements quickly became a significant topic of debate and protest, as well as scorn and ridicule. Despite scientific and medical evidence that face-coverings block or limit aerial dispersal of airborne germs and droplets that could carry the COVID-19 virus, mask mandates have become a source of controversy under the auspices of free-speech and First Amendment rights.[2]

The COVID-19, or novel coronavirus, pandemic has wreaked havoc around the world, especially in the United States, where nearly one million people have died and millions more have been infected.[3] Government-ordered shutdowns, limits on social gatherings, quarantines, and

1. EASY RIDER (Columbia Pictures 1969).
2. *See* Minn. Voters All. v. Walz, 492 F. Supp. 3d 822, 825–26 (D. Minn. 2020) (describing action that advocacy group and activists brought against Minnesota governor and other public officials to challenge executive order requiring state residents to wear face-coverings indoors to control spread of COVID-19).
3. The U.S. Centers for Disease Control and Prevention's COVID-19 Tracker counted over 82 million cases and more than 997,000 deaths in the United States as of mid-May 2022. *United States*

mask mandates have spawned an inevitable constitutional clash, with the First Amendment in the middle of the fight.

Even in the earliest period of the national coronavirus crisis, a number of legal challenges under the First Amendment have made their way into the judicial system.[4] Citizens have raised constitutional arguments claiming government policies have significantly harmed their First Amendment rights, particularly on free-exercise and peaceable-assembly grounds.[5] In the first COVID-19 First Amendment case to reach the United States Supreme Court on a Free Exercise Clause challenge to an executive order, the Court, without an opinion, rejected a request for an injunction.[6]

By spring 2021, more and more of the U.S. population had received vaccinations, and governments began lifting mask mandates. But the resurgence in late 2021, and the advent of new COVID-19 variants, prompted a renewed commitment to mask mandates.[7]

Thus, the debate over masks persists, two years after the pandemic shut down much of the country and masks became part of daily life. Wearing or not wearing a mask has become a flashpoint and controversial political

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COVID-19 Cases, Deaths, and Laboratory Testing (NAATS) by State, Territory, and Jurisdiction, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION COVID DATA TRACKER, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days [https://perma.cc/TLE9-9NVE] (last updated May 17, 2022).

4. *See* discussion *infra* Part IV (discussing *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020), and California's COVID-19 restrictions).

5. *See generally* Capitol Hill Baptist Church v. Bowser, 496 F. Supp. 3d 284, 289 (D.D.C. 2020) (granting church's preliminary injunction against D.C. mayor's prohibition on indoor or outdoor religious gatherings of over a hundred people); Ass'n of Jewish Camp Operators v. Cuomo, 470 F. Supp. 3d 197, 206 (N.D.N.Y. 2020) (rejecting religious camp's claim that New York governor violated Free Exercise Clause of First Amendment in prohibiting operation in summer 2020 to prevent COVID-19 spread); Murphy v. Lamont, No. 3:20-CV-0694, 2020 WL 4435167, at *1 (D. Conn. Aug. 3, 2020) (rejecting motion to enjoin Connecticut governor's executive orders as violating First Amendment's freedoms of association, speech, assembly, and religion); Legacy Church, Inc. v. Kunkel, 472 F. Supp. 3d 926, 935–36 (D.N.M. 2020) (rejecting church's claim that New Mexico's Public Health Emergency Orders violated rights under First Amendment's Free Exercise and Freedom of Assembly Clauses).

6. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020); *see also* discussion *infra* Part IV.

7. For example, President Joe Biden signed two executive orders mandating people wear masks during interstate travel and on all federal property, military bases, and federal buildings. Exec. Order No. 13998, 86 Fed. Reg. 7,205 (Jan. 26, 2021); Exec. Order No. 13991, 86 Fed. Reg. 7,045 (Jan. 25, 2021). Similarly, in December 2021, New York Governor Kathy Hochul instituted an indoor mask mandate for businesses in New York State. *Governor Hochul Announces Major Action to Address Winter Surge and Prevent Business Disruption as COVID-19 Cases and Hospitalizations Rise Statewide*, N.Y. STATE (Dec. 10, 2021), https://www.governor.ny.gov/news/governor-hochul-announces-major-action-address-winter-surge-and-prevent-business-disruption [https://perma.cc/J5HW-XZM8].

issue, with some critics and litigants equating it with pure speech or political speech.[8] Even though the government has a compelling interest in preventing the spread of disease, two commentators questioned whether a mask mandate would be instituted in perpetuity to stop the spread of the common cold, the flu, or other airborne diseases.[9]

One litigious critic of mask mandates, who has filed dozens of legal challenges across the country, has repeatedly argued that mask mandates violate fundamental liberties and "block ability to communicate audibly, clearly, and expressively (e.g. by violating [her] right to smile at others) while wearing a face mask."[10] Critics also argue that punishment targeting those who do not wear face-coverings constitutes a government-sanctioned, content-based restriction on free speech and individual freedom and liberty.[11]

As the debate over masks continues, a constitutional issue percolates, and the question as to whether a mask mandate infringes on a fundamental free-speech right requires courts to weigh in. The courts' judicial analysis depends on what level of scrutiny is applied. Thus, the question is: which level of constitutional scrutiny is appropriate: strict scrutiny, which would elevate wearing or not wearing a mask to the status of a fundamental right, or intermediate scrutiny, relating to content-neutral regulations?

In the debate over the First Amendment implications of wearing masks, several issues intersect: public health and safety, our modern definition of what constitutes protected speech, and the First Amendment speech implications of clothing and wearables.[12]

The intersection of public health and safety and free expression is nothing new. However, for scholars and free-speech advocates eager to extend free-speech rights rather than constrict them, adopting the position that not wearing a mask is not a form of speech that should be protected is a

8. *See, e.g.*, David B. Rivkin Jr. & James Taranto, Opinion, *Face Masks and the First Amendment*, WALL ST. J. (May 18, 2021, 12:41 PM) (arguing that not wearing a mask can be a form of signaling or a political statement that government-mandated masking requirements compromise).

9. *Id.* ("The government undoubtedly has a compelling interest in preventing infectious disease. But that doesn't necessarily imply a compelling need for mask mandates. If it did, they could be justified in perpetuity.").

10. Young v. James, No. 20 CIV. 8252, 2020 WL 6572798, at *1 (S.D.N.Y. Oct. 26, 2020). In this case, Young, a long-haul truck driver, argued that when she traveled to New York for work, she would be "muzzled by the New York governor every time [she] wants to go shopping—all over a non-emergency disease that is less deadly than the flu." *Id.* at *2.

11. *See* Rivkin Jr. & Taranto, *supra* note 8 (criticizing mask mandates as content-based restriction on free speech and suggesting government restrictions fail strict-scrutiny review).

12. *See* discussion *infra* Part VIII; *see also* Eugene Volokh, *The First Amendment and Mask Mandates*, THE VOLOKH CONSPIRACY (May 18, 2021, 4:34 PM), https://reason.com/volokh/2021/05/18/the-first-amendment-and-mask-mandates/ [https://perma.cc/Y5LB-US2B] ("There are many plausible arguments against various kinds of mask mandates; but the First Amendment compelled-expression argument just isn't one of them.").

bit of a change in tone. Finding a First Amendment right in flouting scientifically proven and minimally invasive behavior would fulfill a prophetic warning that just about anything could be a speech right.[13]

It is important in this introductory phase to acknowledge that masks are not completely devoid of the potential for personal expression. A mask can bear a slogan or political message or image or logo, empowering the wearer to express opinions or convey any message, extending the First Amendment rights associated with clothing or wearables. But not wearing a mask, similar to requirements in other venues, such as laws requiring motorcycle riders to wear helmets, falls short in a free-speech argument when a substantial government interest, such as public health and safety, is at stake.[14]

In a public-health crisis, much like a time of war, certain civil liberties receive diminished protection or are completely abridged.[15] If a government mandate to wear protective attire, such as a mask or face-covering, becomes a civil-liberties issue under the First Amendment, then courts must determine whether the mandate invades an individual's liberty or asserts a valid public interest. This requires an analysis of the government action and whether it satisfies the appropriate standard of government interest.

The First Amendment implications of clothing, even lack of clothing, are unmistakable. Clothing and attire carry significant messages and can implicate all aspects of the First Amendment—speech, press, assembly, petition, and religion. Since the 1960s, the Supreme Court has waded into the world of fashion and speech in several significant cases, with sometimes murky resolutions.

The Supreme Court's most recent foray into the speech-attire debate, *Minnesota Voters Alliance v. Mansky*, acknowledged the First Amendment implications of clothing when it conflicts with state laws governing speech and conduct at and around polling places.[16] But the 2018 decision did little to clarify or demarcate the line of appropriate clothing that voters can wear when they vote.[17]

The issue of wearing or not wearing a mask implicates two distinct First Amendment questions addressed throughout this article. First, is the

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13. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 570 (1991) (plurality opinion) ("It can be argued . . . that almost limitless types of conduct . . . are 'expressive' . . . .").

14. *See* discussion *infra* Section VI.B (discussing First Amendment rights and helmets).

15. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 715–16 (1931) (noting that prior restraints on speech are presumed unconstitutional, but government may have more authority during a time of war (citing Schenck v United States, 249 U.S. 47, 52 (1919))).

16. Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1882 (2018).

17. *See id.* at 1888 (holding that a state may prohibit apparel bearing certain political messages in polling places but must "articulate some sensible basis for distinguishing what may come in from what must stay out" beyond generalized "political" content).

decision itself to not wear a mask a form of expressive speech under the First Amendment? Second, what First Amendment rights can be afforded to masks and other wearable items?

This article will address the First Amendment free-speech issues surrounding mask mandates.[18] This article will first introduce COVID-19 and then the First Amendment issues surrounding clothing. Second, this article will look at the worldwide pandemic. Third, this article will discuss the conflict between public health, masks, and the First Amendment. Fourth, this article will discuss judicial scrutiny, with a focus on content neutrality. Fifth, this article will compare individual defiance of mask mandates to other constitutional arguments over not wearing either clothing or motorcycle helmets. Sixth, the article will apply *United States v. O'Brien*. Seventh, the article will link the mask-mandate controversy to the larger constitutional body of law governing clothing.

II. WORLDWIDE PANDEMIC: COVID-19, NOVEL CORONAVIRUS

In late December 2019, health authorities in China discovered a new, highly contagious respiratory virus afflicting numerous Chinese citizens.[19] Scientists named it the "novel severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2)" responsible for causing the "coronavirus disease 2019 (COVID-19)."[20] Within weeks, the infectious disease had spread around the world. By March 2020, large swaths of the U.S. population had become infected, and both the federal and state governments reacted, imposing a range of limitations, including quarantines; travel bans; and the shutdown of schools, businesses, religious institutions, and any other place, location, or event where groups would congregate.[21]

Early in the crisis, public-health officials declared that wearing a mask or a face-covering would be one of the easiest and safest precautions to reduce aerial transmission of the disease.[22] In late October 2020, then-presidential candidate Joe Biden called for a national mask mandate.[23] By October 2020, roughly thirty-three states and the District of Columbia had instituted mask requirements.[24] The U.S. Centers for Disease Control

18. *See* discussion *infra* Section VIII.

19. IHME COVID-19 Forecasting Team, *Modeling COVID-19 Scenarios for the United States*, 27 NATURE MED. 94, 94 (2021).

20. *Id.*

21. *Id.*

22. Sheryl Gay Stolberg, *Biden's Call for 'National Mask Mandate' Gains Traction in Public Health Circles*, N.Y. TIMES (Oct. 29, 2020), https://www.nytimes.com/2020/10/29/us/politics/trump-biden-mask-mandate.html [https://perma.cc/7UY4-GP4A].

23. *Id.*

24. Andy Markowitz, *State-by-State Guide to Face Mask Requirements*, AARP (Oct. 16, 2020), https://web.archive.org/web/20201019034310/https://www.aarp.org/health/healthy-living/info-2020/states-mask-mandates-coronavirus.html [https://perma.cc/TZQ8-SX54].

and Prevention (CDC)[25] and World Health Organization (WHO)[26] both issued statements about masks. Public-health experts, such as Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, who became both a trusted source and voice of scientific reason, were vocal proponents of masks, as were a raft of other experts and even some celebrities.[27] Wearing masks in the face of a public-health crisis is nothing new. In many parts of the world where citizens and governments have battled airborne infectious diseases and pollution, wearing a mask is considered no different from wearing a hat or carrying an umbrella in public.[28]

Early in the public-health crisis, the CDC recommended wearing face-coverings or masks on April 3, 2020.[29] The CDC has provided numerous instructions, guides, and advice on wearing masks.[30] The CDC has explained masks' effectiveness in preventing disease transmission:

> Appropriately worn masks reduce the spread of COVID-19—particularly given the evidence of pre-symptomatic and asymptomatic transmission of COVID-19. Masks are most likely to reduce the spread of COVID-19 when they are widely used by people in public settings. Using masks along with other preventive measures, including social distancing, frequent handwashing, and cleaning and disinfecting frequently touched surfaces, is one of the most effective strategies available for reducing COVID-19 transmission.[31]

Researchers reported that in jurisdictions with mask mandates, infection rates were significantly lower.[32] "The study provides direct evidence

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25. *Your Guide to Masks*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html [https://perma.cc/5YGK-7N67] (last updated Feb. 25, 2022).

26. *Coronavirus Disease (COVID-19): Masks*, WORLD HEALTH ORG., https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-masks [https://perma.cc/XUY7-X3ST] (last updated Jan. 5, 2022) ("Masks are a key measure to suppress transmission and save lives.").

27. Stolberg, *supra* note 22.

28. *See* Monica Gandhi, Chris Beyrer & Eric Goosby, *Masks Do More Than Protect Others During COVID-19: Reducing the Inoculum of SARS-CoV-2 to Protect the Wearer*, 35 J. GEN. INTERNAL MED. 3063, 3063 (2020) ("Countries accustomed to universal population-level masking since the SARS epidemic in 2003 adopted the intervention more readily.").

29. *Recommendation Regarding the Use of Cloth Face Coverings. Especially in Areas of Significant Community-Based Transmission*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 3, 2020), https://stacks.cdc.gov/view/cdc/86440/cdc_86440_DS1.pdf [https://perma.cc/7DK4-5S5U].

30. *See, e.g.*, *How to Select, Wear, and Clean Your Mask*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 27, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html [https://perma.cc/PG89-ECGB] ("CDC recommends that people wear masks in public settings, like on public and mass transportation, at events and gatherings, and anywhere they will be around other people.").

31. Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8,025, 8,026 (Feb. 3, 2021).

32. Wei Lyu & George L. Wehby, *Community Use of Face Masks and COVID-19: Evidence from a Natural Experiment of State Mandates in the US*, 39 HEALTH AFFS. 1419, 1419 (2020).

on the effectiveness of widespread community use of face masks from a natural experiment that evaluated the effects of state government mandates in the US for face mask use in public on COVID-19 spread," one study reported.[33] But during the coronavirus crisis, wearing a mask somehow became a political issue. Though this article prefers not to dwell on the politicization of masks, this discussion and analysis must refer to this controversy.[34]

Pointing to the 1918 Spanish influenza pandemic, Dr. Monica Gandhi noted the United States had adopted a universal mask policy before.[35] Dr. Gandhi's report concluded with an admonition: "For this particular pillar of pandemic control to work in the USA, leading politicians will need to endorse and model mask-wearing."[36]

III. PUBLIC HEALTH, THE GOVERNMENT, MASKS, AND THE FIRST AMENDMENT

The discussion of masks and the First Amendment protections of free speech requires examining the government's role and interest in public health, and then the effect on free speech. These conflicts have played out over the centuries with public-health crises ranging from the nineteenth-century cholera epidemic to the 1918 Spanish flu and smallpox, to the AIDS epidemic in the 1980s and 1990s, to late twentieth- and early twenty-first century infectious maladies including SARS, H1N1, Lyme disease, and now to COVID-19.[37] The government plays an important role in protecting the public during infectious-disease crises.[38]

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33. *Id.* at 1423.

34. The politicization of wearing a mask first came up in the spring of 2020 and largely broke down on political lines with Democrats more likely to wear masks than Republicans. *See* Lauren Aratani, *How Did Facemasks Become a Political Issue in America*, THE GUARDIAN (June 29, 2020, 5:00 AM), https://www.theguardian.com/world/2020/jun/29/face-masks-us-politics-coronavirus [https://perma.cc/L44Y-BCQ4] (explaining political divisions in attitudes toward mask-wearing); *see also* Mark A. Rothstein, *The Coronavirus Pandemic: Public Health and American Values*, 48 J.L., MED. & ETHICS 354, 356–57 (2020) (noting that political parties' differing levels of concern at the pandemic's start demonstrated an early partisan divide).

35. Gandhi, Beyrer & Goosby, *supra* note 28, at 3065.

36. *Id.*

37. *See* Wendy E. Parmet, *Unprepared: Why Health Law Fails to Prepare Us for a Pandemic*, 2 J. HEALTH & BIOMED. L. 157, 157–58 (2006) (listing prior epidemics that should have better prepared society for a pandemic); Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: A Population-Based Approach to the First Amendment*, 39 LOY. L.A. L. REV. 363, 365, 406–07 (2006) (discussing interplay between First Amendment speech issues and public-health issues).

38. *See* Jess Alderman, *Words to Live By: Public Health, the First Amendment, and Government Speech*, 57 BUFF. L. REV. 161, 162 (2009) ("For at least two centuries, the American legal system has recognized that the government is charged with the protection of public health."); Micah L. Berman, *Defining the Field of Public Health Law*, 15 DEPAUL J. HEALTH CARE L. 45, 46 (2013) (arguing that public-health law has grown in scholarship, law-school curricula, government regulation, and litigation).

Laws protecting public health and safety have a long history in the United States. As far back as 1824, in *Gibbons v. Ogden*, a case about navigation rights in New York's rivers and bays, the Supreme Court noted that safeguarding public health was an important governmental function.[39] The Court wrote, "While a health law is reasonable, it is a health law; but if, under colour of it, enactments should be made for other purposes, such enactments might be void."[40]

Decades later in the seminal *Jacobson v. Massachusetts* case, the Supreme Court held that a state law mandating smallpox vaccination was a legitimate exercise of state police powers and important to preserving public health and safety.[41] The petitioner argued that the state's vaccination policies violated his constitutional rights as a substantive due process deprivation. [42] Justice Harlan wrote for the Court, "According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."[43] The state has discretionary powers and may regulate this at the local level or impel local governments to enforce public-health laws or mandates.[44]

In a constitutional clash between an individual's rights and government-imposed public-health standards, the Court pointed to quarantine rules, hygiene standards, and vaccine requirements as means to combat a range of public-health crises.[45] The Court explained that other measures, including restraints and quarantines imposed on Americans' entry at ports alongside other potentially rigid procedures and policies created to combat yellow fever, cholera, and other highly communicable diseases, satisfied an important government interest.[46]

The Court emphasized individual rights' rational limits relative to the government's legitimate interest in protecting public health and safety:

> On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental

39. Gibbons v. Ogden, 22 U.S. 1, 20 (1824) (noting that health laws, such as quarantine laws or other public-safety laws, may affect commerce but still could satisfy an important government interest).
40. *Id.*
41. Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).
42. *Id.* at 13–14.
43. *Id.* at 25.
44. *Id.*
45. *Id.*
46. *Id.* at 29.

> principle that "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned."[47]

Jacobson established a two-prong due-process analysis for the smallpox vaccine dispute: (1) the vaccines should have a real or substantial relation to protecting public health and safety; and (2) the vaccine requirement "cannot be affirmed to be beyond question, in palpable conflict with the Constitution."[48] *Jacobson*'s analysis predated the Supreme Court's tiered scrutiny analysis—whether to apply strict scrutiny for a constitutional challenge to a law affecting a fundamental right, or the lighter intermediate scrutiny, which would be more deferential to government action.[49]

When religious beliefs protected under the First Amendment conflict with public-health policies, particularly with regard to vaccinations, courts have "continually upheld vaccination requirements."[50] A number of health-law scholars, led by Professor Wendy Parmet, have recognized the potential conflict between First Amendment rights and the government's interest in protecting the public in a pandemic or other public-health emergency.[51] Infectious-disease outbreaks required government responses that could affect citizens' legal rights, particularly in population centers.[52]

Similarly, Professor Jess Alderman, a health and law scholar, suggested the government need not give equal weight to opposing beliefs when articulating its public-health policy interests:

> Free speech and public health need not be in opposition to one another, nor is it necessary to rewrite First Amendment jurisprudence to integrate public health and free speech concerns. When courts view cases

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47. *Id.* at 26 (quoting R.R. Co. v. Husen, 95 U.S. 465, 471 (1878)).

48. *Id.* at 31.

49. *See* Denis v. Ige, 538 F. Supp. 3d 1063, 1073 (D. Haw. 2021) (applying *Jacobson* to reject a constitutional challenge to a state mask mandate). "There is no dispute that *Jacobson* remains good law today. And its reasoning is also relevant. During the pandemic, public health authorities still have a duty to enact reasonable regulations to protect the public welfare, irrespective of the 'wishes or convenience of the few' who object." *Id.*

50. JOHN E. NOWAK, RONALD D. ROTUNDA & J. NELSON YOUNG, CONSTITUTIONAL LAW 1066–67 (2d ed. 1983).

51. *See* Parmet & Smith, *supra* note 37, at 406–07 (noting conflict between public health and First Amendment).

52. Wendy E. Parmet, *Public Health and Constitutional Law: Recognizing the Relationship*, 10 J. HEALTH CARE L. & POL'Y 13, 14 (2007) ("When the Constitution was drafted, epidemics of infectious diseases, especially smallpox and yellow fever, wreaked periodic devastation on the American states. In response to these diseases, as well as the more common endemic infections, cities and states undertook a variety of legal measures. They instituted quarantines, provided medical care for the poor, and periodically ordered the cleaning of filthy urban centers.").

> from a public health perspective, both the benefits and risks of governmental power become clearer. It is necessary for the government to be able to choose and communicate its own message without being forced to provide a means of promoting others' viewpoints.[53]

Because COVID-19 litigation is still in its nascent stages, so is legal scholarship on this subject, which again, makes this discussion both timely and relevant.[54] In order for public-health laws and policies to have any force, though, there must be something behind them. For example, one possible preventive measure—imposing criminal liability for exposure or knowingly exposing someone to the disease–would come with teeth but would be a questionable legal option, one team of authors warned.[55]

Even as the United States turned a corner on COVID-19 in the spring of 2021 and states began to lift mask mandates, the issue persisted.[56] Further, future public-health crises may generate similar mask mandates or other restrictions that some may believe infringe on individual rights.

With the COVID-19 crisis, a constitutional challenge was inevitable and almost immediate.[57] Writing in late 2020, Dean Erwin Chemerinsky summarized numerous COVID-19-related issues winding their way through the court system and to the Supreme Court, analyzing matters of voting rights, absentee ballots, health-care-related issues (particularly under the Affordable Care Act), and the First Amendment issues surrounding religious gatherings.[58] He noted that courts have generally sided with the government in these conflicts:

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53. Alderman, *supra* note 38, at 224.

54. *See* Erwin Chemerinsky, *How Will SCOTUS Handle Future Issues Related to the COVID-19 Crisis?*, S.F. ATT'Y MAG., Fall 2020, at 16, 17–21 (detailing how the Court will continue facing unprecedented COVID-19 issues in future terms); Melanie D. Wilson, *The Pandemic Juror*, 77 WASH. & LEE L. REV. ONLINE 65, 65 (2020) (discussing risks COVID-19 poses to jurors and to just trial outcomes generally).

55. *See* Naomi Seiler et al., *The Risk of Criminalizing COVID-19 Exposure: Lessons from HIV*, 24 HUM. RTS. BRIEF 5, 7 (2020) ("Criminalizing COVID-19 exposure may seem reasonable in cases when a person appears to have deliberately tried or threatened to infect others. However, using the criminal law as a tool to address COVID-19 more broadly warrants concern.").

56. *See* Daniel Patrick Sheehan, *State Mask Mandate May End in June*, THE MORNING CALL, May 28, 2021, at 1 (indicating Pennsylvania would life mask mandate by June 28 or when seventy percent of adults were fully vaccinated, whichever occurred first); Katryna Perera, *'It's What We Have to Do': Vaccinating Kids Is the Next Step to Normalcy, Say Parents, Expert*, FREDERICK NEWS-POST, May 28, 2021, at 2; Denis Slattery, *State Eases Mask Rules for Children*, N.Y. DAILY NEWS, May 26, 2021, at 10 (relaxing mask mandate in New York for summer camps, schools); Tracey Tully, *New Jersey Loosens Its Mask Requirements*, N.Y. TIMES, May 25, 2021, at A6 (lifting indoor mask mandate in New Jersey for fully vaccinated residents); Sharon Otterman, *New York City Is Reopening, But Not Quite to 100 Percent*, N.Y. TIMES, May 19, 2021, at A6 (reopening New York City businesses).

57. *See* Chemerinsky, *supra* note 54, at 17.

58. *Id.* at 17.

> The COVID-19 pandemic, not surprisingly, has led to a great deal of litigation throughout the country, especially as there have been challenges to the shelter-in-place and shutdown orders. Overwhelmingly, federal and state courts have ruled in favor of the government and its power to take action to stop the spread of a communicable disease. A few of these cases already have reached the U.S. Supreme Court.[59]

IV. COVID-19 AND THE FIRST AMENDMENT

The first COVID-19 First Amendment case to reach the Supreme Court, *South Bay United Pentecostal Church v. Newsom*, was rejected in a five-to-four vote.[60] Here, the church sought to block California Governor Gavin Newsom's executive order limiting the size of in-person gatherings for religious services.[61] Though there was no majority opinion, Chief Justice Roberts wrote a concurring opinion supporting the public-health initiative over the purported free-exercise claim.[62]

Chief Justice Roberts reasoned that the state's policy did not discriminate on the basis of religion, but rather regulated content-neutral behavior related to spread of infectious disease:

> Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.[63]

In a subsequent challenge to California's restrictions on in-person worship and singing, in February 2021, Chief Justice Roberts wrote that courts pay deference to the political branches, particularly to state officials with expertise in public health in setting standards for gatherings and other safety protocols.[64] But as he joined the majority in a partial rejection of California's religious-gathering restrictions, he explained the government's interests do not completely override individual rights:

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59. *Id.*

60. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020). The Supreme Court has weighed in on California's COVID-19 regulations several times, including a partial rejection of religious gathering and singing standards. The First Amendment challenges, which have support among a majority of justices, focus on religious practices rather than free speech. *See* S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716–17 (2021) (detailing justices' split over religious-exercise issues).

61. *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring).

62. *Id.*

63. *Id.*

64. *S. Bay United Pentecostal Church*, 141 S. Ct. at 716–17 (Roberts, C.J., concurring).

> I adhere to the view that the "Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States." But the Constitution also entrusts the protection of the people's rights to the Judiciary—not despite judges being shielded by life tenure, but because they are. Deference, though broad, has its limits.[65]

A. Masks in Minnesota

In the short lifespan of COVID-19-related First Amendment litigation, the first case on the First Amendment implications of a state-ordered mask mandate was *Minnesota Voters Alliance v. Walz*.[66] This case emanated from a March 13, 2020, executive order, when the president declared a national emergency and Minnesota Governor Tim Walz declared a statewide peacetime emergency.[67] Governor Walz issued Executive Order 20-81, mandating Minnesotans wear a mask or legitimate face-covering at all indoor businesses, indoor public spaces, or locations where people are waiting to enter a public space.[68] Violation of the order would be a petty misdemeanor.[69]

A group of political activists sought an injunction in district court, arguing that the order violated citizens' First Amendment rights.[70] Though plaintiffs acknowledged COVID-19's virulence and that wearing masks has a proven scientific role in slowing or preventing the virus's spread, and while they did not pose any arguments under the religion clauses, they argued that the executive order violated the First Amendment because it also conflicted with a long-standing state statute prohibiting face-coverings at polling places.[71] The mask mandate, plaintiffs argued, "chilled" them from "engaging in political activities that are protected by the First Amendment, such as voting in person, campaigning in public, and associating with others in indoor settings."[72]

They argued that if a voter complied with the order and wore a mask to a polling place to vote, that person would be committing a crime under

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65. *Id.* at 717.

66. Minn. Voters All. v. Walz, 492 F. Supp. 3d 822, 825–26 (D. Minn. 2020); Minn. Voters All. v. Walz, No. 20-3072, 2020 U.S. App. LEXIS 41975 at *1 (8th Cir. Nov. 9, 2020) (dismissing appeal); *see also* Minn. Voters All. v. Walz, 494 F. Supp. 3d 610, 611 (D. Minn. 2020) (detailing plaintiffs' action against an Executive Order of a mask mandate in Minnesota).

67. *Minn. Voters All.*, 492 F. Supp. 3d at 827.

68. *Id.* at 827–28 (discussing EO 20-81).

69. *Id.* at 827.

70. *Id.* at 827–28. Much of the court's decision focused on the procedural elements and standards for a preliminary injunction under a traditional four-prong analysis: (1) likelihood of success on the merits; (2) threat of irreparable harm; (3) balance between the harm of granting the injunction versus not granting it; and (4) general public interest. *Id.* at 827–28, 838–40.

71. *Id.* at 827 ("[P]laintiffs emphasize that 'no one in this case is saying that mask wearing isn't a good thing.'").

72. *Id.* at 827.

Minnesota state statute § 609.735, which prohibits face-coverings at polling places.[73] This, plaintiffs said, raised questions about the statute and how it could be interpreted to deal with a disguise or an effort to obscure the identity of people going to vote.[74] The plaintiffs here misapplied *Mansky*, which addressed the First Amendment expressive elements of clothing, by arguing the combination of the executive order and the polling place statute was not "capable of reasoned application."[75]

The district court noted the incompatibility of applying § 609.735, which was passed to counter voting fraud, intimidation, or other chicanery associated with hooded or masked Ku Klux Klan members involved in local elections.[76] The underlying purpose of this law, however, did not conflict with the executive order, the district court wrote.[77] First, the court noted that the mask requirement under the executive order was not intended to obscure or disguise anyone's identity.[78]

The district court in *Walz* found that a broad and overly expansive application of the statute would likely deviate from any legislative intent, reasonable interpretation by the Minnesota Supreme Court, and existing constitutional precedent under *Jacobson v. Massachusetts*.[79] For example, the court explained that over-application would result in "absurd results" and could potentially apply prohibitions to a broad range of workers who regularly wear masks, including construction workers in public places, hazmat crews, emergency medical technicians, and manicurists.[80] "The Minnesota legislature could not possibly have intended to criminalize such a broad range of commonplace conduct," the court wrote.[81] The

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73. *Id.* at 834 (discussing MINN. STAT. § 609.735).

74. *Id.*

75. *See Mansky*, 138 S. Ct. at 1882 (holding that MINN. STAT. § 211B.11 prohibition on "political" apparel in polling places could not be reasonably applied). The court in *Minnesota Voters Alliance v. Walz*—on the action's second round in district court—discussed why plaintiffs not only inappropriately invoked *Mansky*, but stretched its holding to the point of meritlessness:

> *Mansky* concerned an explicit restriction of political speech at polling places that election judges were responsible for interpreting and applying. By contrast, § 609.735 is a generally applicable law that does not on its face regulate speech or have anything to do with elections or polling places. Nor is there any suggestion that election judges have any role to play in interpreting or enforcing §609.735; unlike in *Mansky*, plaintiffs have not cited a single instance in which any election judge has attempted to enforce § 609.735 at any polling place, despite the fact that Minnesota held a primary after EO 20-81 went into effect. In short, *Mansky* has little to do with this case.

Minn. Voters All., 494 F. Supp. 3d at 613.

76. *Minn. Voters All.*, 492 F. Supp. 3d at 834.

77. *Id*. at 835–36.

78. *Id.* at 835.

79. *Id.* at 835–36.

80. *Id.* at 835.

81. *Minn. Voters All.*, 492 F. Supp. 3d at 835.

court added, "Needless to say, such an interpretation of § 609.735 would raise significant constitutional concerns."[82]

Turning to the executive order's purported First Amendment issues, the court was equally unconvinced, calling plaintiffs' arguments "meritless."[83] The mask requirement was not expressive conduct under the First Amendment, especially during the pandemic.[84]

Before employing the *O'Brien* test, the court wrote, "First, EO 20-81 does not implicate the First Amendment at all. Second, even if EO 20-81 did implicate the First Amendment, the order would easily pass muster under *United States v. O'Brien*[85] and *Jacobson v. Massachusetts*."[86]

Under *O'Brien*, the Executive Order did not relate to "inherently expressive" conduct. Because of the public-health implications, the order was based on a substantial government interest in public health and safety and had only a tangential effect on speakers' free-speech rights.[87] The court distinguished the mask requirement from other expressive conduct, such as burning the American flag.[88]

The court summarized its application and holding, concluding the Minnesota policy did not violate the First Amendment:

> There is no question that Minnesota has the constitutional authority to enact measures to protect the health and safety of its citizens. Likewise, there is no question that EO 20-81 furthers the substantial government interest in controlling the spread of a deadly and highly contagious disease . . . federal health officials recommend face coverings as an effective way to slow the spread of COVID-19, and this recommendation finds support in recent studies. Finally, EO 20-81 is unrelated to the suppression of free expression and has at most an incidental effect on First Amendment freedoms that is no greater than necessary; plaintiffs are free to express their opinions about EO 20-81 in every conceivable way *except* by violating its provisions and putting at risk the lives and health of their fellow citizens.[89]

Furthermore, it was unquestionable that the executive order "bears a real and substantial relation to the public-health crisis caused by COVID-19."[90]

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82. *Id.* at 836.
83. *Id.* at 837–39.
84. *Id.*
85. *O'Brien* is discussed in greater depth *infra* Part V.
86. *Minn. Voters. All.*, 492 F. Supp. 3d at 837.
87. *Id.*
88. *Id.* (citing Texas v. Johnson, 491 U.S. 397, 404 (1989) (holding flag-burning was protected as expressive conduct under First Amendment)).
89. *Id.* at 838.
90. *Id.* ("And EO 20-81 either does not implicate the First Amendment at all or, at most, has an incidental and trivial impact on First Amendment freedoms ... plaintiffs have no chance of success on their claim that EO 20-81 standing alone, violates the First Amendment.")

B. Subsequent Mask Cases

In the months since *Minnesota Voters Alliance v. Walz*, First Amendment challenges to mask mandates have expanded across the country.[91] No individual illustrates controversy better than Huguette Nicole Young, a long-haul truck driver and law-school graduate from Oregon, who has filed at least three dozen lawsuits challenging the constitutionality of mask mandates all over the country.[92] In *Young v. Becerra*, a federal case in California, Young argued that her First Amendment rights would be hindered by wearing a mask because it impaired her First Amendment right to "smile at others" and "communicate audibly, clearly and expressively."[93] Like many of the courts across the country, the judge dismissed the complaint because the First Amendment protects the expression of ideas, not the mechanics of speaking:

> Free expression applies to the content of speech, not the mechanics of speaking clearly and being able to smile, as Young would have it. Nothing in the regulation she challenges indicates that it is a content-based restriction, or seeks to limit speech based on its viewpoint or the identity of the speaker.[94]

Three other cases, discussed below, however, contributed significant, reasoned analysis on the mask issues.

C. Hawaii

A mask-mandate challenge in Hawaii was caught up in constitutional and procedural challenges in related litigation: *Lomma v. Connors* and

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91. *See* Bechade v. Baker, No. 20-11122, 2020 U.S. Dist. LEXIS 17460, at *5–*7 (D. Mass., Sept. 23, 2020) (holding plaintiff's First Amendment challenge failed because she could not show how a mask mandate inflicted a particularized harm or damages); Shelton v. City of Springfield, 497 F. Supp. 3d 408, 413 (W.D. Mo. 2020) (rejecting claim that mask-mandate ordinance infringed on plaintiffs' First Amendment rights to worship because any perceived harm was too "hypothetical" and no proof of actual injury could be linked to government); Cangelosi v. Edwards, No. 20-1991, 2020 U.S. Dist. LEXIS 205095, at *10 (E.D. La. Nov. 3, 2020) (rejecting challenge because injunctive relief requested for alleged prospective injury was "highly speculative").

92. *See* Young v. James, No. 20 Civ. 8252, 2020 U.S. Dist. LEXIS 198392, at *2, *8 n.2 (S.D.N.Y. Oct. 26, 2020) (listing at least thirty-six cases plaintiff filed across the country); *see also* Young v. Ellison, No. 20-cv-2144, 2020 WL 8673995, at *4 (D. Minn. Dec. 14, 2020) (rejecting complaint for lack of subject-matter jurisdiction); Young v. Becksted, No. 20-cv-1080, 2020 U.S. Dist. LEXIS 226347, at *1, *8, *9 (D.N.H. Nov. 10, 2020) (denying request for preliminary injunction enjoining mask mandate and dismissing for lack of subject-matter jurisdiction). As another court denied reconsideration of its dismissal for failure to prove harm under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the court noted the plaintiff had filed similar claims in more than ten other federal jurisdictions, including Arkansas, California, Hawaii, Kentucky, Louisiana, Maryland, New Mexico, Washington and Wisconsin. Young v. Healey, No. 20-11832, 2020 U.S. Dist. LEXIS 202607, at *1–*2, *4 n.2 (D. Mass. Oct. 30, 2020).

93. *See* Young v. Becerra, No. 3:20-cv-05628, 2021 WL 1299069, at *1 (N.D. Cal. Apr. 7, 2021) (dismissing for lack of standing and failure to show concrete harm).

94. *Id.* at *2 (applying Texas v. Johnson, 491 U.S. 397, 404 (1989)).

For Our Rights v. Ige.[95] In *Lomma*, the federal district court dismissed the state-law claims but abstained from rendering a decision based on the *Pullman* doctrine because *For Our Rights*, filed in Hawaii state court, had constitutional implications and was pending appeal.[96]

The plaintiff in the federal action, Levana Lomma, sued Hawaii's governor, challenging a series of emergency orders, particularly the March 4, 2020, Proclamation 18, the state's mask mandate requiring people to wear a face-covering in all public places.[97] In October 2020, the plaintiff filed her lawsuit as well as a motion for a speedy hearing under Rule 57 of the Federal Rules of Civil Procedure.[98] Her argument focused on the First Amendment free-speech and expression grounds because masks infringed on her "ability to speak audibly and clearly, removing facial expression which is an aspect of the content of speech, forcing the adoption of a cult-like religious tradition, which violate[d] [her] religious convictions" and her "God-given right to breathe freely and to simply be left alone."[99] The plaintiff was also a party to a similar lawsuit in state court filed by For Our Rights, which the court dismissed and plaintiffs appealed, prompting the federal court to hold off on deciding the constitutional aspects of the argument during the appeal's pendency.[100]

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95. Lomma v. Connors, 539 F. Supp. 3d 1094, 1097–98 (D. Haw. 2021); For Our Rights v. Ige, No. 21-0000024 (Haw. Ct. App. Feb. 25, 2022), https://cases.justia.com/hawaii/court-of-appeals/2022-caap-21-0000024.pdf?ts=1645827158.

96. *Lomma*, 539 F. Supp. 3d at 1099. Because the state-court appeal of *For Our Rights v. Ige* was pending during the federal action's progress, the federal court applied a constitutional abstention analysis under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), which allows a federal court to pass or withhold ruling on a state-law issue when a state appellate court is still considering a case with constitutional implications. *Id.* The state-court case of which the federal court was awaiting resolution did not involve a free-speech claim; its constitutional claim was that the governor's emergency orders were "unconstitutionally vague" such that they violated the plaintiffs' right to due process under the Fourteenth Amendment. For Our Rights v. Ige, No. 21-0000024 (Haw. Ct. App. Feb. 25, 2022) at 6.

97. *Lomma*, 539 F. Supp. 3d at 1096. The governor's March 4, 2020, emergency order required "all individuals within the state of Hawaii to 'wear a face covering over their nose and mouth when in public.'" *Id.* The proclamation included a definition: "Face covering is defined as a tightly woven fabric (without holes, vents, or valves) that is secured to the head with either ties or straps, or simply wrapped and tied around the wearer's nose and mouth." *Id.* at 1096–97.

98. *Id.* at 1097.

99. *Id. See also* Complaint at 13, Lomma v. Connors, 539 F. Supp. 3d 1094 (D. Haw. 2021) (No. 20-00456) (identifying plaintiff as a "recently unemployed hair stylist" who has been "gravely affected" by mask mandates, leading to emotional distress). In another related federal action, filed under the name of Lomma's unincorporated association and joined by Lomma and more than a dozen other plaintiffs, Lomma alleged that the mask mandate and other quarantine requirements caused her to lose her job and income while depleting her savings. Complaint at 19, For Our Rights v. Ige, No. 20-cv-00268 (D. Haw. June 9, 2020), ECF 1. She also claimed her mental and physical health suffered, and she experienced depression, fear, anxiety, social isolation, and panic attacks, and she was unable to attend Alcoholics Anonymous meetings. *Id.* Plaintiffs to *For Our Rights v. Ige* voluntarily dismissed their complaint shortly after filing. Notice of Voluntary Dismissal without Prejudice at 1, For Our Rights v. Ige, No. 20-cv-00268 (D. Haw. June 25, 2020), ECF 26.

100. *Lomma*, 539 F. Supp. 3d at 1098–99.

In most First Amendment cases, the court has acknowledged that a *Pullman* abstention would not be appropriate because a delay of blocking government action relating to speech would perpetuate a "chilling effect" on that speech.[101] However, this case, involving a public-health crisis during a pandemic, changes the equation, the court said.[102] "This case unquestionably touches upon a sensitive area of social policy. The COVID-19 global pandemic is unprecedented, and states have been tasked with determining how best to manage public health and safety."[103]

D. Pennsylvania

In *Parker v. Wolf*, a district court rejected a preliminary injunction seeking to block both the governor's mask-mandate and contact-tracing orders.[104] The court focused on Article III standing based on cognizable harm, which plaintiffs failed to establish in both issues, though the court acknowledged that it was a "closer call" when analyzing the mask-mandate challenge.[105] With a two-prong attack, plaintiffs made their First Amendment argument because the mask mandate: 1) harmed them as a form of compelled speech, a compelled medical procedure, or an infringement on their political speech with which they disagreed; and 2) incorporated a threat of enforcement or punishment, compounding their harm.[106]

In the Article III harm analysis, the court assumed standing to assess harm, but narrowed its analysis on whether the harm was "concrete" or "intangible."[107] Even intangible harm, as the plaintiffs allege in this case, could accrue as something more provable or measurable.[108] The court held that the mask mandate could cause a concrete injury that was traceable to the government defendants, stating, "we have no trouble finding the alleged injury is 'actual or imminent.'"[109] However, the court could not find that the plaintiffs could meet the "particularity" or "redressability" elements of establishing standing. First, the mask mandates failed the particularity prong because it did not target the plaintiffs, and their harm was not specific to them.[110]

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101. *Id.* at 1100.
102. *Id.* at 1101.
103. *Id.*
104. Parker v. Wolf, 506 F. Supp. 3d 271, 274 (M.D. Pa. 2020).
105. *Id.* at 286–87.
106. *Id.*
107. *Id.* at 287.
108. *Id.*
109. *Id.* (applying Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) ("A 'concrete' injury must be 'de facto'; that is it must actually exist.")).
110. *Id.* at 287–88 ("Plaintiffs alleged injuries suffered as a result of wearing a mask are identical to every other citizen in the Commonwealth. To be clear, it is not the sheer number of people

Further, on redressability, the court questioned whether an injunction would stave off the injury or whether the action was too speculative.[111] Therefore, citing *Lujan v. Defenders of Wildlife*, the court held, "Article III courts can only adjudicate live 'cases' and 'controversies'—disputes that can be 'appropriately resolved through the judicial process' as opposed to the political or legislative spheres. Because Plaintiffs do not have standing to challenge the Mask Mandate, we must deny the motion."[112]

In addition to the constitutional-standing rejection, the court reaffirmed *Jacobson* in a lengthy footnote, rejecting the plaintiffs' substantive due-process argument in the face of a national and global public-health crisis.[113] The court emphasized the constitutionality of reasonable public-health policies:

> The overwhelming majority of federal courts that have adjudicated constitutional challenges to COVID-19 mitigation efforts have utilized a two-part test based on *Jacobson*'s text—a plaintiff must show that the challenged order either (1) has 'no real or substantial relation' to protecting public health; or (2) that it is 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law."[114]

E. West Virginia

In *Stewart v. Justice*, restaurant owners in West Virginia challenged the governor's mask mandate, Executive Order 50-20.[115] The plaintiffs publicly posted messages on Facebook stating they intended to ignore the mask mandate and would not require their employees or patrons to wear masks, in open defiance of the executive order.[116] Their First Amendment arguments focused on not wearing a mask as a form of political speech.[117]

The First Amendment challenge also included a request for a preliminary injunction and a claim for retaliation[118] based on plaintiffs' speech

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who suffer the same injuries claimed by Plaintiffs that forecloses a finding of 'particularity'—it is that each of those citizens under Plaintiffs' theory, suffers an injury *indistinguishable* from any other Pennsylvanian.").

111. *Id.* at 288. The court added a question about the practical effect of enforcing an injunction against the state while municipalities instituted their own concurrent mask mandates. *Id.*

112. *Id.* at 291 (quoting and applying Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

113. *Id.* at 291 n.20.

114. *Id.*

115. Stewart v. Justice, 518 F. Supp. 3d 911, 914–15 (S.D. W.Va. 2021).

116. *Id.* at 914.

117. *Id.* at 914, 919.

118. *Id.* at 919–20. The unsuccessful retaliation claim was based on a local inspector's announcement that they would shut down the restaurant after plaintiffs made public statements about their intent to ignore the mask mandates. *Id.* at 919. The arguments, based on *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), required the plaintiff to show punitive government action directly related to their expressive activity. *Id.* at 920. The court applied the Fourth Circuit's three-prong test under *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685–86 (4th Cir. 2000): (1) that plaintiff's speech was protected; (2) that defendant's actions retaliated against constitutionally protected speech; and (3) a causal connection existed between the speech and the retaliation. *Id.*

or expressive activities because government inspectors announced intent to shut down the restaurant.[119]

Applying *Jacobson*, which the court declared "is still good law," the district court dismissed the claims.[120] The two prongs are: (1) whether the mask mandate (and the stay-at-home order) had "real or substantial" relation to protecting public health; or (2) whether the government action "beyond all question" invaded a fundamental right.[121] Thus, the court held that the governor's orders were justified because of masks' proven scientific efficacy, backed by CDC standards and data, in limiting airborne transmission of COVID-19.[122] Due to masks' substantial relation to protecting public health, the orders were neither arbitrary nor unreasonable, nor did they invade any fundamental or constitutional rights.[123]

As a form of speech, the court rejected the First Amendment argument that not wearing a mask was a form of protected political speech.[124] "[T]he act of refusing to wear a face covering does not carry a meaning that is 'overwhelmingly apparent' such that it is protected speech."[125]

More importantly, the court acknowledged that even if courts engaged in a constitutional analysis of a mask mandate, it would apply intermediate scrutiny and *O'Brien* elements.[126] These orders were content-neutral time, place, and manner restrictions: "[B]eing required to wear a mask in conformity with the Governor's Order may be an inconvenience or annoyance, but it is a trivial imposition on an individual's freedom outweighed by the reasonableness of such precautions during a pandemic."[127]

V. LOOKING AT SCRUTINY—THE *O'BRIEN* TEST

When David Paul O'Brien and his three friends took to the steps of a South Boston courthouse to protest the Vietnam War by burning their draft cards, they inadvertently opened a challenge to federal law that

119. *Id.* at 914–15.
120. *Id.* at 915–16.
121. *Id.* at 917 (applying *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905)).
122. *Id.* ("In developing West Virginia's response to the pandemic, the Governor consulted with public health professionals who have 'reviewed countless scholarly articles, news reports, and studies from around the world since the pandemic began.' The Government has determined that the disease spreads through 'droplets, aerosols, talking, yelling, screaming, coughing, sneezing, and just breathing, and it spreads more the longer persons spend in contact with each other.'" (quoting from the record)).
123. *Id.* at 918.
124. *Id.* at 919.
125. *Id.* (citing Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 66 (2006)).
126. *Id.* at 919.
127. *Id.*

would set standards for the First Amendment implications of what has become known as symbolic speech in *United States v. O'Brien*.[128]

Though O'Brien's stated purpose was political protest through symbolic speech, he acknowledged that burning his draft card was breaking the law.[129] If burning the draft card was a form of expressive free speech, O'Brien argued, the statute at issue violated his First Amendment rights.[130] The Supreme Court, however, was more circumspect, concerned that just about any expressive conduct could be converted into a First Amendment speech issue with potentially "limitless" possibilities.[131]

Chief Justice Warren's analysis formed a four-prong test: 1) whether the government regulation is within the state's constitutional power; 2) whether the government action furthers an important or substantial government interest; 3) whether the regulation is unrelated to the suppression of free expression; and 4) whether the incidental restriction on a First Amendment right is no greater than is essential to further that interest.[132]

The substantial interest imbued in the statute that justified it and its application, Chief Justice Warren wrote for the Court, "[w]hatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government . . . ."[133]

VI. To Wear or Not To Wear? That Is the Constitutional Question

An *O'Brien* analysis is useful in assessing First Amendment arguments in two areas arguing a constitutional right not to wear clothing or protective equipment: public nudity and motorcycle helmets.

A. Public Nudity

If an argument is to be made that there is a First Amendment speech right to not wear an article of clothing or even a protective garment, then it would raise an immediate comparison to the right to wear nothing at all. Public nudity as a First Amendment issue is often intertwined with

128. United States v. O'Brien, 391 U.S. 367, 370 (1968).

129. *Id.* at 370–71. The law at issue here under the Universal Military Training and Service Act of 1948 and its 1965 amendments made it a crime to knowingly or willfully destroy or mutilate documents and registration related to selective service or the military draft. *See generally* 50 U.S.C. § 462.

130. *Id.* at 376.

131. *Id.* at 376–77 ("We find that the 1965 Amendment to § 12(b)(3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.").

132. *Id.* at 377.

133. *Id.*

eroticism and indecency.[134] Public nudity and exposure laws, disproportionately applied to women, have also been unsuccessfully argued as a violation of equal-protection rights.[135]

Over and over, courts have found an important government interest behind public-nudity laws, even if they distinguish or discriminate against women.[136] A 2020 district court decision in *Eline v. Town of Ocean City, Maryland*, upheld a municipal ordinance barring female toplessness while ignoring males and found that protecting the public satisfied a substantial government interest.[137] The court distinguished the law's constitutionality from the broader normative question it raised:

> Whether or not society *should* differentiate between male and female breasts is a separate inquiry from whether it is constitutional to do so. Following the precedent . . . the Court finds that protecting the public sensibilities from the public display of areas of the body traditionally viewed as erogenous zones—including female, but not male, breasts—is an important government objective.[138]

Whether female public nudity or a topless woman would really embody a substantial public-safety concern is immaterial in the face of overwhelming precedent.[139] The government interest, more in line with the public-health and safety arguments about mask requirements, is more reasonably explained in *Barnes v. Glen Theatre* and *City of Erie v. Pap's A.M.*

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134. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 567 (1991) (plurality opinion) (holding that Indiana's prohibition on nude dancing does not violate First Amendment).

135. *See, e.g.*, Nassim Alisobhani, *Female Toplessness: Gender Equality's Next Frontier*, 8 U.C. IRVINE L. REV. 299, 302 (2018) ("Female toplessness laws are an unjustifiable burden on women and bear no justification in sound legal or societal principles. The common justifications for these laws are based on antiquated Victorian and Judeo-Christian values that have no place in our modern society.").

136. *See* Free the Nipple-Springfield Residents Promoting Equal. v. City of Springfield, 923 F.3d 508, 512 (8th Cir. 2019) (holding an ordinance banning female toplessness was not an equal-protection violation because regulating and promoting public decency and morals was an important government interest); Tagami v. City of Chicago, 875 F.3d 375, 380 (7th Cir. 2017) (holding a city ordinance did not violate equal protection by barring female toplessness); United States v. Biocic, 928 F.2d 112, 115 (4th Cir. 1991) (holding Fish & Wildlife Department's incorporation of local nudity ordinance was supported by important government interest); Buzzetti v. City of New York, 140 F.3d 134, 144 (2d Cir. 1998) (holding a city law barring topless female entertainment was not an equal-protection violation because of the law's purpose in preserving quality of life and preventing crime).

137. Eline v. Town of Ocean City, Md., 452 F. Supp. 3d 270, 282 (D. Md. 2020).

138. *Id.* at 281.

139. *See* Free the Nipple-Fort Collins v. City of Fort Collins, 916 F.3d 792, 804 (10th Cir. 2019) ("A female-only toplessness ban strikes us as an unnecessary and overbroad means to maintain public order and promote traffic safety . . . ."). This precedent is an outlier within the Tenth Circuit, challenging the city's three-point argument to justify the female-toplessness ordinance that (1) it was important to protect children from female public nudity; (2) the law promoted traffic safety and (3) it maintained public order. *Id.* at 802–05.

In *Barnes v. Glen Theatre*, the Court found an Indiana nude dancing ordinance did not violate the First Amendment rights of the owner of a strip club, the Kitty Kat Lounge, or its dancers.[140] Chief Justice Rehnquist rejected nudity as expressive conduct:

> It can be argued, of course, that almost limitless types of conduct—including appearing in the nude in public—are "expressive," and in one sense of the word this is true. People who go about in the nude in public may be expressing something about themselves by so doing. But the court rejected this expansive notion of "expressive conduct . . . ."[141]

Building on *Barnes*, the Supreme Court more recently addressed nude dancing, upholding a similar ordinance in *City of Erie v. Pap's A.M.*, because the law restricted conduct and did not target speech or expression.[142] As a control on conduct rather than pure speech, the ordinance was reviewable under less rigorous standards.[143]

Here, the owner of a strip club challenged the public-indecency ordinance on grounds that it violated the First Amendment rights of the club, Kandyland, which featured "totally nude erotic dancing."[144] The Court ruled that the ordinance was not a content-based restriction on expressive activity because "[b]eing 'in a state of nudity' is not an inherently expressive condition" and "falls only within the outer ambit of the First Amendment's protection."[145]

Writing for the Court in a splintered opinion, Justice O'Connor applied *O'Brien* to find that the ordinance was content-neutral and not targeting expressive speech.[146]

First, the ordinance's purpose addressed the secondary effects of adult-entertainment establishments: aiming toprevent, or reduce crime, and this purpose was well within the state's powers to protect the public's health and safety.[147]

Second, the regulation provably furthered an important or substantial government interest: "combating the harmful secondary effects associated with" nude dancing.[148]

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140. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 571–72 (1991) (plurality opinion).
141. *Id.* at 570 (citing United States v. O'Brien, 391 U.S. 367, 376 (1968)).
142. Erie v. Pap's A.M., 529 U.S. 277, 302 (2000) (plurality opinion).
143. *Id.* at 289.
144. *Id.* at 283–84. Erie Ordinance 75-1994 covered a range of public behavior that could be a violation including public exhibitions of sex, public exposure, and other behavior. *Id.* But the ordinance also covered expressive activity including nude dancing at public places such as the strip club at issue here. *Id.* Procedurally, the case was based on the owner's declaratory action and injunction, which the Pennsylvania Supreme Court enforced, but by the time the case was heard at the Supreme Court it could have been moot. *See id.* at 283–87 (recounting procedural history). But because the lower court action was still in effect, the court continued with the case. *Id.* at 287–89.
145. *Id.* at 289.
146. *Id.*
147. *Id.* at 296.
148. *Id.*

Third, the ordinance was not related to the suppression of expression, and it was content-neutral.[149]

Fourth, the restriction was no greater than was necessary to achieve the government's interest: "The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis*."[150]

The Court concluded the ordinance did not violate the First Amendment:

> By its terms, the ordinance regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity. And like the statute in *Barnes*, the Erie ordinance replaces and updates provisions of an "Indecency and Immorality" ordinance that has been on the books since 1866, predating the prevalence of nude dancing establishments such as Kandyland.[151]

Public nudity as a form of protest may be a bit murkier because of the gender-inequity issue.[152] For example, in *People v. Santorelli*, female defendants were charged under New York's public-nudity law, New York Penal Law § 245.01, after they took their shirts off to protest the law.[153] The court held that the statute was not applicable because its purpose was intended to regulate bare breasts in restaurants and venues that served alcohol, not public protests.[154]

B. Crash Landing: Motorcycle-Helmet Laws

The rugged individualism of the American biker may serve as a more analogous conflict between free expression, individual liberty, and public health than nude dancing. If mask objectors argue that their liberty itself should trump public-health concerns, perhaps case law surrounding motorcycle helmet laws can guide the discussion. But even a biker's disregard for his or her own safety is not an apt comparison to a highly contagious virus.

In the 1960s, a handful of courts overturned mandatory helmet laws in cases in Michigan,[155] Louisiana,[156] and Ohio.[157] It seems the only (and

149. *Id.* at 298, 301.

150. *Id.* at 301. Even the statute's requirement that dancers wear pasties or G-strings were content neutral with a *de minimis* burden. *Id.*

151. *Id.* at 290.

152. *See* People v. Santorelli, 600 N.E.2d 232, 233 (N.Y. 1992) (arguing that an anti-nudity statute was discriminatory on its face because it defined "private parts" of a woman's body and not a man's body).

153. *Id.* at 233–34.

154. *Id.*

155. Am. Motorcycle Ass'n v. Davids, 158 N.W.2d 72, 76–77 (Mich. Ct. App. 1968).

156. Everhardt v. City of New Orleans, 208 So.2d 423, 427 (La. Ct. App. 1968).

157. State v. Betts, 252 N.E.2d 866, 872 (Ohio Mun. Ct. 1969).

last) court to find a motorcycle-helmet law unconstitutional was *State v. Betts* in 1969.[158]

In *Betts*, the defendant challenged charges he faced for riding a motorcycle without a helmet, in violation of an Ohio law.[159] The court found the helmet requirement and punishment for not complying harmed the petitioner's liberty rights under the Ohio Constitution, as well as the Fourteenth Amendment of the U.S. Constitution.[160]

Betts, however, is an outlier. Numerous appellate courts across the country have rejected challenges to mandatory helmet laws.[161] In *Robotham v. State*, the Nebraska Supreme Court ruled that a motorcycle enthusiast who refused to wear a helmet or buy one for his son did not have a valid liberty, privacy, or equal-protection claim.[162] The court thus only needed to find the law was justified under a rational-basis test, which was satisfied through the legislative history, which pointed to the emotional and economic harm that cycling-related head injuries cause to family members and society.[163]

The court reasoned the government had a legitimate interest in minimizing damage from motorcycle accidents by requiring helmets:

> The ends of protecting society from the extra economic costs incurred because of injuries to motorcycle riders, and of preventing the other impacts on society of unnecessarily severe motorcycle accidents, are permissible goals for legislation. The helmet law is a rational means to those ends. Therefore, the helmet law violates neither due process nor equal protection under either the Nebraska Constitution or the federal Constitution.[164]

The Vermont Supreme Court took a similar stance in *Benning v. State*, in a challenge brought by Joseph C. Benning, regional head of a group called Freedom of the Road.[165] Benning had been cited for not wearing a helmet.[166] The case focused on whether the state law violated Chapter I, Article 1 of the Vermont Constitution: "That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty,

158. *Id.*; *see also* Benning v. State, 641 A.2d 757, 760 (Vt. 1994) ("Plaintiffs cite the single case that has found a motorcycle helmet law unconstitutional, specifically rejecting the *Solomon* reasoning." (discussing *Betts*, 252 N.E.2d at 871–72)).

159. *Betts*, 252 N.E.2d at 867; OHIO REV. CODE § 4511.53 (1969).

160. *Betts*, 252 N.E.2d at 872.

161. Robotham v. State, 488 N.W.2d 533, 540–41 (Neb. 1992) (upholding helmet law and citing to more than a dozen other similar holdings in other state appellate courts).

162. *Id.* at 542.

163. *Id.* at 539–40.

164. *Id.* at 542.

165. Benning v. State, 641 A.2d 757, 758 (Vt. 1994).

166. *Id.*

acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety . . . ."[167]

The court warned that an over-expansive reading of the term "liberty" was not appropriate, especially in the face of a reasonable government regulation.[168] Furthermore, the government's interest in motorcycle safety went beyond protecting the single biker.[169] The court explained the larger societal consequences of individual bikers' choices not to wear helmets legitimized government regulation:

> This rationale is particularly apparent as the nation as a whole, and this state in particular, debate reform of a health care system that has become too costly although many do not have access to it. Whether in taxes or insurance rates, our costs are linked to the actions of others and are driven up when others fail to take preventive steps that would minimize health care consumption. We see no constitutional barrier to legislation that requires preventive measures to minimize health care costs that are inevitably imposed on society.[170]

Even with laws that ostensibly seek to protect an individual, not necessarily combat a widespread infectious disease, the courts have been willing to hold in favor of the government regulation. A city-court judge in Buffalo, New York, colorfully summed up the issue in *People v. Bielmeyer*: "The old joke about the happy motorcyclist—'the one with the bugs on his teeth'—is not too funny when one hears or reads about instances where cyclists have been hit with hard-shelled beetles or bees and have lost control of their bikes, causing damage and injuries to others."[171]

C. And, the Workplace

These free-expression issues also intersect with workplace safety and Occupational Safety and Health Administration (OSHA) standards, moving the discussion farther outside the constitutional realm. Masks or other personal protective equipment can be an occupational necessity.[172] Since its establishment in 1970, OSHA's standards have required employers to provide protective equipment.[173] In particular, 29 C.F.R. § 1910.132(a)

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167. *Id.* at 759 (quoting VT. CONST. ch. I, art. I).
168. *Id.* at 760–61.
169. *Id.* at 762.
170. *Id.* at 762.
171. People v. Bielmeyer, 282 N.Y.S.2d 797, 800 (Buffalo City Ct. 1967).
172. *See* COVID-19: FREQUENTLY ASKED QUESTIONS, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/coronavirus/faqs [https://perma.cc/VC8F-VALV] (last visited Jan. 28, 2022) (describing need for face masks in certain occupational settings).
173. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590; *see* U.S. DEP'T OF LABOR, ALL ABOUT OSHA 9 (2020), https://www.osha.gov/sites/default/files/publications/all_about_OSHA.pdf [https://perma.cc/2H7S-4R55] (explaining OSHA requirements to provide personal protective equipment at no cost to workers where applicable).

requires employers in hazardous or dangerous professions to provide reasonable safety or protective equipment or gear.[174] Employers' First Amendment challenges to OSHA investigations and sanctions have been unavailing.[175]

For example, in *Ryder Truck Lines v. Brennan*, a case about a trucking company's failure to provide loading-dock workers with sufficient protective footwear, the court found the government's objective of setting safety standards for workers in potentially hazardous conditions was remedial and not criminal legislation, but, more importantly, "the rights guaranteed by the First Amendment are not remotely related to this case."[176]

Interestingly, in these OSHA cases, regulations intended to prevent injury to workers will be constitutional, if they are drafted with "exactitude" and enforced with fair process and reasonable warning.[177] Mask and protective equipment controversies for medical, health-care, and emergency workers, though, relate to supply and quality, not any First Amendment issues.

Though this article imports historic First Amendment jurisprudence that intersects with clothing and wearable items, the utilitarian and prophylactic nature of protective masks should mute any pronouncements on masks as pure speech.

VII. DISCUSSION

It seems to defy logic that citizens would object to a safety precaution as simple as wearing a face-covering or mask in public. When individual freedom and self-expression come into the fray, it seems almost any sort of behavior can constitute free speech.[178] Since the 1960s, courts have

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> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

29 C.F.R. § 1920.132(a)

175. *See* Ray Evers Welding Co. v. Occupational Safety & Health Rev. Comm'n, 625 F.2d 726, 732 (6th Cir. 1980) (holding a welding company's failure to provide safety belts and lanyards was not an infringement on First Amendment rights); McLean Trucking Co. v. Occupational Safety & Health Rev. Comm'n, 503 F.2d 8, 10 (4th Cir. 1974) (ruling trucking company's failure to provide dock workers with protective boots could not be considered on First Amendment grounds).

176. Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233 (5th Cir. 1974).

177. *Id.*

178. City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989).

been protective of these rights, acknowledging free-speech rights associated with clothing and apparel, even if it is offensive.[179] But context—time, place, and manner—matters. For example, incarcerated prisoners do not maintain First Amendment rights in what they wear or how they wear their mandated uniforms.[180] Similarly, employees lose some of their free-expression rights when clothing is linked to job requirements.[181]

More importantly, *O'Brien* provides a clear checklist to determine if a regulation impermissibly infringes on an individual's free-speech rights. An *O'Brien* analysis of a typical mask order, even absent reciting actual language, yields an important answer:

1) A mask mandate through executive order, legislation, or administrative ruling at the federal, state, or local level would be well within the government's constitutional authority under its police powers to protect public health and safety under *Jacobson*.[182]
2) A mask requirement, as medical and health experts report—and even some mask opponents acknowledge—could advance the government's substantial interest in preventing or slowing the airborne transmission of the virus.
3) As a public-health regulation, a mask mandate is not intended as nor inherently linked to suppression of free speech or expression.
4) Even if mask requirements affect a First Amendment right, it is not only incidental, but at worst a *de minimis* effect on free speech.

In the mask context, the government has a substantial interest in preventing transmission of a highly infectious disease in the height of a national crisis and global pandemic. Requiring people to wear masks in some public places seems like a relatively *de minimis* requirement that barely affects citizens' free-speech rights.

Thus, the argument that the mask requirement violates an individual's First Amendment rights under the Speech Clause does not override the legitimate or substantial government interest in protecting the public under *Jacobson*.[183] This may feel like a difficult argument to make, especially for First Amendment advocates, but it follows First Amendment jurisprudence, public-health law, and common sense.

This is the same application and analysis articulated by the West Virginia district court in *Stewart v. Justice*, the challenge by the restaurant

179. *See* Cohen v. California, 403 U.S. 15, 25 (1971) (holding First Amendment protected right to wear clothing with offensive language).

180. Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 90 (2006).

181. *See generally* Carroll v. Talman Fed. Sav. & Loan of Chi., 604 F.2d 1028 (7th Cir. 1979), *cert denied*, 445 U.S. 929 (1980).

182. Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

183. *Id.*

owners.[184] Under *O'Brien*, the government interest in mask mandates was 1) a justifiable exercise of state police power; 2) furthering a compelling interest by slowing the spread of the virus which would save lives; 3) unrelated to an alleged restriction on speech or expression; and 4) imposing no greater restriction than is required because it is limited by age, activity, and place.[185]

VIII. CLOTHING, ATTIRE, AND THE FIRST AMENDMENT

As something to be worn, masks never strayed far from the long-standing discussion about the First Amendment rights associated with clothing itself. Clothing says a lot. Aside from the clichés about "clothes make the man" or the woman, the First Amendment implications of clothing and attire have been in conflict before in schools, courthouses, and polling places. The standards and rules are sometimes as gray as a traditional flannel suit. Add to the mix a global pandemic and the politicization of a particular wearable item—masks—and the age-old conflict surrounding clothing and free expression adds an additional wrinkle to the discussion.

An article of clothing, even something utilitarian like a mask, can be a form of speech, both pure and symbolic.[186] This section briefly discusses how clothing can carry a message as a form of speech, with a variety of protections depending on the context and venue.[187]

The same week the Supreme Court issued an opinion on the First Amendment implications of clothing, attire, and apparel citizens could wear to the polling place for voting in *Minnesota Voters Alliance v. Mansky*, First Lady Melania Trump wore a coat to an appearance at an immigration detention center with a bizarre and—to some—insensitive statement on the back.[188]

The First Lady's jacket became a major talking point and a source of global criticism.[189] The now infamous Zara parka had "I really don't care, do u" scrawled across the back. Though the message was vexing, and the

184. Stewart v. Justice, 518 F. Supp. 3d 911, 916 (S.D. W. Va. 2021).

185. *Id.* at 919 ("Therefore, the Court reaffirms its findings that Plaintiffs have failed to sufficiently plead a First Amendment violation.").

186. *See generally* Minn. Voters All. v. Mansky, 138 S. Ct. 1876 (2018).

187. *See* Ramachandran, *supra* note 180, at 18 ("Failure to explore freedom of dress as a unique right prevents us from gaining a complete and coherent understanding of what it is we are really doing when we get a tattoo, style and color our hair, get dressed in the morning, choose to wear certain kinds of makeup, put on jewelry ranging from delicate to punk, or wear a uniform.").

188. Sophie Williams, *Melania Trump Jacket: 'I DON'T CARE' Zara Coat Sparks Wave of Twitter Memes Giving Slogan a Makeover*, THE EVENING STANDARD (LONDON) (June 22, 2018), https://www.standard.co.uk/news/world/melania-trump-s-i-don-t-care-jacket-sparks-wave-of-angry-memes-giving-the-slogan-a-makeover-a3869251.html [https://perma.cc/P6PU-27BE]; *'I really don't care': Melania Trump Jackets Stuns on Migrant Visit*, AGENCE FRANCE-PRESSE (English) (June 21, 2018).

189. Williams, *supra* note 188.

First Lady's intent was just as confusing, the incident certainly diverted public attention away from substantive issues for at least a news cycle.[190]

The political message of clothing and apparel transcends parties and politics—remember the red baseball caps that permeated the 2016 and 2020 Trump campaigns emblazoned with the campaign mantra to "Make America Great Again"? How about the proliferation of pink knit caps with cute little ears known as the "pussyhats," which became the centerpiece of a women's rights social movement?[191]

When it comes to government regulation of symbolic speech or expression through clothing, the venue and context matter.[192] Public schools,[193] prisons, and the military can dictate attire worn within their confines.[194]

For example, in the seminal student-speech case, *Tinker v. Des Moines Independent Community School District*, the Court ruled that public schools can control or sanction certain types of clothing students wear.[195] In December 1965, Mary Beth Tinker, her brother, John, and their friend Christopher Eckhardt donned black armbands and wore them to school.[196] The black armbands were hardly a fashion statement but were a subtle way to protest the Vietnam War.[197] The students were ultimately

190. *See* Joyce Boland-DeVito*, Fashion(ing) a Political Statement: A Review of the Legal & Social Issues That Arise from Banned Political Clothing and Other Controversial Fashion Items in Light of the U.S. Supreme Court's Decision in* Minnesota Voters Alliance v. Mansky, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 493, 525 (2020) ("At the very least, the First Lady's fashion statement demonstrates the power words written on a jacket can have and the intense scrutiny public figures can be subjected to from both social media and traditional media.").

191. *Id.* at 529.

192. *See, e.g.*, State v. Mitchell, 288 N.E.2d 216, 227 (Ohio Ct. App. 1972) (upholding conviction of a man who had sewn a patch from an American flag over a hole in the crotch of his pants). The court wrote, "When confronted with the 'symbolic speech' issue, flag desecration can be labeled 'conduct,' and, pure speech being relatively inconsequential, any First Amendment protection may safely be ignored." *Id.* at 222.

193. Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 330 (2d Cir. 2006) (applying *Tinker* to find a student was improperly censored and disciplined for a T-shirt criticizing the president, calling him a "Chicken Hawk" with depictions of alcohol and drugs, because the shirt did not disrupt school operations); Hardwick *ex rel.* Hardwick v. Heyward, 711 F.3d 426, 430 (4th Cir. 2013) (holding a school policy prohibiting students from wearing shirt with confederate flags was reasonable by empowering officials to prevent disruptions); B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 298 (3d Cir. 2013) (holding breast cancer awareness bracelets with slogan "I (Heart) Boobies" were protected because they did not disrupt school operations); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 286–87 (5th Cir. 2001) (holding a school's uniform policy mandating style and color of students' clothing satisfied an important government interest).

194. East Hartford Educ. Ass'n v. Bd. of Educ., 562 F.2d 838, 841 (2d Cir. 1977) ("Conversely, recognizing the role clothing plays in giving individuals a sense of freedom and identity, the military, prisons, and other authoritarian institutions have long used strict uniformity of dress and hair style to effectuate conformity.").

195. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507–08 (1969).

196. *Id.* at 504.

197. *Id.*

sent home from school and suspended for defying school policies.[198] They unsuccessfully challenged the suspension in district court under § 1983, with the court acknowledging the symbolic nature of the armband but also affirming the school's rights to maintain conditions within the confines of the school.[199]

When the case reached the Supreme Court, Justice Fortas delivered his famous mantra that students do not shed their First Amendment rights at the schoolhouse gate, but that schools also maintain authority to control, punish, or prohibit speech or clothing that disrupts the sanctity of the school environment.[200] Justice Fortas even downplayed that the dispute revolved around clothing:

> The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech."[201]

While school officials barred the black armbands, officials had not barred other students from wearing buttons or even the Nazi Iron Cross to school.[202] This government-backed decision-making was viewed as content discrimination, and thus unconstitutional.[203] The Court described the situation as a non-disruptive expression of a political viewpoint:

> Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.[204]

Another war-protest case came out of California in 1971, this time involving a jacket. In *Cohen v. California*,[205] Paul Robert Cohen was prosecuted for maliciously disturbing the peace in a Los Angeles courthouse by wearing a jacket emblazoned with a profane rebuke of the draft.[206] *Cohen*, perhaps one of the Court's most vocal pronouncements on the collision between clothing and political speech, held that jacket bearing

198. *Id.*
199. *Id.* at 504–05.
200. *Id.* at 506–07.
201. *Id.* at 507–08 (citations omitted).
202. *Id.* at 510.
203. *Id.* at 510–11.
204. *Id.* at 514.
205. Cohen v. California, 403 U.S. 15, 15–16 (1971).
206. *Id.*

the statement "Fuck the draft" might have been crude and offensive, but it was nonetheless political speech protected by the First Amendment.[207]

Cohen was arrested and convicted under a California law that prohibited maliciously and willfully disturbing the peace through offensive conduct, even though he was not noisy or otherwise disruptive.[208] Writing for the Court, Justice Harlan famously quipped, "it is nevertheless often true that one man's vulgarity is another's lyric."[209] He added that officials should not venture into "matters of taste and style so largely [left] to the individual."[210]

Justice Harlan expounded on the importance of protecting diverse political viewpoints:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[211]

Fast forward to the Supreme Court's 2018 ruling in *Minnesota Voters Alliance v. Mansky*.[212] Here, where the Court found against a state law prohibiting voters at the polling place from wearing a political badge, button, or anything with a political insignia inside a polling place on election day.[213] Chief Justice Roberts lauded the First Amendment protections that should be afforded to clothing, but the decision also balanced the need for restrictions at polling places.[214] Thus, the seven-to-two opinion seemed to run in multiple directions, which muddied its clarity.

The case involved a challenge to Minnesota's voting law by a nonprofit government reform group and activists.[215] The law forbade a person to "display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated."[216] The statute's second sentence prohibited "political badges, political buttons, or other

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207. *Id.* at 26.

208. *Id.* at 16; *see* CAL. PENAL CODE § 415 (prohibiting fighting, loud or unreasonable noise, and certain offensive words in public).

209. *Cohen*, 403 U.S. at 25.

210. *Id.*

211. *Id.* at 24 (citing Whitney v. California, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring)).

212. *See generally* Minn. Voters All. v. Mansky, 138 S. Ct. 1876 (2018).

213. *Id.* at 1891–92.

214. *Id.* at 1885.

215. *Id.* at 1884; *see* MINN. STAT. § 211B.11 (2017) (prohibiting vote solicitation near polling places or when transporting voters to or from a polling place).

216. MINN. STAT. § 211B.11 (2017).

political insignia to be worn at or about the polling place."[217] The third sentence stated, "political apparel" including a "political badge, political button, or other political insignia may not be worn at or about the polling place."[218] The law empowered election officials at the polling places to determine violations.[219]

The apparel specifically at issue in the case involved a "Please I.D. Me" button and a T-shirt bearing the slogan "Don't Tread on Me," and a Tea Party Patriots logo.[220] "The First Amendment prohibits laws 'abridging the freedom of speech.' Minnesota's ban on wearing any 'political badge, political button, or other political insignia,' plainly restricts a form of expression within the protection of the First Amendment," the Court wrote.[221]

First, the Court analyzed how to consider the rights linked to the interior of a polling place, thus applying a forum analysis.[222] The Court divided its forum analysis into three categories of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums.[223]

Because of the important nature of what goes on in a polling place, it was not considered equivalent to a traditional public forum, such as a park, street, or sidewalk.[224] The government may impose content-neutral restrictions based on reasonable time, place, and manner criteria.[225] The Court reiterated that content-based restrictions must pass strict scrutiny.[226] Despite First Amendment protections, the government does not have to afford widespread free-speech rights to every venue, even every government venue, which would include nonpublic places and political speech and advocacy in venues such as polling places.[227] The Court stressed that there should be no question that the interior of a polling place would be considered a nonpublic forum on election day.[228] The Minnesota law did not discriminate based on content or the speaker's message, which removed the strict-scrutiny element, but the Court still wrestled

217. *Id.*
218. *Id.*
219. *Id.* The law submitted violators to the administrative hearing process for a petty misdemeanor with the potential for a civil penalty and a maximum $300 fine. *See* MINN. STAT. § 609.02(4a) (2021) (defining "petty misdemeanor").
220. *Minn. Voters All.*, 138 S. Ct. at 1884.
221. *Id.* at 1885.
222. *Id.*
223. *Id.*
224. *Id.* at 1886.
225. *Id.* at 1885.
226. *Id.*
227. *Id.* at 1885–86.
228. *Id.* at 1886 (citing Burson v. Freeman, 504 U.S. 191, 196–97 (1992) (plurality opinion)).

with whether the law was "reasonable in light of the purposes served by the forum."[229]

In its discussion, the Court relied heavily on precedent in polling-place restrictions.[230] The Court discussed the special place the polling place has in a democracy and the significance of a citizen casting a vote on Election Day.[231] Thus, restrictions, even on political clothing, may be justified because of the importance of polling places and the sanctity of the voting booth.[232] The majority of states follow this rule as well.[233]

With potential political messages inextricably intertwined with clothing, the Court seemed poised to lament the confusion spurred by a seemingly never-ending parade of political groups and movements including organized labor, educational associations, religious organizations, civics groups, civil-rights activists, and others that could be roped into these restrictions.[234] In addition to specific Democrat or Republican apparel, the Court considered other political movements and issues, such as "Support Our Troops" and "#MeToo."[235] The Court noted examples from "All Lives Matter," to the National Rifle Association, to a shirt with a rainbow. The Court asked, "A shirt simply displaying the text of the Second Amendment? Prohibited. But a shirt with the text of the First Amendment? 'It would be allowed.'"[236]

More specifically, the Court used the Boy Scouts of America as an example. The group's policy of excluding members based on sexual orientation became a heated political issue in the 2012 election cycle, which prompted the Court to ask: "Should a Scout leader in 2012 stopping to vote on his way to a troop meeting have been asked to cover up his uniform?"[237]

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229. *Id.* (citing Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 806 (1985)).

230. *See id.* at 1887 n.1. The court noted that while *Burson* did not address clothing or clothing with campaign insignias or paraphernalia, the issue was raised at both oral arguments and in briefs in the case. *Id.* The Tennessee Attorney General arguing the case before the Supreme Court said the statute at issue banned T-shirts, campaigning buttons, and hats "because such items implicate and invite the same problems and that voters would be asked to take campaign buttons off as they go in." *Id.* (internal quotations omitted).

231. *Id.* at 1887.

232. *Id.* at 1887–88 ("Members of the public are brought together at the place, at the end of what may have been a divisive election season, to reach considered decisions about their government and laws. The State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most.").

233. *Id.* at 1888. The court analyzed laws in other states, including a fifty-state survey of laws attached as an appendix, and noted both similarities and differences. *See id.* at 1892–93 (outlining various states that adopt a political-clothing restriction).

234. *Id.* at 1890.

235. *Id.* at 1889–90.

236. *Id.* at 1891.

237. *Id.* at 1890.

Even though decisions on suppression are made at the hands of polling-place officials, the Court reiterated the important government purpose of securing polling places: "[T]he State's interest in maintaining a polling place free of distraction and disruption would be undermined by the very measure intended to further it."[238]

The Court concluded that a general prohibition on political apparel in a polling place could not be consistently applied and so failed constitutional muster:

> Cases like this "present[] us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote." Minnesota, like other States, has sought to strike the balance in a way that affords the voter the opportunity to exercise his civic duty in a setting removed from the clamor and din of electioneering. While that choice is generally worthy of our respect, Minnesota has not supported its good intentions with a law capable of reasoned application.[239]

While the issue might not be as acute in "more mundane settings," such as an airport, the clothing restrictions, even under *Mansky*, rely on time, place, and manner and context.[240] So, applying these rules to masks within the context of a pandemic and a public-health crisis takes the discussion to the next arena beyond the narrow confines of a polling place on election day.

The reasonable time, place, and manner restrictions applied in public places throughout the current and future public-health crises could also remove the First Amendment speech argument from the mask debate. A more telling question would be if a person wearing a mask was challenged or sanctioned because of a slogan or offensive statement on the mask itself. This situation, untested to date, could certainly raise First Amendment concerns.

IX. CONCLUSION

In the end, an even-handed *O'Brien* analysis yields a reasonable answer that in the face of a public-health crisis, mask mandates offer a potential solution to a scary and complicated public-health emergency. A mask is hardly invasive or restrictive, and a requirement that *everyone* in public places would need to wear one does not single out individuals or discriminate against speakers for their political speech.

Even though, from a clothing or apparel standpoint, a mask would be a purely utilitarian article, it could carry a range of messages and might

238. *Id.* at 1891.

239. *Id.* at 1892 (quoting Burson v. Freeman, 504 U.S. 191, 198 (1992) (plurality opinion)).

240. *Id.* at 1887 (discussing *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), which addressed T-shirts with political messages at airports).

thus implicate an important First Amendment protection. Though the *Minnesota Voters Alliance v. Walz* case ended up focusing on the plaintiffs' failure to prove standing, in a concluding footnote, Judge Schiltz added that the question comes down to balancing public health and safety over nullifying a statute that was never enforced in the first place.[241]

This is not to say that a mask cannot be a form of speech if worn. The court in *Walz* reiterated that the mask itself can be a platform for speech.[242] In the months since COVID-19 hit and mask-wearing became both mainstream and a practical necessity for access to many public places, masks have taken on an expressive quality. Slogans, logos, pictures, illustrations, and other artistic renderings have become as commonplace as the standard light blue medical mask. The court in *Walz* pointed to this form of expression as an outlet for disaffected mask-wearers or others who want to express themselves in a manner that takes public health and safety into account.

Ultimately, a mask may provide a more visible platform for speech and protest than not wearing one altogether. From a messaging standpoint, it might even rise to the level of putting your money where your mouth is.

241. *See* Minn. Voters All. v. Walz, 492 F. Supp. 3d 822, 840 n.14 (D. Minn. 2020) ("Given that the choice would be between enjoining a particular application of a never-enforced statute, on the one hand, and enjoining an executive order that is saving lives during an ongoing public-health crisis, on the other hand, the balance of harms and the public interest would overwhelmingly point toward enjoining enforcement of § 609.735.")

242. *See id.* at 837–38 (discussing whether wearing or not wearing face-coverings is inherently expressive conduct).