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## Face Masks and Freedom of Speech: The Constitutionality of Illinois Face Mask Mandates Amidst the COVID-19 Pandemic

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# FACE MASKS AND FREEDOM OF SPEECH: THE CONSTITUTIONALITY OF ILLINOIS FACE MASK MANDATES AMIDST THE COVID-19 PANDEMIC

## I. INTRODUCTION

In March of 2020, the World Health Organization (WHO) declared the coronavirus disease (COVID-19) a pandemic.<sup>1</sup> COVID-19 “is an infectious disease caused by a newly discovered coronavirus,”<sup>2</sup> making this pandemic the first of its kind.<sup>3</sup> COVID-19 infections occur mainly through exposure to respiratory droplets when an individual is in close contact with someone who has the virus.<sup>4</sup> To prevent the spread of COVID-19, a majority of states have ordered their residents to stay at home, excluding essential workers.<sup>5</sup> For example, New York, one of the “hardest-hit” states, “ordered residents to stay at home . . . and all non-essential businesses to close.”<sup>6</sup> The purpose of the stay-at-home orders was “to limit people’s contact with each other in order to slow the spread of [COVID-19].”<sup>7</sup> In addition to these stay-at-home orders, state governments have issued orders requiring face masks<sup>8</sup> to be

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1. *WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19*, WORLD HEALTH ORGANIZATION (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> [hereinafter *WHO Director-General’s Opening Remarks*]. “In ‘COVID-19,’ ‘CO’ stands for ‘corona,’ ‘VI’ for ‘virus’ and ‘D’ for ‘disease.’” *About COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 1, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/about-COVID-19.html>.

2. *Coronavirus*, WORLD HEALTH ORGANIZATION, [https://www.who.int/health-topics/coronavirus#tab=tab\\_1](https://www.who.int/health-topics/coronavirus#tab=tab_1) (last visited Mar. 28, 2021).

3. *WHO Director-General’s Opening Remarks*, *supra* note 1.

4. *How COVID-19 Spreads*, Centers for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last updated July 14, 2021).

5. Jiachuan Wu et al., *Stay-at-home Orders Across the Country*, NBC NEWS, <https://www.nbcnews.com/health/health-news/here-are-stay-home-orders-across-country-n1168736> (last updated Apr. 29, 2020). As of April 29, 2020, all but five states issued stay-at-home orders. *Id.*

6. *Id.*

7. Nancy Schimelpfening, *What Does a Stay-at-Home Order Mean? 11 Questions Answered*, HEALTHLINE (Mar. 25, 2020), <https://www.healthline.com/health-news/what-a-stay-at-home-order-means>.

8. For purposes of this Comment, “face masks” shall include face coverings.

worn in public to curb the spread of COVID-19.<sup>9</sup> In response to the COVID-19 pandemic, the Governor of Illinois, Jay Robert “J.B.” Pritzker (Governor Pritzker), issued Executive Order 2020-32 (Executive Order), requiring individuals in Illinois to wear face masks in public spaces where maintaining a minimum distance of six feet away from others is not possible.<sup>10</sup>

Although executive orders in response to COVID-19, including the one issued by Governor Pritzker, require the use of face masks in public spaces, some find such a requirement to be a mere option.<sup>11</sup> The United States has seen numerous demonstrations protesting face mask mandates amidst the COVID-19 pandemic.<sup>12</sup> Some opponents of the Executive Order have gone so far as to bring the issue to court, alleging that a statewide order requiring the use of face masks in public is an abridgment of freedom of speech.<sup>13</sup>

This Comment considers the constitutionality of Governor Pritzker’s Executive Order, analyzing whether the Illinois face mask mandate violates the First Amendment of the U.S. Constitution. This Comment argues that it does not. Part II provides a background of the COVID-19 disease, the events leading up to the issuing of Governor Pritzker’s Executive Order, and the responses to that Executive Order. In addition, Part II surveys caselaw concerning freedom of speech and regulations created to preserve public health. Part III analyzes whether a face mask requirement by the State of Illinois abridges free-

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9. Andy Markowitz, *State-by-State Guide to Face Mask Requirements*, AARP, <https://www.aarp.org/health/healthy-living/info-2020/states-mask-mandates-coronavirus.html#:~:text=to%20date%2C%20four%20states%20that,Iowa%2C%20North%20Dakota%20and%20Mississippi> (last updated Mar. 26, 2021).

10. Ill. Exec. Order No. 2020–32 (Apr. 30, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx>. This face mask requirement applied only to individuals at least two years old and medically able to wear a mask. *Id.* See also *Guidance on the Use of Masks by the General Public*, ILLINOIS DEPARTMENT OF PUBLIC HEALTH, <https://www.dph.illinois.gov/covid19/community-guidance/mask-use> (last updated May 18, 2021).

11. See, e.g., Marissa Sulek, *Illinois Shoppers See Gov. Pritzker’s State Mask Order as an Option*, WQAD (May 4, 2020), <https://www.wqad.com/article/news/illinois-shoppers-see-gov-pritzkers-state-mask-order-as-an-option/526-75d1de01-51c6-4b4f-89e8-063feb72e07c>.

12. See, e.g., *Anti-mask Protest Held Outside Plantation Courthouse During Hearing for Maskless Target Demonstrators*, WSVN 7 NEWS (Feb. 19, 2021), <https://wsvn.com/news/local/broward/anti-mask-protest-held-outside-plantation-courthouse-during-hearing-for-maskless-target-demonstrators/> (anti-mask protest in Florida); BrieAnna J. Frank et al., *Viral Videos Show Anti-mask Protest at Arizona Mall: ‘They’re endangering people’*, USA TODAY (Dec. 21, 2020), <https://www.usatoday.com/story/news/nation/2020/12/21/viral-videos-show-anti-mask-protest-christown-spectrum-mall-in-phoenix/3990868001/> (anti-mask protest in Arizona); Stephen Collinson, *America’s Mask Resistance is Just the Latest Example of a Perennial Struggle*, CNN (June 23, 2020), <https://www.cnn.com/2020/06/23/world/meanwhile-in-america-june-23-intl/index.html>.

13. See, e.g., Verified Complaint for Declaratory and Injunctive Relief for Violation of Constitutional Rights, *Sehmel v. Weisman*, No. 20-2-0045321 (Wash. Super. Ct. 2020).

dom of speech in the context of Governor Pritzker’s Executive Order. Part IV discusses the impact of the Executive Order and considers the implications and efficacy of statewide face mask mandates generally. Part V concludes this Comment by revisiting the instruction that caselaw provides.

## II. BACKGROUND

This Part will begin with an overview of the COVID-19 pandemic, as well as the efficacy of face masks in preventing its spread. Next, this Part will discuss Governor Pritzker’s Executive Order and the responses to the face mask requirement. Finally, this Part will survey caselaw relevant to resolving the issue of whether the face mask requirement of Governor Pritzker’s Executive Order violates freedom of speech.

### A. *The COVID-19 Pandemic*

COVID-19 is a disease caused by a virus known as severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).<sup>14</sup> The virus was first identified in Wuhan, China, in 2019.<sup>15</sup> COVID-19 is “primarily transmitted from person-to-person through respiratory droplets.”<sup>16</sup> When a person infected with the virus sneezes, coughs, or talks, that person may release infectious respiratory droplets.<sup>17</sup> A person who comes in contact with these infectious droplets may then risk contracting the virus and, eventually, COVID-19.<sup>18</sup>

On March 11, 2020, the WHO declared COVID-19 a pandemic,<sup>19</sup> pointing to over 118,000 cases of COVID-19 “in over 110 countries and territories around the world” and indicating “the sustained risk of

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14. *Coronavirus Disease (COVID-19)*, WORLD HEALTH ORGANIZATION, [https://www.who.int/health-topics/coronavirus#tab=tab\\_1](https://www.who.int/health-topics/coronavirus#tab=tab_1) (last visited Oct. 19, 2021).

15. *Basics of COVID-19*, WORLD HEALTH ORGANIZATION, <https://www.cdc.gov/coronavirus/2019-ncov/your-health/about-covid-19/basics-covid-19.html> (last updated May 24, 2021).

16. *Id.*

17. *Id.*

18. See *Coronavirus (COVID-19) Frequently Asked Questions*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last visited Nov. 6, 2021). There are three ways in which COVID-19 may spread: (1) “[b]reathing in air when close to an infected person who is exhaling small droplets and particles that contain the virus”; (2) “[h]aving these small droplets and particles that contain virus land on the eyes, nose, or mouth, especially through splashes and sprays like a cough or sneeze”; and (3) “[t]ouching eyes, nose, or mouth with hands that have the virus on them.” *Id.*

19. WHO Director-General’s Opening Remarks, *supra* note 1.

further global spread.”<sup>20</sup> By November 21, 2020, the United States had seen over 12 million confirmed cases of COVID-19.<sup>21</sup> Around this same time, Illinois had seen over 656,000 confirmed cases of COVID-19 and over 11,500 deaths caused by the disease.<sup>22</sup> These alarming statistics demonstrate the severity of COVID-19 and its disastrous effects on public health.

### B. Face Masks

To protect oneself and others from contracting the virus, the Centers for Disease Control and Prevention (CDC) recommends covering the mouth and nose with a face mask when around others.<sup>23</sup> Wearing a face mask helps to reduce the risk of spreading COVID-19 both by close contact and by airborne transmission.<sup>24</sup> The CDC affirmed that face masks could reduce the spread of COVID-19,<sup>25</sup> indicating that there is “evidence that [face masks] help prevent people who have COVID-19 from spreading the virus to others.”<sup>26</sup> Given that the “main function” of a face mask is to protect others who may be around the wearer, wearing a face mask could help prevent those who are infected, but not displaying symptoms, from infecting others.<sup>27</sup> As case studies suggest, face masks are helpful in reducing transmission of the virus and preventing its spread.<sup>28</sup> A face mask, when used uni-

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20. Jamie Ducharme, *World Health Organization Declares COVID-19 a ‘Pandemic.’ Here’s What That Means*, TIME (Mar. 11, 2020, 12:39 PM), <https://time.com/5791661/who-coronavirus-pandemic-declaration/>.

21. Christianna Silva, *U.S. Passes 12 Million Confirmed Coronavirus Cases*, NATIONAL PUBLIC RADIO (Nov. 21, 2020, 5:06 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/11/21/937615700/u-s-passes-12-million-confirmed-coronavirus-cases>.

22. *Coronavirus in Illinois Updates: Here’s what Happened Nov. 21-22 with COVID-19 in the Chicago Area*, CHICAGO TRIBUNE (Nov. 22, 2020 at 12:14 PM), <https://www.chicagotribune.com/coronavirus/ct-covid-19-pandemic-chicago-illinois-news-20201121-26tiptkw4vbadhspsclquu6ugq-story.html>.

23. *How COVID-19 Spreads*, *supra* note 4.

24. *Id.*

25. Press Release, *CDC Calls on Americans to Wear Masks to Prevent COVID-19 Spread*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Jul. 14, 2020), <https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html> [hereinafter *CDC Calls on Americans*].

26. *Id.*

27. *Considerations for Wearing Masks*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Nov. 12, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html>.

28. *See id.* A case study from the Journal of the American Medical Associates showed that adherence to universal masking policies reduced transmission of SARS-CoV-2 within a Boston hospital system. *See* Brooks et al., *Universal Masking to Prevent SARS-CoV-2 Transmission—The Time Is Now*, 324 J. AM. MED. ASS’N. 635, 635–36 (2020). Another case study from the CDC’s Morbidity and Mortality Weekly Report showed that wearing a mask prevented the spread of infection from two hair stylists to their customers in Missouri. *See* Hendrix et al., *Absence of Apparent Transmission of SARS-CoV-2 from Two Stylists After Exposure at a Hair*

versally within a community setting, is one of the “most powerful weapons” available to slow and stop the spread of the virus.<sup>29</sup>

### C. Governor Pritzker’s Executive Order

On April 30, 2020, Governor Pritzker issued the Executive Order in response to the spread of COVID-19.<sup>30</sup> The Executive Order was issued “for the preservation of public health and safety throughout the entire State of Illinois.”<sup>31</sup> Following the recommendations by the CDC, Governor Pritzker ordered that Illinois residents must wear “a face covering in public places or when working.”<sup>32</sup> Specifically, any individual over the age of two and who is able to medically tolerate a face covering, such as a face mask or cloth face covering, must “cover their nose and mouth with a face covering when in a public place and unable to maintain a six-foot social distance.”<sup>33</sup> Aside from mandating the use of face masks in public spaces, the Executive Order provided social distancing guidelines and required Illinois residents to stay at home when possible.<sup>34</sup>

Reception of Governor Pritzker’s Executive Order was mixed.<sup>35</sup> Although some Illinois residents agreed with the reasons for and purposes of issuing the Executive Order, others believed that the Executive Order overstepped governmental power.<sup>36</sup> For example, Illinois State Representative Darren Bailey (R-Xenia) expressed that he would not comply with the face mask requirement of the Executive Order and the updated Illinois House rules.<sup>37</sup> As a result, Illinois House members voted to remove the southeastern Illinois Republican

*Salon with a Universal Face Covering Policy* — Springfield, Missouri, May 2020, 69 MORBIDITY AND MORTALITY WEEKLY REP. 930, 932 (2020).

29. CDC Calls on Americans, *supra* note 25.

30. Ill. Exec. Order No. 2020–32 (Apr. 30, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx>.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* The Executive Order also provided guidelines for essential businesses and required non-essential businesses to cease. *Id.*

35. Gabi Guerrero, *Residents React to the Stay-at-home Order*, WEEK (Mar. 21, 2020, 5:11 PM), <https://week.com/2020/03/21/residents-react-to-the-stay-at-home-order/>.

36. Alice Bazerghi, *Gov. J.B. Pritzker’s New Restrictions on Stores, Museums and Casinos: What People Think*, CHICAGO SUN TIMES (Nov. 20, 2020, 2:15 PM), <https://chicago.suntimes.com/coronavirus/2020/11/20/21573181/chicago-coronavirus-survey-illinois-restrictions-museums-casinos-stores-jbpritzker>.

37. Bill Wheelhouse & Sam Dunklau, *House Rep. Ejected for Face Mask Rule-breaking, State Lawmakers Greeted by Protests*, NATIONAL PUBLIC RADIO ILLINOIS (May 20, 2020), <https://www.nprillinois.org/post/house-rep-ejected-face-mask-rule-breaking-state-lawmakers-greeted-protests#stream/0>.

from the floor.<sup>38</sup> Prior to his removal, Bailey expressed that his removal from the House floor would be “silencing millions of voices of people who have had enough.”<sup>39</sup>

Furthermore, Illinois residents have mobilized in retaliation toward Governor Pritzker’s Executive Order. In one instance in Springfield, Illinois, people rallied at the Illinois State Capitol to protest the State’s requirement that children must wear face coverings in school “to discourage transmission of the contagious and potentially deadly coronavirus.”<sup>40</sup> Protesters at this rally held signs displaying COVID-19 conspiracy theories, even equating the statewide mandate to a form of “tyranny.”<sup>41</sup> Aside from organized demonstrations, other Illinois residents resorted to violence in expressing their disdain over face masks.<sup>42</sup> In the Lawndale neighborhood of Chicago, for example, two sisters assaulted a store’s security guard after the security guard asked the sisters to leave for refusing to wear face masks in the store.<sup>43</sup>

In response to those residents of Illinois who have protested against the Executive Order and who have refused to comply with the statewide face mask requirement, Governor Pritzker stated that going out in public without a face mask is “not a political statement,” but a “callous disregard for the people in your community, county, and in our state and our nation.”<sup>44</sup> Denouncing such protestors, Governor Pritzker stated that, “[t]he enemy is not your mask . . . [i]f you’re not wearing a mask in public, you’re endangering everyone around you. The enemy is you.”<sup>45</sup>

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38. *Id.*

39. *Id.*

40. John O’Connor, *Protesters in Springfield Rally Against State’s Requirement of Children Wearing Masks in School*, CHICAGO SUN TIMES (July 25, 2020, 6:09 PM), <https://chicago.sun-times.com/coronavirus/2020/7/25/21338721/anti-mask-march-springfield-schools>.

41. *Id.*; Dan Mihalopoulos, *Pritzker, Top Aides Counter Shutdown Protesters who Compared Governor to Nazis*, WBEZ CHICAGO (May 2, 2020, 5:24 PM), <https://www.wbez.org/stories/pritzker-counters-protesters-who-compared-him-to-nazis/ad0a5d6f-a08e-43fc-98d3-6bf81bc38661> (protestor holding sign reading “[t]he only reason to wear a mask is to show obedience to tyranny”).

42. See David Struett & Manny Ramos, *Sisters Stabbed Guard 27 Times After Being Told to Wear Masks at Chicago Store, Prosecutors Allege*, CHICAGO SUN TIMES (Oct. 27, 2020, 3:08 PM), <https://chicago.suntimes.com/crime/2020/10/27/21536171/jessica-jayla-hill-stabbing-store-west-side-homan-square-roosevelt-face-mask-covid>.

43. *Id.*

44. *Gov. Pritzker: ‘The enemy is you’ to Ill. Residents not Wearing Masks*, WIFR (July 22, 2020, 1:42 PM), <https://www.wifr.com/2020/07/22/gov-pritzker-the-enemy-is-you-to-ill-residents-not-wearing-masks/>.

45. *Id.*

## D. Freedom of Speech

### 1. Speech Generally

Opponents of Governor Pritzker’s Executive Order have argued that the Executive Order violates the Free Speech Clause of the First Amendment.<sup>46</sup> The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.”<sup>47</sup> In other words, the First Amendment prohibits the government from limiting a given expression due to “its message, ideas, its subject matter, or its content.”<sup>48</sup> In deciding which forms of speech are constitutionally protected, the Supreme Court (Court) has recognized that the protections afforded by the First Amendment extend to individuals and collective speech “in pursuit of a wide variety of political, social, economic, education, religious, and cultural ends.”<sup>49</sup> Protected speech may be divided into two categories: (1) political and ideological speech, and (2) commercial speech.<sup>50</sup> Political and ideological speech consists of speech concerning “politics, nationalism, religion, or other matters of opinion.”<sup>51</sup> As discussed below, political and ideological speech may be expressed through conduct containing no oral elements, or symbolic speech.<sup>52</sup>

### 2. Symbolic Speech

Although the First Amendment expressly forbids the abridgment of freedom of speech, the Court has “long recognized that [First Amendment] protection does not end at spoken or written word.”<sup>53</sup> Speech can also take the form of a symbolic act.<sup>54</sup> In *United States v. O’Brien*, the Court attempted to define circumstances under which conduct may be “sufficient to bring into play the First Amendment.”<sup>55</sup> The *O’Brien* Court considered a Vietnam War-era law that criminalized the knowing destruction of registration certificates issued by the Se-

46. See, e.g., *Illinois Republican Party v. Pritzker*, 973 F.3d 760, 761–62 (7th Cir. 2020).

47. U.S. Const. amend. I.

48. *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 536–37 (1980).

49. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

50. Victoria L. Killion, *The First Amendment: Categories of Speech*, CONG. RESEARCH SERV., <https://fas.org/sgp/crs/misc/IF11072.pdf> (last updated Jan. 16, 2019). This Comment will not discuss commercial speech and its relations to face masks, if any.

51. *Id.* “The Supreme Court has recognized limited categories of speech that the government may regulate because of their content.” *Id.* These categories include obscenity, defamation, false statements of fact, incitement, fighting words, true threats, speech integral to criminal conduct, and child pornography. *Id.*

52. *Id.*

53. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

54. Killion, *supra* note 50; see *Johnson*, 491 U.S. at 406.

55. *United States v. O’Brien*, 391 U.S. 367, 376 (1968).



lective Service System.<sup>56</sup> The defendant argued that the conduct of burning his registration certificate was symbolic speech within the purview of the First Amendment and that the law violated his freedom of speech.<sup>57</sup> However, the Court held that the law in question, on its face, did not concern conduct related to speech.<sup>58</sup> Even assuming that the speech element of the defendant's conduct provoked the First Amendment, the Court found that the conduct was not protected by the Constitution,<sup>59</sup> concluding that there was "nothing necessarily expressive" about destroying registration certificates.<sup>60</sup> However, the Court rejected the view that an "apparently limitless variety of conduct" can be considered speech whenever the actor intends to express an idea.<sup>61</sup>

The *O'Brien* Court noted that, when a certain course of conduct contains both "speech" and "nonspeech" elements, a "sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."<sup>62</sup> From this, the Court devised a four-part test to determine whether a law regulating symbolic speech violates the First Amendment:

[A] government regulation [of conduct] is sufficiently justified if it is within the constitutional power of the [g]overnment; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>63</sup>

Applying this standard, the Court found that the law in question met all four parts of the test, thereby upholding the constitutionality of the law.<sup>64</sup>

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56. *Id.* at 375. The law at issue was the Universal Military Training and Service Act of 1948, 50 U.S.C. § 462(b)(3) (1965) (as amended). *Id.* at 370. Section 462(b)(3) provided that any person commits an offense when she "forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes [a registration certificate issued by the Selective Service System]." *Id.*

57. *Id.* at 376.

58. *Id.* at 375.

59. *Id.* at 376.

60. *Id.* at 375 ("A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records.").

61. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The Court does not explicitly state why it is unable to accept this view. In consideration of this position, however, accepting such a view would, in turn, allow any act to be considered speech, no matter how purposeful or frivolous, so long as there exists an intent to express an idea.

62. *Id.*

63. *Id.* at 377.

64. *Id.* at 377-82.

Not all cases concerning freedom of speech are subject to the *O'Brien* test because the Court “limits[s] the applicability of *O'Brien*’s relatively lenient standard to those cases in which ‘the governmental interest is unrelated to the suppression of free expression.’”<sup>65</sup> Unlike *O'Brien*, *Texas v. Johnson* involved a law regulating conduct which had a governmental interest that was indeed related to the suppression of free expression.<sup>66</sup> The *Johnson* Court attempted to define the extent to which conduct may be considered expressive, or, in other words, symbolic speech.<sup>67</sup> In *Johnson*, the defendant burned an American flag as part of a demonstration protesting the policies of the Reagan administration during Ronald Reagan’s renomination for President.<sup>68</sup>

As the *Johnson* Court instructed, certain conduct is considered symbolic speech if it is “sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.”<sup>69</sup> To determine whether particular conduct possesses “sufficient communicative elements” such that it is protected by the First Amendment, a court must determine (1) “whether [a]n ‘intent to convey a particularized message was present’” in such conduct, and (2) “[whether] the likelihood was [so] great that the message would be understood by those who viewed [such conduct].”<sup>70</sup>

Applying this framework, the *Johnson* Court found that the “expressive, overtly political nature” of the defendant’s flag burning was “intentional and overwhelmingly apparent.”<sup>71</sup> That is, burning the flag became expressive conduct because it was performed with an intent to convey a message that was likely to be understood by others.<sup>72</sup> Accordingly, the Court ruled that the burning of the flag was conduct “sufficiently imbued with elements of communication” to trigger the First Amendment.<sup>73</sup> Under this same framework, the Court has recognized as symbolic speech the expressive nature of, among other acts,

65. *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (quoting *O'Brien*, 391 U.S. at 376).

66. *Id.* at 400. The law that the *Johnson* Court analyzed was Tex. Penal Code. Ann. § 42.09(a)(3) (1989), which criminalized the desecration of the American flag. *Id.* The Court indicated that it has “identif[ied] an expressive element in conduct relating to flags,” as the “purpose of [the American] flag is to serve as a symbol of [the] country.” *Id.* at 405.

67. *Id.* at 402–07.

68. *Id.* at 399, 406.

69. *Id.* at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). The Court has also held that the factual context and environment in which conduct occurs determines whether an individual engages in a form of protected speech. *Spence*, 418 U.S. at 409–10.

70. *Johnson*, 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 410–11).

71. *Id.* at 406 (1989).

72. *See id.* at 404.

73. *Id.* at 406 (quoting *Spence*, 418 U.S. at 409).

students wearing black armbands to protest American military involvement in Vietnam,<sup>74</sup> black individuals sitting in a “whites only” area to protest racial segregation,<sup>75</sup> and refusing to salute the American flag.<sup>76</sup>

### 3. *Compelled Speech*

The federal government may not compel individuals to express certain ideologies.<sup>77</sup> The compelled speech doctrine provides that the government cannot force an individual to advocate certain beliefs or expressions.<sup>78</sup> “Thus, the First Amendment not only limits the government from punishing a person for his speech, it also prevents the government from punishing a person for refusing to articulate, advocate, or adhere to the government’s approved messages.”<sup>79</sup>

The Court has determined that the First Amendment protects citizens from being forced by the government to express certain speech.<sup>80</sup> In *West Virginia State Board of Education v. Barnette*, the Court held that the First Amendment protects students from being forced to salute the American flag or recite the Pledge of Allegiance in public school for religious reasons.<sup>81</sup> As Justice Robert H. Jackson asserted, “[i]f there is any fixed star in our constitutional constellation, it is that no official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>82</sup>

Justice Jackson’s statement provides guidance in determining whether face mask mandates may be considered compelled speech, if speech at all. Opponents of face mask mandates argue that such orders are compelled speech, thereby violating the First and Fourteenth Amendments of the Constitution.<sup>83</sup> Such opponents go so far as to claim that “[f]orcing already struggling businesses to enforce com-

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74. *Id.* (citing *Tinker v. Des Moines Indep. Community Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969)).

75. *Id.* at 404 (citing *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966)).

76. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citing *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943)).

77. David L. Hudson, *Compelled Speech*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://mtsu.edu/first-amendment/article/933/compelled-speech>.

78. *See id.*

79. *Id.*

80. *See W. Va. Bd. Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943).

81. *Id.*

82. *Id.* at 642.

83. *See, e.g.,* Brendan Cole, *Colorado Republican House Candidates Sue over Mask Policy: ‘Healthy People do not Spread SAR-CoV-2’*, NEWSWEEK (July 25, 2020, 10:12 AM), <https://www.newsweek.com/colorado-covid-19-masks-lawsuit-1520481>.

pelled speech mandates is worse because it exposes them to potential liability under federal civil rights statutes.”<sup>84</sup> However, at least one federal court has rejected the claim that a face mask requirement is compelled speech.<sup>85</sup> In *Antietam Battlefield KOA v. Hogan*, a group of veterans argued that a face mask requirement violated their freedom of speech.<sup>86</sup> The veterans claimed that wearing a face mask was equivalent to “capture on the battlefield, and subservience to the captor,” the captor being the State.<sup>87</sup> The U.S. District Court for the District of Maryland held that such a meaning was not “overwhelmingly apparent.”<sup>88</sup> The district court noted that, “especially in the context of COVID-19, wearing a face mask would be viewed as a means of preventing the spread of COVID-19, not as expressing any message.”<sup>89</sup> The district court found that face mask requirements regulate conduct, not speech, and that the “State of Maryland had established a rational basis between the order to cover faces in public areas and the legitimate public interest in protecting citizens against COVID-19.”<sup>90</sup> This district court decision provides a foundation to understanding the expressive status, if any, of face masks and other materials or equipment used to protect the public health.

#### *E. State Police Power and Protecting Public Health*

Although the First Amendment protects freedoms of speech, press, petition, assembly, and religion,<sup>91</sup> these freedoms, like all liberties protected by the Constitution, are not absolute.<sup>92</sup> “All constitutional rights are subject to the government’s authority to protect the health, safety, and welfare of the community,”<sup>93</sup> otherwise known as a state’s police power. Based on the Tenth Amendment,<sup>94</sup> the police power refers to the “power of governing[ ] possessed by the States but not by

84. Melissa Greathouse, *Federal Lawsuit Challenges Colorado’s Mask Mandate*, KOAA NEWS (Jul. 24, 2020, 9:49 PM), <https://www.koaa.com/news/coronavirus/federal-lawsuit-challenges-colorados-mask-mandate>.

85. *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214, 237 (D. Md. 2020).

86. *Id.* at 226.

87. *Id.* at 237.

88. *Id.* (citing *Rumsfeld v. Forum Acad. Inst. Rts., Inc.*, 547 U.S. 47, 66 (2006)).

89. *Id.*

90. Polly J. Price & Patrick C. Diaz, *Face-Covering Requirements and the Constitution*, AMERICAN CONSTITUTION SOCIETY (June 3, 2020), <https://www.acslaw.org/expertforum/face-covering-requirements-and-the-constitution/>.

91. U.S. Const. amend. I.

92. John E. Finn, *The Constitution Doesn’t have a Problem with Mask Mandates*, THE CONVERSATION (July 22, 2020, 8:00 AM), <https://theconversation.com/the-constitution-doesnt-have-a-problem-with-mask-mandates-142335>.

93. *Id.*

94. See U.S. Const. amend. X.

the Federal Government . . . .”<sup>95</sup> Furthermore, the police power refers to a state government’s right to make “regulations designed to promote the public health, the public morals, or the public safety.”<sup>96</sup> The Court has affirmed Congress’s limited power in enacting legislation concerning the health, safety, and welfare of the community, ruling that such power belongs to the states.<sup>97</sup> In *United States v. Lopez*, the Court affirmed Congress’s limited power to enact legislation, ruling that “[t]he Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.”<sup>98</sup>

The Court has held that protecting public health is a sufficient reason to impose measures that might otherwise violate the First Amendment or other constitutional freedoms.<sup>99</sup> In *Jacobson v. Massachusetts*, the Court upheld the authority of the State of Massachusetts to enforce a statewide regulation mandating vaccinations amidst the outbreak of smallpox in the United States.<sup>100</sup> In proposing the regulation, a board of medical professionals (Board of Health) deemed smallpox vaccinations “necessary for the speedy extermination of the disease.”<sup>101</sup> Deferring to the Board of Health’s recommendations, the Massachusetts Legislature ordered all residents of Cambridge, Massachusetts, who had not yet been vaccinated against smallpox to do so.<sup>102</sup> The Court concluded that the Massachusetts Legislature enacted the law “in a reasonable and proper exercise of the police power” because it had done so in an effort to protect public health.<sup>103</sup> The Court reasoned that, “[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”<sup>104</sup>

95. *Nat’l Fed. Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012).

96. *Bacon v. Walker*, 204 U.S. 311, 317 (1907). The police power also gives a government the right to make “regulations designed to promote the public convenience or the general prosperity . . . .” *Id.*

97. *See United States v. Morrison*, 529 U.S. 598, 618 (2000) (“The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States . . . . [W]e can think of no better example of the police power . . . than the suppression of violent crime . . . .”); *see United States v. Lopez*, 514 U.S. 549, 566 (1995).

98. *Lopez*, 514 U.S. at 566; *see id.* at 584–85 (Thomas, J., concurring) (“[W]e *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power.”).

99. *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905).

100. *Id.* at 12.

101. *Id.*

102. *Id.* at 12–13.

103. *Id.* at 35.

104. *Id.* at 27.

The Court also held that the mandatory vaccinations were neither arbitrary nor oppressive so long as they do not “go so far beyond what was reasonably required for the safety of the public.”<sup>105</sup>

With smallpox being “prevalent and increasing” in Cambridge, Massachusetts, the Court found that the state law in question was “necessary in order to protect the public health and secure the public safety.”<sup>106</sup> The Court noted that, for certain individuals “in a particular condition of . . . health,” the requirement of vaccination would be “cruel and inhuman[e],” in which case, courts would be empowered to interfere in order to “prevent wrong and oppression.”<sup>107</sup>

Furthermore, the *Jacobson* Court held that it was appropriate for the legislature to refer the question of what ought to be done in a public health emergency to a board of health professionals, reasoning that such a board is fit to resolve issues concerning public health.<sup>108</sup> The Court advised that it is not the duty of a court to determine the most effective method of protecting the public against disease, as such a function is reserved for the legislature in light of all available information.<sup>109</sup> As the Court found, the Massachusetts Legislature acted “upon the theory which recognized vaccination as at least an effective, if not the best known, way in which to meet and suppress . . . a smallpox epidemic that imperiled an entire population.”<sup>110</sup>

In reviewing laws concerning the general welfare of the people, the *Jacobson* Court indicated that it may only opine on the constitutionality of the law if the law is unrelated to protecting the health, morals, and safety of the public, or if it indubitably violates fundamental rights.<sup>111</sup> As the Court provided:

If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.<sup>112</sup>

105. *Jacobson v. Massachusetts*, 197 U.S. 11, 27–28 (1905).

106. *Id.* at 28.

107. *Id.* at 38–39.

108. *Id.* at 27.

109. *Id.* at 30.

110. *Id.* at 30–31.

111. *See Jacobson v. Massachusetts*, 197 U.S. 11, 30–31 (1905).

112. *Id.*

In this sense, the Court limits the role in which the judiciary may review legislation concerning the general welfare of the public.<sup>113</sup>

Tantamount to the *Jacobson* decision is the idea that individual liberty is not absolute.<sup>114</sup> The Court held that, in preserving the safety of the general public from “great dangers,” the rights of individuals may be limited by “reasonable regulations[ ] as the safety of the general public may demand.”<sup>115</sup> The Court further held that “[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own [liberty], whether in respect of his person or his property, regardless of the injury that may be done to others.”<sup>116</sup>

The Court has reaffirmed the potential limitations that the police power has on individual freedoms.<sup>117</sup> In *South Bay United Pentecostal Church v. Newsom*, the Governor of California issued an executive order that aimed to limit the spread of COVID-19 by placing temporary restrictions on public gatherings, specifically, attendance at places of worship.<sup>118</sup> At the time the executive order was issued, there was no cure, treatment, or vaccine available.<sup>119</sup> The petitioners applied for injunctive relief to the Court; the Court denied the application.<sup>120</sup> Concurring in the denial of application for injunctive relief, Chief Justice Roberts stated:

[The] Constitution principally entrusts “[t]he safety and the health of the people” to the politically accountable officials of the States “to guard and protect.” When those officials “undertake to act in areas fraught with medical and scientific uncertainties,” their latitude “must be especially broad.” Where those broad limits are not exceeded, they should not be subject to second-guessing by an “unelected federal judiciary,” which lacks the background, competence, and expertise to assess public health and is not accountable to the people.<sup>121</sup>

In sum, *Jacobson* provides a framework as to how courts ought to construe health regulations enacted in response to the COVID-19 pandemic and other public health crises.<sup>122</sup> A court may decide on the

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113. *See id.* at 30-31.

114. *Id.* at 11.

115. *Id.* at 29.

116. *Id.* at 26.

117. *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2021) (Roberts, J., concurring).

118. *Id.* at 1613.

119. *Id.*

120. *Id.*

121. *Id.* at 1613–14 (citations omitted).

122. *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905) (“While this court should guard with firmness every right appertaining to life, liberty, or property as secured to the individual by the

constitutionality of a law purporting to protect public health only if it is unrelated to that governmental interest or if the law clearly violates rights afforded by the Constitution.<sup>123</sup> Given this limited scope of judicial review, *Jacobson* instructs the judiciary to afford wide latitude to the judgment of health experts and state legislatures,<sup>124</sup> so long as the measures taken by state legislatures are a “reasonable and proper exercise of the police power.”<sup>125</sup>

### III. ANALYSIS

#### A. *Face Mask Mandates and Freedom of Speech*

The First Amendment of the U.S. Constitution provides that “Congress shall make no law . . . abridging . . . freedom of speech . . . .”<sup>126</sup> Generally, this means “that the government may not jail, fine, or impose civil liability” on a person based on what she says or what she writes, except under certain circumstances.<sup>127</sup> As discussed in the previous Part, the “Supreme Court has long considered political and ideological speech to be at the core of the First Amendment,” and such speech includes political matters.<sup>128</sup> This speech can be written, spoken, or, in the case of wearing a face mask, a symbolic act.<sup>129</sup> A government regulation that implicates political or ideological speech is generally reviewed by courts under strict scrutiny, “whereby the government must show that the law is narrowly tailored to achieve a compelling government interest.”<sup>130</sup> Should a court find that wearing a

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supreme law of the land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law. The safety and the health of the people of Massachusetts are, in the first instance, for that [State] to guard and protect.”).

123. *See id.* at 30–31.

124. *Id.* at 35 (“While we do not decide, and cannot decide, that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the state, and, with this fact as a foundation, we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power.”).

125. *Id.*

126. U.S. Const. amend. I. The First Amendment is known to protect five basic freedoms: speech, religion, press, assembly, and the right to petition the government. *7 Things You Need to Know About the First Amendment*, THE FREE SPEECH CENTER AT MIDDLE TENNESSEE STATE UNIVERSITY, <https://www.mtsu.edu/first-amendment/page/things-you-need> (last visited Nov. 1, 2021).

127. U.S. Const. amend. I; Geoffrey R. Stone & Eugene Volokh, *Freedom of Speech and the Press*, NATIONAL CONSTITUTION CENTER, <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-i/interps/266> (last visited Nov. 1, 2021). The Illinois Constitution treats freedom of speech in a similar manner, providing that “[a]ll persons may speak, write and publish freely, being responsible for the abuse of that liberty.” Ill. Const. art. I. § 4.

128. Killion, *supra* note 50.

129. *Id.*

130. *Id.*



face mask limits freedom of speech, that court will likely determine that a government mandate requiring the use of face masks is constitutional so long as such a mandate is imposed to achieve a compelling government interest, such as protecting public health.

A face mask is commonly perceived as a piece of cloth with stretchable bands attached at both ends that is used to cover an individual's mouth and nose to protect those around that mask-wearing individual from contact with germs. Prior to the COVID-19 pandemic, face masks were not commonly perceived to contain any expressive value. For example, upon seeing a doctor or other healthcare provider wearing a face mask, a patient is not led to question the political message attached to that face mask, nor is the patient led to question the political beliefs and ideologies of the doctor or healthcare provider.

Although a face mask is not inherently expressive, it has developed an expressive status, becoming a partisan issue amidst the COVID-19 pandemic.<sup>131</sup> Political leaders from different parties have expressed their views on face masks in response to the pandemic, contributing to the divisive effect that such devices have had on the American people.<sup>132</sup> “Democratic leaders have been more vocal about the importance of face masks,” and “many Democratic governors have made it mandatory to wear masks in public.”<sup>133</sup> In particular, then-presidential candidate Joe Biden, a Democrat, expressed that, if elected, he would “do everything possible to make it required that people have to wear masks in public.”<sup>134</sup> On the other hand, Republican leaders, such as former President Donald Trump, have been hesitant to mandate the use of face masks and have even mocked Democratic officials for wearing face masks in public.<sup>135</sup> These contrasting accounts demonstrate that wearing a face mask has become a partisan issue. Indeed, studies indicate that Democrats overwhelmingly comply with face mask requirements, while many Republicans disobey and contest them.<sup>136</sup>

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131. Lauren Aratani, *How Did Face Masks Become a Political Issue in America?*, THE GUARDIAN (June 29, 2020), <https://www.theguardian.com/world/2020/jun/29/face-masks-us-politics-coronavirus>.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Dominic-Madori Davis & Nick Lichtenberg, *'I really don't care, do U?': How the Act of Refusing to Wear a Mask Became the New Symbol of American Fear*, BUSINESS INSIDER (Aug. 16, 2020, 10:20 AM), <https://www.businessinsider.com/not-wearing-mask-becomes-stronghold-for-class-losing-power-analysis-2020-8>.

In light of the ongoing COVID-19 pandemic, “the mask has become a symbol of defiance and freedom for those who refuse to wear it.”<sup>137</sup> “For those who wear the mask, it’s a symbol of respect and [social] responsibility.”<sup>138</sup> Not only that, but also, upon the sight of an individual with or without a face mask on, others are quick to assume the political affiliations of that individual and their beliefs.<sup>139</sup> Albeit a piece of cloth with stretchable bands attached at the ends, the face mask has become a divisive symbol to the American people.<sup>140</sup>

Although the face mask has become a symbol of American partisanship arising out of the pandemic, a face mask does not inherently express a political view. In order for conduct to be subject to First Amendment protection, there must be “[a]n intent to convey a particularized message,” and that message must likely be understood by those who witness such conduct.<sup>141</sup> The nature of the conduct in question, combined with the factual context and environment in which it occurred, determines whether an individual engages in a form of protected speech.<sup>142</sup>

As previously discussed, the *Johnson* Court held that burning a flag during a presidential renomination was “expressive[ ] [and] overtly political” such that the conduct was “sufficiently imbued with elements of communication” to trigger the First Amendment.<sup>143</sup> The underlying message of the defendant’s flag burning in *Johnson*, which was to express disdain for a presidential nominee, is not comparable to the underlying message of wearing a face mask, if any. In the context of the COVID-19 pandemic, wearing a face mask is “part of a comprehensive strategy of measures to suppress the transmission” of COVID-19.<sup>144</sup> Though face masks have become a symbol of sociopolitical identity,<sup>145</sup> the nature of wearing a face mask is neither inher-

137. *Id.*

138. *Id.*

139. See Nattavudh Powdthavee et al., *When Face Masks Signal Social Identity: Explaining the Deep Face-mask Divide During the COVID-19 Pandemic*, PLOS ONE (June 10, 2021), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0253195> (experiment results indicating “people may have evolved over time to assign face mask usage as a minimal condition required for favouring in-group members and discriminating against out-group members”).

140. *Id.*

141. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)).

142. See *Spence*, 418 U.S. at 409–10.

143. *Johnson*, 491 U.S. at 406 (quoting *Spence*, 418 U.S. at 409).

144. *Coronavirus Disease (COVID-19) Advice for the Public: When and How to Use Masks*, WORLD HEALTH ORGANIZATION, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public/when-and-how-to-use-masks> (last updated Dec. 1, 2020).

145. See Powdthavee et al., *supra* note 139.

ently “expressive” nor “overtly political.”<sup>146</sup> To establish that the conduct of wearing a face mask is symbolic speech within purview of the First Amendment, a plaintiff must prove that the message being conveyed within such conduct is “intentional and overwhelmingly apparent.”<sup>147</sup> Such a plaintiff would fail, as neither political affiliation nor political doctrines are inherently or immediately obvious in the wearing of a face mask. Rather, wearing a face mask is simply a measure to preserve public health by protecting people from contracting infectious diseases.

Furthermore, government officials require people to wear face masks in public to help slow the spread of COVID-19, not to further some existing political belief or ideology of the government.<sup>148</sup> To put it simply, a face mask requirement regulates conduct, not speech. At most, a law requiring individuals to wear face masks in public limits where and how an individual may speak.<sup>149</sup> An individual is nonetheless able to express her beliefs while wearing a face mask. A face mask does not impede that individual from expression. For example, an individual is free to protest a face mask mandate while wearing a face mask or while not wearing one.<sup>150</sup> Therefore, wearing a face mask does not limit an individual from exercising her freedom of speech.<sup>151</sup>

As previously discussed in the Part above, the U.S. government may not compel individuals to express certain ideologies.<sup>152</sup> The government does not compel individuals to spread certain political ideologies by requiring them to wear face masks. Rather, the government is enforcing a health initiative that overlooks the political ideologies of people and that prioritizes, overall, the health and safety of all people. In other words, the face mask requirement was designed to achieve

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146. See *Johnson*, 491 U.S. at 406.

147. *Id.*

148. See Ill. Exec. Order No. 2020–32 (Apr. 30, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx>; see, e.g., 10 N.Y. Comp. Codes R. & Regs. tit. 10, § 66–3.1 (2021) (“Any person who is over age two and able to medically tolerate a face-covering shall be required to cover their nose and mouth with a mask or face-covering when in a public place and unable to maintain, or when not maintaining, social distance . . .”).

149. Finn, *supra* note 92.

150. See, e.g., *How to Protest Safely During the Coronavirus (COVID-19) Pandemic*, UW MEDICINE, <https://www.uwmedicine.org/coronavirus/protesting-safely> (last visited Oct. 23, 2021) (recommending protestors to wear face masks that fully cover nose and mouth when protesting).

151. Wearing a face mask does not limit an individual from exercising the other First Amendment freedoms. For example, an individual, while wearing a face mask, may protest Governor Pritzker’s Executive Order; may practice whatever religion she chooses; may publish; may assemble; and may petition the government. Although wearing a face mask may be somewhat uncomfortable or get in the way of one’s oral speech, it nonetheless does not restrict a person from successfully exercising her First Amendment freedoms.

152. Hudson, *supra* note 77.

the governmental objective of protecting the public from the dangers and uncertainties associated with COVID-19. In the case of Governor Pritzker’s Executive Order, the Executive Order was issued to prevent the spread of COVID-19. The recital provisions of the Executive Order lack any indication that Governor Pritzker issued the Executive Order to promote any personal political ideologies belonging to him or any other government official in Illinois.<sup>153</sup>

Assuming that the Executive Order restricted or otherwise affected an individual’s right to freedom of speech, the Executive Order is justified as it meets all four elements of the *O’Brien* test.<sup>154</sup> First, the Executive Order was within the constitutional power of the Illinois government. Because face masks are not mentioned in the U.S. Constitution, the power to mandate face masks is delegated to the states by the Tenth Amendment.<sup>155</sup> Second, the Executive Order furthers an important or substantial governmental interest. As explained in the recital of the Executive Order, “protecting the health and safety of Illinoisans is among the most important functions of State government.”<sup>156</sup> Third, the governmental interest is unrelated to the suppression of free expression. The State of Illinois’s governmental interest concerns the health and safety of the people of Illinois. Nowhere in the Executive Order does Governor Pritzker suggest an intent to suppress free expression or speech. The Executive Order was created to preserve the health of the State. Fourth, and finally, the incidental limitations caused by the Executive Order, if any, on alleged First Amendment freedom of speech, are no greater than essential to further the government’s interest in protecting the health of the public. As discussed above, wearing a face mask does not limit an individual from expressing her beliefs.<sup>157</sup> Therefore, under the *O’Brien* test, Governor Pritzker’s Executive Order is constitutional.

While the act of wearing a face mask does not fall under the type of speech that is protected by the First Amendment, it is important to note that it does not qualify as unprotected speech either.<sup>158</sup> In general, speech is restricted based on its content, and such “communicative content speech” is presumptively unconstitutional and subject to

153. See generally Ill. Exec. Order No. 2020–32 (Apr. 30, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx>.

154. *United States v. O’Brien*, 391 U.S. 367, 377 (1968); see *supra* Part II.D.2.

155. U.S. Const. amend. X. (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

156. Ill. Exec. Order No. 2020–32.

157. See *supra* Part III.A.

158. See Killion, *supra* note 50.

strict scrutiny.<sup>159</sup> The government may regulate certain categories of speech because of their content.<sup>160</sup> However, the conduct of wearing a face mask does not fall within any such categories. That is, wearing a face mask is not obscene;<sup>161</sup> is not defamatory;<sup>162</sup> is not a fraudulent statement;<sup>163</sup> is not directed to or likely to incite or produce imminent lawless action;<sup>164</sup> is not “likely to provoke the average person to retaliation, and thereby cause a breach of the peace”;<sup>165</sup> is not a “means to communicate a serious expression of an intent to commit an act of unlawful violence”;<sup>166</sup> is not integral to criminal conduct;<sup>167</sup> and is not child pornography.<sup>168</sup>

### B. *Face Mask Mandates and the Police Power*

As stated above, face masks and mandates thereof are not mentioned in the U.S. Constitution. Therefore, the states are free to enact legislation concerning face mask requirements under the Tenth Amendment by means of their police power.<sup>169</sup> Again, police power

159. *Id.* (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015)).

160. *Id.* (“The Court generally identifies these categories [of unprotected speech] as obscenity, defamation, fraud, incitement, fighting words, true threats, speech integral to criminal conduct, and child pornography.”).

161. *See Miller v. California*, 413 U.S. 15, 23–24 (1973) (“[W]e now confine the permissible scope of [statutes designed to regulate obscene materials] to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”).

162. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–280 (1964) (Damages may be recovered for a defamatory statement only if the statement was made with the “knowledge that it was false or with reckless disregard of whether it was false or not”).

163. *See United States v. Alvarez*, 567 U.S. 709, 718–19 (2012) (“[S]ome false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation.”).

164. *See Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

165. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942); *see also Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (“[S]peech cannot be restricted simply because it is upsetting or arouses contempt”).

166. *See Virginia v. Black*, 538 U.S. 343, 359 (2003).

167. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (The First Amendment does not protect speech that is “used as an integral part of conduct” in committing a crime).

168. *See New York v. Ferber*, 458 U.S. 747, 764 (1982) (Prohibition on child pornography is “limited to works that visually depict sexual conduct by children below a specified age” and the “category of ‘sexual conduct’ proscribed must also be suitably limited and described”) (emphasis omitted).

169. U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

includes the power of the states, but not the federal government, to establish and enforce laws to protect the welfare, safety, and health of the public.<sup>170</sup> Accordingly, Governor Pritzker is able to issue face mask mandates through the police power.<sup>171</sup> Furthermore, Governor Pritzker may issue face mask mandates because he is doing so based on a compelling governmental interest, namely, to protect the health and safety of Illinois residents.<sup>172</sup> “The Supreme Court has long held that protecting public health is a sufficient reason to institute measures that might otherwise violate the First Amendment or other provisions in the Bill of Rights.”<sup>173</sup>

The Court’s opinion in *Jacobson* provides guidance on the constitutionality of Governor Pritzker’s Executive Order with respect to its face mask requirement.<sup>174</sup> In *Jacobson*, the Court considered whether a state may require its citizens to receive smallpox vaccinations in light of a public health crisis.<sup>175</sup> *Jacobson* provides that the liberty afforded by the Constitution to every person within its jurisdiction does not give them absolute freedom at all times and circumstances.<sup>176</sup> Rather, “[t]here are manifold restraints to which every person is necessarily subject for the common good.”<sup>177</sup> The *Jacobson* Court held that, “[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”<sup>178</sup> The Constitution entrusts “[t]he safety and the health of the people” to the politically accountable officials of the states “to guard and protect” the people.<sup>179</sup> Furthermore, the *Jacobson* Court held that when those officials “act in areas fraught with medical and scientific uncertainties,” their latitude “must be especially broad.”<sup>180</sup> Finally, “where those broad limits are not exceeded, they should not be subject to second-guessing by an ‘unelected federal judiciary,’ which lacks the background, compe-

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170. See *supra* Part II.E.

171. See *Jacobson v. Massachusetts*, 197 U.S. 11, 35 (1905) (Vaccination mandate imposed during epidemic is a “reasonable and proper exercise of police power”).

172. See Ill. Exec. Order No. 2020–32 (Apr. 30, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx>.

173. Finn, *supra* note 92.

174. See *Jacobson*, 197 U.S. at 35.

175. *Id.* at 11.

176. *Id.*

177. *Id.* at 26.

178. *Id.* at 27.

179. *Id.* at 38.

180. *Marshall v. United States*, 414 U.S. 417, 427 (1974).

tence, and expertise to assess public health and is not accountable to the people.”<sup>181</sup>

As the Court’s opinion in *Jacobson* instructs, the government may rely on the guidance of health professionals during a public health crisis.<sup>182</sup> Governor Pritzker similarly relied on such guidance upon issuing the Executive Order. Specifically, the Executive Order acknowledges the CDC recommendation of wearing face masks in public settings where social distancing measures are difficult to maintain.<sup>183</sup> Accordingly, the Executive Order requires “any individual who is over age two and able to medically tolerate face-coverings (a mask or cloth face-covering) . . . to cover their nose and mouth with a face-covering when in a public place and unable to maintain a six-foot social distance.”<sup>184</sup>

Under *Jacobson*, statewide orders requiring individuals to wear face masks in public settings are constitutional under the Tenth Amendment’s state police powers.<sup>185</sup> Such orders have been issued in response to a public health crisis—namely, the COVID-19 pandemic—and fulfill the governmental interest in protecting the health and safety of the public.<sup>186</sup> Wearing a face mask not only protects the wearer, but also those around the wearer from droplets and other bodily fluids that may contain COVID-19.<sup>187</sup> Furthermore, Governor Pritzker properly exercised the police power of the State of Illinois in enacting the Executive Order. Applying the Court’s holding in *Jacobson* to the Executive Order evidences the fact that it is within constitutional limits. That is, there was a compelling state interest, as the Executive Order was aimed at protecting the health and safety of Illinois residents, which is one of the most important functions of state government.<sup>188</sup> Additionally, the Executive Order was issued in response to a national emergency. In March of 2020, the WHO charac-

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181. Daniel R. Karon & Giliann E. Karon, *To Mask or Not to Mask? It’s Not a Constitutional Question*, THE CLS BLUE SKY BLOG (Oct. 29, 2020), <https://clsbluesky.law.columbia.edu/2020/10/29/to-mask-or-not-to-mask-its-not-a-constitutional-question/>.

182. *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905).

183. Ill. Exec. Order No. 2020–32 (Apr. 30, 2020), <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx>.

184. *Id.*

185. See *Jacobson*, 197 U.S. at 35 (“[T]he statute in question is a health law, enacted in a reasonable and proper exercise of the police power.”).

186. See, e.g., Ill. Exec. Order No. 2020–32 (“[F]or the preservation of public health and safety throughout the entire State of Illinois, and to ensure that our healthcare delivery system is capable of serving those who are sick, I find it necessary to take measures consistent with public health guidance to slow and stop the spread of COVID-19 . . .”).

187. *How COVID-19 Spreads*, *supra* note 4.

188. Ill. Exec. Order No. 2020–32.

terized the COVID-19 outbreak as a pandemic.<sup>189</sup> By the end of the following month, the WHO reported over 3 million confirmed cases of COVID-19 and over 200,000 deaths caused by the disease globally.<sup>190</sup> Upon issuing the Executive Order, no vaccine or treatment was available to fight COVID-19 and its spread,<sup>191</sup> and the WHO warned that there was “no evidence that people who have recovered from COVID-19 and have antibodies are protected from a second infection.”<sup>192</sup> In addition, the WHO indicated that COVID-19 would continue to spread rapidly,<sup>193</sup> calling on governments to take significant steps to help prevent the spread.<sup>194</sup>

Concerning the freedoms of the people in times of national emergency, the *Jacobson* Court stated that “the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.”<sup>195</sup> Therefore, in times of national emergency, the government may restrict freedoms if doing so is conducive to protecting the health and safety of the nation and its people. Hence, Governor Pritzker was constitutionally permitted to issue the Executive Order. Even if the face mask requirement of the Executive Order violates an individual’s freedom of speech, the Executive Order excuses such a violation, as it was to prevent the

189. See *WHO Director-General’s Opening Remarks*, *supra* note 1.

190. *Coronavirus Disease 2019 (COVID-19) Situation Report – 101*, WORLD HEALTH ORGANIZATION (Apr. 30, 2020), [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200430-sitrep-101-covid-19.pdf?sfvrsn=2ba4e093\\_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200430-sitrep-101-covid-19.pdf?sfvrsn=2ba4e093_2).

191. The Executive Order was issued on April 30, 2020. Ill. Exec. Order No. 2020–32. The U.S. Food and Drug Administration agreed to an emergency use authorization for the first COVID-19 vaccines (namely, the Pfizer, BioNTech vaccine) on December 11, 2020. *A Timeline of COVID-19 Developments in 2020*, AMERICAN JOURNAL OF MANAGED CARE, <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020> (last updated Jan. 1, 2021). See also *Covid-19: First Vaccine Given in US as Roll-out Begins*, BBC (Dec. 14, 2020), <https://www.bbc.com/news/world-us-canada-55305720>.

192. “Immunity passports” in the Context of COVID-19, WORLD HEALTH ORGANIZATION (Apr. 24, 2020), <https://www.who.int/news-room/commentaries/detail/immunity-passports-in-the-context-of-covid-19>.

193. *WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19*, WORLD HEALTH ORGANIZATION (Apr. 13, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19--13-april-2020> (“[W]hile COVID-19 accelerates very fast, it decelerates much more slowly.”).

194. *ICC-WHO Joint Statement: An Unprecedented Private Sector Call to Action to Tackle COVID-19*, WORLD HEALTH ORGANIZATION (Mar. 16, 2020), <https://www.who.int/news/item/16-03-2020-icc-who-joint-statement-an-unprecedented-private-sector-call-to-action-to-tackle-covid-19> (“Governments should commit to making available all necessary resources to combat COVID-19 with the minimum of delay and to ensure that cross-border medical and other essential goods supply chains are able to function effectively and efficiently.”).

195. *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905).



spread of COVID-19 throughout the State of Illinois and to protect residents of the State.

#### IV. IMPACT

Should the Executive Order be viewed as not having any restrictions on an individual's freedom of expression, then the Illinois government can take further measures in implementing the use of face masks in public settings where social distancing is difficult to maintain, so long as such measures are within constitutional bounds. For example, Illinois legislatures can enact laws that fine individuals who refuse to cooperate with businesses that require a face mask upon entering their facilities,<sup>196</sup> as well as fine businesses for not requiring patrons to wear face masks on business premises.<sup>197</sup> By adding a criminal component to the face mask requirement, Illinois can encourage its residents and visitors to wear face masks in order to prevent the spread of COVID-19, as well as to deter them from acting in retaliation to such a requirement. Ultimately, such measures would help to increase the speed at which the State returns to normalcy.

If a court determines that the principles of *Jacobson* apply to the face mask requirement of the Executive Order, then the court would be able to uphold the initiatives of the Illinois government in protecting the health and safety of Illinois residents. Such a decision would provide the State with a guideline as to how to respond in future national health crises. Again, *Jacobson* is a reminder that, in national health crises, government officials ought to turn to medical professionals for guidance.<sup>198</sup>

Although state governments, by means of their police power, may freely take proactive steps in fighting the spread of COVID-19 within their own respective states, a state-by-state approach is not well-suited for public health emergencies.<sup>199</sup> As was the case with COVID-19, diseases may spread to adjoining states.<sup>200</sup> The use of face masks dem-

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196. See, e.g., Mary Hansen, *Springfield To Fine Individuals for Not Wearing Masks in Stores*, NPR ILLINOIS (Nov. 4, 2020, 11:32 PM), <https://www.nprillinois.org/springfield/2020-11-04/springfield-to-fine-individuals-for-not-wearing-masks-in-stores>.

197. See, e.g., Dave McKinney & Tony Arnold, *Illinois Businesses Now Face Fines for Failing to Require Masks*, NPR (Aug. 12, 2020), <https://www.npr.org/local/309/2020/08/12/901628853/illinois-businesses-now-face-fines-for-failing-to-require-masks>.

198. See *Jacobson*, 197 U.S. at 30 ("It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain."); see *supra* Part II.E.

199. Lawrence O. Gostin et al., *Universal Masking in the United States: The Role of Mandates, Health Education, and the CDC*, 324 J. AM. MED. ASS'N. 823, 837 (2020).

200. *Id.*

onstrates that state policies rapidly affect the regions of the nation and the nation overall.<sup>201</sup> Since states currently adhere to their own policies and procedures, there is no national uniformity in the response to COVID-19.<sup>202</sup> For example, a state may see a decrease in the number of confirmed cases of COVID-19 and decide to reopen the state, only to experience another spike in cases and a potential spillover of the virus across state borders.<sup>203</sup> As such, a future health emergency requires national leadership and strategy that affords the CDC flexible powers to ensure a uniform and well-coordinated response to prevent the interstate and intrastate spread of diseases.<sup>204</sup>

## V. CONCLUSION

As discussed above, the conduct of wearing a face mask is not a form of speech, nor does it restrict speech. Although the face mask has become a symbol of political affiliation throughout the COVID-19 pandemic, the wearing of a face mask does not contain any inherent expressive value. Per the *Jacobson* decision, any freedom that is granted to the people is not absolute,<sup>205</sup> and, in times of public health crises, a regulation that incidentally limits one's constitutional freedoms is likely to be excused. Even if wearing of a face mask was deemed to limit freedom of speech, a statewide order requiring the use of face masks in public spaces is permitted as a legitimate exercise of a state's police power. As the preservation of public health supersedes freedom of speech,<sup>206</sup> Governor Pritzker, therefore, reasonably exercised his police power in issuing the Executive Order and did so within constitutional bounds. Should Illinois and different states achieve full compliance of their face mask requirements by their residents, our nation may be able to return back to normalcy and function as it had prior to the pandemic.

*Israel M. Del Mundo*

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201. *Id.* at 838.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

206. *See id.* at 26–27.

