No. _____

In the
Supreme Court of the United States

CHAD PARKER, ET AL.,
Petitioners,

v.

GOVERNOR OF PENNSYLVANIA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The COVID-19 pandemic created a constitutional crisis. For years, American citizens, including Petitioners, were subject to constantly changing orders that imposed burdens on fundamental freedoms in a way that our nation has never experienced in its history. The cost of these burdens is incalculable. Unfortunately, many courts did nothing, abdicating their duty to say what the law is and allowing this assault on liberty to proceed largely unchecked.

1. Is this constitutional challenge to the Pennsylvania "mask mandate" moot when the restriction is capable of repetition yet so short in duration that it evaded review and Pennsylvania officials voluntary ceased the allegedly unlawful action while this lawsuit was pending?

2. Do Petitioners have standing to challenge Pennsylvania's "contact tracing" program, which was developed during the COVID-19 pandemic, when Petitioners were directly subject to its restrictions during the pandemic, the program had a chilling effect on Petitioners' freedom to associate, Petitioners had private and personal data subject to disclosure as a result of a breach of the program's database, and the program remains in existence today?

PARTIES TO THE PROCEEDING

Petitioners are Chad Parker, Rebecca Parker ("Parkers"), Mark Redman, and Donna Redman ("Redmans") (collectively referred to as "Petitioners").

Respondents are the Governor of Pennsylvania, the Attorney General of Pennsylvania, and the Secretary of the Pennsylvania Department of Health (collectively referred to as "Respondents").

STATEMENT OF RELATED PROCEEDINGS

There are no related proceedings.

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OPINIONS BELOW

The opinion of the court of appeals appears at App. 1 and is available at *Parker v. Governor of Pennsylvania*, No. 22-2789, 2023 U.S. App. LEXIS 23850 (3d Cir. Sep. 8, 2023). The opinion of the district court appears at App. 12 and is available at *Parker v. Wolf*, No. 1:20-CV-01601, 2022 U.S. Dist. LEXIS 244944 (M.D. Pa. Sep. 13, 2022).

JURISDICTION

The opinion of the court of appeals was entered on September 8, 2023. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III provides, in relevant part, "The judicial power shall extend to all Cases [and] Controversies . . . ." U.S. Const. art. III.

The First Amendment provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. Const. amend. I.

The Fourteenth Amendment provides, in relevant part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction

the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

I. Procedural Background.

Petitioners filed this action on September 3, 2020. On October 6, 2020, Petitioners filed a motion for preliminary injunction, seeking to preliminarily enjoin Pennsylvania's mask mandate and contact tracing program. The motion was denied on December 11, 2020. That same day, Petitioners filed a notice of appeal. Petitioners also filed a motion for injunction pending appeal with the district court. The motion was denied. Petitioners then promptly filed a motion for injunction pending appeal with the U.S. Court of Appeals for the Third Circuit, and that motion was denied without an opinion on January 19, 2021.

The Third Circuit affirmed the district court's denial of Petitioners' request for a preliminary injunction on November 23, 2021.

On May 25, 2021, Petitioners filed a First Amended Complaint. R-42. Respondents moved to dismiss the pleading under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Petitioners opposed the motion.

On September 13, 2022, the district court granted Respondents' motion, dismissing the claims on justiciability grounds and closing the case. Petitioners filed a timely notice of appeal. On September 8, 2023, the Third Circuit affirmed the district court's ruling. App. 1-11.

This petition follows.

II. Decision Below.

The Third Circuit affirmed the district court's order dismissing Petitioners' First Amended Complaint on justiciability grounds. The circuit court dismissed Petitioners' challenge to the contact tracing program on standing grounds, concluding that Petitioners lacked an ongoing or imminent injury arising from the program. App. 5-8. More specifically, the court relied on the prior panel's preliminary injunction ruling and held that Chad Parker's past exposure to the program did not render a future injury imminent, noting that "the risk of future exposure depends on an 'attenuated chain of events' initiated by third parties." App. 6. The court also "rejected [Petitioners'] alleged change in behavior as a valid injury." *Id*.

The court further held that Petitioners' alleged "'chilling injury' does not support Article III standing," and that Petitioners "cannot establish an ongoing or imminent injury simply through allegations" that there was a "large data breach" of Petitioners' private and personal information that was collected and stored by the government pursuant to the challenged program. *See* App. 7-8.

The circuit court also relied primarily on the prior panel's preliminary injunction ruling and dismissed Petitioners' challenge to the mask mandate on mootness grounds. The court held that the Department of Health's decision to lift the mandate in June 2021 rendered Petitioners' challenge moot and "that neither exception to the mootness doctrine

applied because the mandate 'expired based on the availability of vaccines' and [Petitioners] failed to show there was a 'reasonable expectation that a statewide mask order will be reinstated.'" App. 9-10.

III. Statement of Facts.

A. The Mask Mandate.

On March 9, 2020, the Pennsylvania Secretary of Health announced the presence of 10 suspected cases of COVID-19 in Pennsylvania and stated that the Commonwealth would start contact tracing. R-42, First Am. Compl. ¶ 30.

On April 1, 2020, the Pennsylvania Governor issued a state-wide, stay-at-home order pursuant to his "emergency powers." The stay-at-home order was the equivalent of a house arrest for the people of Pennsylvania, including Petitioners. *Id*. ¶ 31.

At that time, Petitioners were told that the stay-at-home order was required to ensure that the hospitals were not overrun and to "flatten the curve." Petitioners were willing to cooperate given this explanation and what certainly appeared to be a short-term restriction. While both of the conditions were soon met, the restriction remained. *Id*. ¶ 32.

Respondents did not establish any clear guidelines or objective criteria for when they would lift or end the COVID-19 restrictions, including the challenged mask mandate and contact tracing program. With regard to the contact tracing program, Respondents built a large, government infrastructure surrounding the program such that this program will be permanent and thus

available for use during any government-perceived or government-created "crisis." *Id.* ¶ 34.

On July 1, 2020, the Pennsylvania Secretary of Health issued an order mandating "universal face coverings," requiring all persons in Pennsylvania to wear a face mask when leaving their home. More specifically, pursuant to the mask mandate, individuals were required to wear a face mask when outdoors and unable to consistently maintain a distance of six feet from individuals who are not members of the same household and when in any indoor location where members of the public are generally permitted. *Id.* ¶ 47.

On November 17, 2020, the Department of Health issued an "Updated Order" requiring universal face coverings. This mandate went into effect on November 18, 2020. The mandate was amended again on March 16, 2021. *Id.* ¶¶ 53-54.

At all times, Petitioners were subject to the mask mandate and the penalties for failing to comply with it. *Id.* ¶ 55.

For many, including Petitioners, requiring them to wear a face mask forced them to convey a message with which they disagreed. To Petitioners, wearing a mask conveys the message that the wearer has surrendered his or her freedom to the government, particularly in light of the facts of the declared pandemic. *Id.* ¶ 64.

Because a mask had become a political symbol during the highly politicized pandemic, the wearing of a mask was a form of symbolic speech. Consequently, via the mask mandate, Respondents were compelling

Petitioners to engage in a form of expression and to convey a message with which Petitioners disagreed. *Id.* ¶ 65.

The mask mandate presumed that all people were diseased and thus made the wearer contribute to a false public statement that all people were in fact diseased. *Id.* ¶ 66.

Petitioners also objected to the mask mandate because it violated privacy interests, including their right to bodily integrity and personal autonomy free from government interference. *Id.* ¶ 67.

Under the mask mandate, a mask was required for everyone, even though the vast majority of individuals required to wear one were healthy or were not in a group with a high risk to contract COVID-19. In fact, under the mandate, masks were required to be worn by those who already contracted COVID-19 and were now immune from the virus, including Petitioner Chad Parker. *Id.* ¶ 68.

Respondents also implemented a policy whereby vaccinated persons were excused from certain COVID-19 restrictions, including the requirement to wear a face mask. This policy discriminated against people who oppose the COVID-19 vaccine (specifically including Petitioners, who oppose it on religious grounds); it discriminated in favor of those who were vaccinated over those who were not vaccinated; and it was a way for the government to coerce individuals to receive the vaccine. *Id.* ¶ 82.

The mask mandate was eventually lifted, unilaterally, by the Department of Health on June 28, 2021. App. 3.

B. The Contact Tracing Program.

On July 14, 2020, Petitioner Chad Parker believed he had a sinus infection, so he sought medical treatment. On July 19, 2020, he was tested for COVID-19, and on July 24, 2020, his test result was positive. Petitioner works for a government employer, which follows the CDC guidance for when a person who tests positive for COVID-19 is cleared to return to work. Pursuant to the guidance in place at the time, Petitioner was cleared on July 24, 2020, and he returned to work on July 25, 2020. R-42, First Am. Compl. ¶ 110.

On July 25, 2020, Petitioner Chad Parker was contacted by a contact tracer. The contact tracer asked probing questions, including who Petitioner lives with, the ages of the individuals he lives with, the names of any businesses or other places he recently visited, and the names and contact information of any people he recently visited or had contact with. Petitioner was disturbed by the intensive questioning by this government investigator and by the investigation itself, which sought personal and private information regarding his personal and private contacts and associations. *Id*. ¶ 111.

In a press release posted on August 31, 2020, the Department of Health acknowledged the following with regard to the contact tracing program: "During the case investigation, public health professionals spend 30 to

60 minutes asking questions to ensure all potential close contacts are identified. *They collect information about who the case came in contact with and where they went while they were infectious*." *Id*. ¶ 112 (emphasis added).

Shortly following the probing phone call with the contact tracer, the Parkers received a letter in the mail from the Department of Health dated July 25, 2020 ("DOH Letter"). The letter was addressed to the "Parker/Kenwick Family," and it stated that "[t]he Secretary of Health is directing you as a close contact of a person that has COVID-19 to self-quarantine in your home." The letter further stated that "[t]his authority is granted to the Secretary of Health under the law," citing as authority, *inter alia*, various sections of the Disease Prevention and Control Law and the Department of Health's regulations found at 28 Pennsylvania Code Chapter 27. *Id*. ¶¶ 113-14.

During the mandated, 14-day quarantine (house arrest), the DOH Letter also "directed" the Parkers to, *inter alia*, "[m]aintain social distancing of at least 6 feet from family members" and to "[c]ooperate with the monitoring and other contacts of the Department or its representatives." The letter concluded with a stern warning:

> You must immediately adhere to this quarantine directive and all disease control measures included in it. If you do not cooperate with this directive, the Secretary of Health may petition a court to have you *confined* to an appropriate place chosen by the Department. . . . This may be a hospital, or some other appropriate place,

> *whichever the Department determines is best suited for your case. You will be kept there until the Department determines it can release you from quarantine. Law enforcement may be called upon, to the extent necessary, to ensure your compliance with this directive.*

Id. ¶¶ 115-16 (emphasis added).

Pursuant to 28 Pennsylvania Code Chapter 27, a violation of the Department' directives as set forth in the DOH Letter could result in criminal penalties (§ 27.8). Additionally, Chapter 27 gives the Department very broad, plenary, and punitive powers. For example, among other powers, the Department has the power to isolate, quarantine, segregate, and surveil individuals without a warrant or consent (§ 27.60(a)); it has the power to define the conditions of the quarantine (§ 27.65); it has the power to put a placard/sign in front of a person's home if the Department believes that the person is not "fully" compliant (§ 27.66); it has the power to restrict physical movement, requiring the quarantine to "take place in an institution where the person's movement is physically restricted" (§ 27.88(a)); it has the power to "treat" minors without parental consent (§ 27.97); it has the power to isolate a person if he or she refuses treatment (§ 27.87(a)); it has the power to enter a home without a warrant or consent (§ 27.152(b)); and it has the power to review confidential medical records without a warrant or consent (§ 27.152(c)). All of these powers are available to the Department this very day to enforce the challenged contact tracing program. R-42, First Am. Compl. ¶ 117.

Indeed, the Department of Health has the authority to remove minor children from their homes and place them in an isolated quarantine location without parental consent pursuant to the contact tracing program. *Id*. ¶ 118.

From the date of his first phone call with a contact tracer to August 24, 2020, Petitioner Chad Parker received approximately 14 text messages a day as a result of the contact tracing program. The text messages required responses to a "Daily Self-Report." There was no way to stop the incessant messages, which were apparently generated by the Sara Alert system. Moreover, pursuant to the DOH Letter, the Parkers were required to "cooperate" and thus respond. *Id*. ¶ 122.

Because the Parkers are now in Respondents' contact tracing database, they reasonably fear that they will be subjected once again to a quarantine. At a minimum, they object to being subjected to surveillance, having their personal medical records reviewed by the Department of Health, and being in the government's database. *Id*. ¶ 123.

The Redmans were also subject to the contact tracing program. On April 29, 2021, the Redmans were advised by an assistant principal from their son's high school that their son, P.G., was a "close contact" with someone who had tested positive for COVID-19. The Redmans were advised that their son was ordered to leave the school, and that they should pick him up as he could not take the bus home. Based on the date of the last contact, P.G. was excluded from school until

May 8, 2021, as the school uses a 14-day quarantine period. *Id*. at ¶ 133.

On May 3, 2021, the Redmans received a letter from the high school advising them that P.G. "may have been exposed to someone who has COVID-19." As a result of the contact tracing program, P.G. was forced to stay at home even though he had no symptoms whatsoever of COVID-19. In addition to missing his in-person instruction, P.G. missed a scheduled lifeguard recertification class as a result of the contact tracing quarantine. *Id*. ¶¶ 138-39.

On May 7, 2021, P.G. (a minor) received a letter addressed to him from the Department of Health. The letter stated: "I need to speak with you regarding an urgent health matter. Please contact me at 1-877 PA HEALTH (1-877-724-3258), Option l, as soon as possible. Please leave a message with a good contact number if I am not available. Your cooperation is greatly appreciated." The letter was signed by Emily Charland-Snoots, "PA Department of Health Contact Tracer." *Id*. ¶ 140.

The contact tracing program has resulted in the government (Respondents) creating a large database of confidential, private, and, sensitive information about private individuals. This massive contact tracing database was subject to a serious data breach, thereby compromising the confidential, private, and sensitive information of countless numbers of Pennsylvanians, including Petitioners, who have been subject to the contact tracing program and are part of the database. *Id*. ¶ 150.

REASONS FOR GRANTING THE PETITION

"Determination by the [government] of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts." *Meyer v. Neb.,* 262 U.S. 390, 400 (1923). But this supervision is only effective if the courts are willing to exercise their authority to decide important constitutional questions. Unfortunately, the Courts' justiciability doctrines (standing, ripeness, mootness) have become convenient excuses for lower courts to surrender their duty to say what the law is, particularly when dealing with the draconian and historic restrictions imposed during the recent pandemic.

While the fear engendered by war, pandemic, or some other crisis might lead politicians, their attorneys, and yes, even judges of the highest order, to assert that patent violations of the Constitution are acceptable (or beyond judicial scrutiny) because public safety interests demand an exception to our most fundamental liberties, history teaches that we will look back on these arguments as "gravely wrong . . . overruled in the court of history . . . and . . . [having] no place in law under the Constitution." *Trump v. Haw.*, 138 S. Ct. 2392, 2423 (2018) (repudiating *Korematsu v. United States*, 323 U.S. 214 (1944)).

During times such as these, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The importance of doing so during (and in the immediate aftermath of) a crisis is essential to ensure the protection of constitutional

liberties for it is in such times that the need for protection is at its zenith. *See generally Coolidge v. N.H.*, 403 U.S. 443, 455 (1971) ("In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law [the Fourth Amendment] and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts.").

Indeed, our Constitution does not permit such a tyrannical reign even if it is of short duration. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

The only meaningful check on such abuse of power is the judiciary. However, if the judiciary refuses to exercise its authority to resolve the merits of a case, then tyranny lives for another day.

Review by this Court is necessary because the lower courts do not uniformly apply the Court's justiciability doctrines, and this is particularly true in cases challenging the enforcement of emergency orders issued during the recent COVID-19 crisis. *See* Sup. Ct. R. 10(c).

ARGUMENT

This case presents a justiciable controversy. Petitioners' challenge to the Pennsylvania mask mandate is not moot for at least two reasons. *First*, the government's cessation of its unlawful actions was entirely voluntary, the government retains the authority to continue the illegal conduct, and the public

has an exceedingly strong interest in determining whether the government's action was lawful. This Court has repeatedly said that a defendant who invokes mootness based on voluntary cessation bears a "formidable burden." That is, *Respondents* bear a "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." Respondents cannot meet this burden, and it was wrong to place that burden on Petitioners. And *second*, the mandate is *capable* of repetition yet too short in duration for meaningful review.

Petitioners likewise have standing to challenge the contact tracing program. Cognizable injuries caused by the program include: (1) the chilling effect caused by forced disclosures; (2) changes in behavior compelled by the program; (3) the current and ongoing retention by the government of private information and records of Petitioners due to the fact that Petitioners were themselves targets of the program; and (4) this database was hacked, resulting in a leak of the private information. These injuries are fairly traceable to Respondents, and they are likely to be redressed by the requested relief.

This Court should grant the petition, vacate the adverse decision below, clarify the Court's justiciability doctrines, particularly mootness, and remand the case for the Third Circuit to properly apply the doctrines in this case.

I. Petitioners' Challenge to the Mask Mandate Is Not Moot.

The judiciary's primary role is to safeguard freedom—it would be wrong to surrender that role because of a pandemic. As stated by Justice Gorsuch, "[Courts] may not shelter in place when the Constitution is under attack. Things never go well when [they] do." *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring).

This case reflects a growing trend of allowing government defendants to moot a pending case by rescinding the challenged regulation prior to the courts deciding the constitutionality of the claims against them, thus allowing government officials to remain unaccountable for the legal ramifications of their enacted policies.

Such decisions are an abuse of the doctrine of mootness. As recently stated by Judge Ho in the Fifth Circuit:

> To be clear, it's not supposed to be this way. It shouldn't be that easy for the government to avoid accountability by abusing the doctrine of mootness. But judges too often dismiss cases as moot when they're not—whether out of an excessive sense of deference to public officials, fear of deciding controversial cases, or simple good faith mistake. And when that happens, fundamental constitutional freedoms frequently suffer as a result.
>
> That's why legal commentators have bemoaned that acts of "strategic mooting litter the Federal

> Reporter." Joseph C. Davis & Nicholas R. Reaves, *The Point* Isn't *Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary Cessation Doctrine*, 129 Yale L.J. Forum 325, 328 (2019). Because judicial acceptance of such gamesmanship "harm[s] both good sense and [] individual rights" and "depriv[es] the citizenry of certainty and clarity in the law" by "preventing the final resolution of important legal issues." *Id.*
>
> I am thankful that our court does not make that same mistake today. But I continue to worry that judges may be tempted to misapply mootness in other cases—not to ensure that we decide only actual cases or controversies, but to avoid deciding cases that happen to be controversial.

Tucker v. Gaddis, 40 F.4th 289, 293-94 (5th Cir. 2022) (Ho, J., concurring).

This case presents a particularly egregious example of the "gamesmanship" identified by Circuit Judge Ho. While the mask mandate was in full force, the district court denied Petitioners' request for a preliminary injunction, erroneously concluding that Petitioners lacked standing to challenge the mandate (mootness was obviously not an issue at that time). Notably, the government never raised standing as an issue in the district court as Petitioners were plainly subject to the mandate, which carried penalties for violating it. Petitioners immediately appealed the district court's ruling, seeking an injunction pending appeal in the lower court, which was denied for the same reasons the

court denied the preliminary injunction. Petitioners immediately followed that denial with a request for an injunction pending appeal in the Third Circuit (while the mandate was still in effect). That request was denied without explanation. In the Third Circuit's opinion on the merits of Petitioners' interlocutory appeal (which was not heard until after the mandate was voluntarily ended by government officials), the court held that the challenge to the mask mandate was now moot.

Upon remand, the district court followed the Third Circuit's decision and ultimately dismissed the First Amended Complaint. That dismissal was affirmed by the Third Circuit.

A. Petitioners' Challenge to the Mask Mandate Is Not Moot as the Challenged Restriction Falls Within the Capable of Repetition, Yet Evading Review Exception to Mootness.

The Pennsylvania mask mandate, like so many COVID restrictions, was an on-again/off-again mandate. The original mask mandate was issued in July 2020. R-42, First Am. Compl. ¶ 47. On November 17, 2020, the Department of Health issued a new mask mandate order, which went into effect on November 18, 2020. *Id.* ¶ 53. The November 2020 order expressly stated, "My Order Requiring Universal Face Coverings, dated July 15, 2020, is hereby rescinded and superseded by this Order." *Id.*, Ex. 1. This mandate was then updated on March 16, 2021, and it expressly stated, "This Amended Order shall take effect at 12:01 a.m. on March 17, 2021 and *shall*

remain in effect until further notice." *Id*., Ex. 2 (emphasis added). The mandate was unilaterally rescinded by the Department of Health on June 28, 2021. App. 8.

Petitioners' claim comes within the "capable of repetition, yet evading review" exception to the mootness doctrine. This exception applies to situations where: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there was a *reasonable* expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 148 (1975) (emphasis added).

This Court has found periods of up to two years to be too short to be fully litigated. *See, e.g., Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (holding that a procurement contract that expires in two years does not permit judicial review). Petitioners satisfy the first requirement.

Petitioners also satisfy the second requirement of the "capable of repetition, yet evading review" exception because this standard is a forgiving one. That is, "*reasonable*" in this context is not an exacting bar. Indeed, this Court has indicated that it is somewhat *less* than probable:

> [W]e have found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable . . . Our concern in these cases . . . was whether the controversy was *capable* of repetition and not . . . whether the claimant had demonstrated

> that a recurrence of the dispute was more probable than not.

Honig v. Doe, 484 U.S. 305, 318 n.6 (1988) (emphasis in original) (internal citations omitted).

In other words, recurrence of the issue need not be more probable than not; instead, the controversy must be *capable* of repetition. This standard provides that the chain of potential events does not have to be certain or even probable to support the court's finding of non-mootness.

This Court has found restrictions issued during the COVID-19 pandemic capable of repetition. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court found that a church's challenge to New York's pandemic restrictions was not moot where "[t]he Governor regularly change[d] the classification of particular areas without prior notice" and retained the authority to continue doing so. 141 S. Ct. 63, 68 (2020) (per curiam). And while the Court did not identify which mootness exception applied, it cited to *Wisconsin Right to Life*'s discussion of the "capable of repetition, yet evading review" exception. *Id.* (citing *Wis. Right to Life*, 551 U.S. 449, 462 (2007)).

The Court applied *Roman Catholic Diocese* in *Tandon v. Newsom* and held that a challenge to California's restrictions on religious gatherings was not moot because California officials "retain[ed] authority to reinstate" the challenged restrictions "at any time." 141 S. Ct. 1294, 1297 (2021) (per curiam) (citing *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720, 209 (2021) (Gorsuch, J.) (explaining that the case

was not moot because California officials have a record of "moving the goalposts")).

The Third Circuit's dismissal of this challenge based on mootness grounds was contrary to this Court's precedent, and there is a strong public interest in having the constitutionality of such mandates determined by the courts.

B. Respondents' Voluntary Cessation of the Mask Mandate Does Not Moot Petitioners' Challenge.

When a party seeks to escape liability by claiming that it has voluntarily ceased the offending conduct, "the *heavy burden* of persuading the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party*" seeking to avoid liability. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (internal quotations and citation omitted) (emphasis added).

As this Court noted, not only is a defendant "free to return to his old ways," *but also the public has an interest "in having the legality of the practices settled*." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953) (emphasis added); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, n.10 (1982).

Consequently, "[a]long with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *W. T. Grant Co.*, 345 U.S. at 633. Accordingly, a claim for injunctive relief may be improper only "if the defendant can demonstrate that 'there is no *reasonable*

expectation that the wrong will be repeated.' The [defendant's] burden is a *heavy one*." *Id.* (citation omitted) (emphasis added).

This Court has also instructed the lower courts to be particularly vigilant in cases *such as this*, warning that "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *Id.* at 632, n.5.

As the Court concluded, denying a plaintiff prospective relief "would be justified only if it were *absolutely clear* that the litigant no longer had *any* need of the judicial protection that it sought." *Adarand Constructors, Inc.*, 528 U.S. at 224 (emphasis added); *see also Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767-70 (6th Cir. 2019) (finding the challenge to a university's speech restriction not moot and stating that "[i]f the discretion to effect the change lies with one agency or individual, or there are no formal processes required to effect the change, significantly more than the bare solicitude itself is necessary to show that the voluntary cessation moots the claim").

Here, the Department of Health's cessation of the mask mandate was done unilaterally and not by a formal legislative process. Respondents are free to return to their old ways, and the public has a very strong interest in having the legality of the challenged restrictions settled. This challenge is not moot, and a federal court should decide the important constitutional claims presented.

II. Petitioners Have Standing to Challenge the Contact Tracing Program.

Similar to mootness, the justiciability doctrine of standing was abused in this case to avoid reaching a ruling on the merits of Petitioners' challenge to the contact tracing program.

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

As alleged in the First Amended Complaint:

> The challenged contact tracing program is not limited to COVID-19. Rather, Defendants have put in place a large, government infrastructure that can be utilized during any alleged health "crisis."

R-42, First Am. Compl. ¶ 149. This Orwellian program exists today. *Id.* Consequently, there is nothing moot about this challenge. The only question is whether Petitioners, *who were directly and personally harmed by this program and remain harmed by it*, have standing to advance their challenge. That is, whether Petitioners have suffered a redressable injury that is fairly traceable to this program.

Identifying *one* redressable injury, trifle or otherwise, is sufficient. *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 278 (3d Cir. 2014) ("In the context of a motion to dismiss, we have held that the [i]njury-in-fact element is not Mount Everest. The contours of the injury-in-fact requirement, while not precisely defined, are very generous, requiring only that claimant allege [ ] some specific, identifiable trifle of injury."); *Ross v. Bank of Am., N.A.*, 524 F.3d 217, 222 (2d Cir. 2008) ("Injury in fact is a low threshold . . . .").

As alleged in the First Amended Complaint:

> The contact tracing program has resulted in the government ([Respondents]) creating a large database of confidential, private, and, sensitive information about private individuals. This massive contact tracing database was subject to a serious data breach, thereby compromising the confidential, private, and sensitive information of countless numbers of Pennsylvanians, including [Petitioners].

R-42, First Am. Compl. ¶ 150; *see also id.* ¶ 123 (objecting to "being subjected to surveillance, having their personal medical records reviewed by the Department of Health, and being in the government's database").

Moreover, Petitioners did not volunteer to be ensnarled in the contact tracing program. There is nothing voluntary about it. Pursuant to the program, the government demanded the information from those required to report, and the information was sent *without* Petitioners' consent. *See, e.g., id.* ¶¶ 120, 123

(alleging, *inter alia*, that a positive test "triggers" contact tracing and that Petitioners object to being forced into the program). There is no dispute that the government demands cooperation with the contact tracing program, and if the person refuses, they are subject to penalty. *See id.* ¶¶ 114-18.

Additionally, following the district court's denial of Petitioners' request for a preliminary injunction based on the lower court's opinion that it was too speculative that any Petitioner would again be subjected to this program, Petitioners were, in fact, subjected to it. More specifically, the Redmans' minor son was subject to the contact tracing program when he returned to school—one of the fears the Redmans had with returning their children to school. *Id.* ¶¶ 124, 128, 134. The allegations regarding the Redmans' more recent entanglement with the contact tracing program, which further demonstrate the reasonableness of Petitioners' fears about the program and its harmful chilling effect, were not included in the original complaint nor were they in Petitioners' request for a preliminary injunction as they occurred after these filings. They were, however, included in the First Amended Complaint. *Id.* ¶¶ 133-44. Nonetheless, the Third Circuit subsequently rejected Petitioners' arguments.

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy v. James*, 408 U.S. 169, 181 (1972) (citations omitted). "[I]mplicit in

the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). As recently stated by this Court:

> When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The risk of a chilling effect on association is enough, because First Amendment freedoms need breathing space to survive.

Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021) (internal quotations and citation omitted).

A cognizable injury includes the chilling effect on the First Amendment right of association caused by forced disclosures, such as those required by the contact tracing program. *See Salvation Army v. Dep't of Cmty. Affairs*, 919 F.2d 183, 201 (3d Cir. 1990) (acknowledging that "forced disclosure may chill individuals from associating with a group"). The threat to quarantine under the contact tracing program was a penalty that hung over private associations like the Sword of Damocles, thereby chilling these associations and causing irreparable harm. Through the contact tracing program, the government uses its authority to inquire into and search out the private associations of individuals. The breadth of government power under this program forced Petitioners to keep their children from attending public schools in person (the public schools are required to follow the contact tracing

program and report contacts); to avoid seeking medical treatment (medical facilities are required to report); and to avoid businesses, restaurants, and other public or social events that may keep rosters, lists, videos or other ways to document persons who entered the business establishment or attended the event. The keeping of this contact information by businesses was required by the Governor's order. The program also forced the Redmans to avoid worship services, and it required the Parkers to maintain social distancing among family members living in the same household. R-42, First Am. Compl. ¶¶ 108-50.

Accordingly, the contact tracing program compelled Petitioners to change their behavior to comply with (or, more accurately, to avoid the sanctions of) this government program that impermissibly burdened their fundamental rights. *See Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 535-36 (6th Cir. 2011) (changing behavior to comply with future mandate requirements causes a present injury in fact); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 154 (1967) (stating that there was "no question that petitioners have sufficient standing" to challenge a regulation that would require "changes in their everyday business practices"). Petitioners need not wait for additional, future harm to occur to seek relief from a court. Indeed, when a challenged restriction chills rights protected by the First Amendment, the affected party has standing to challenge that restriction. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) ("The threat of sanctions may deter . . . almost as potently as the actual application of sanctions."); *Elrod*, 427 U.S. at 373 ("The loss of First Amendment freedoms, for even

minimal periods of time, unquestionably constitutes irreparable injury."); *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir. 1994) (recognizing that "a chilling effect on one's constitutional rights constitutes a present injury in fact").

Petitioners have also been injured by the fact that their personal information, including medical information, is now part of the contact tracing database as Petitioners have been the targets of this program, and this database has been shown to be susceptible to breaches of privacy. *See* R-42, First Am. Compl. ¶¶ 123, 150, 190. This harm could be remedied by declaring the program unconstitutional and ordering the government to expunge all of Petitioners' private information and records from the program. *See, e.g., Smith v. Nixon*, 807 F.2d 197, 204 (D.C. Cir. 1986) (stating that "a court may order expungement of records in an action brought . . . directly under the Constitution, without violating the intricate statutory provisions that purport to be the 'exclusive' means by which [government records] may . . . be alienated or destroyed").

In sum, the harm caused by this program is not "hypothetical"—it is real. And this harm is the natural and probable consequence of the intrusive, unchecked government program. Petitioners have standing to advance this challenge.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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