

CASE NO. 21-4021
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BENTKEY SERVICES, LLC
D/B/A THE DAILY WIRE,
Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
DEPARTMENT OF LABOR
Respondent.

BRIEF OF *AMICUS CURIAE*
THE GAVEL PROJECT
IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Corporate Disclosure Statement: 2.

Table of Authorities: 3.

Argument: 4–14.

References: 15–16.

Verification of Service: 17.

Certificate of Compliance: 18.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, The Gavel Project does not have a parent corporation, and no publicly held corporation owns more than ten percent of its stock.

TABLE OF AUTHORITIES

Spence v. Washington, 418 U.S. 405 (1974): 7.

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969): 7–8.

Thomas v. Collins, 323 U.S. 516, 530 (1945): 13.

United States v. O'Brien, 391 U.S. 367 (1968): 8, 12–13.

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943): 4, 6, 9–12.

ARGUMENT

1. NO BRANCH OF GOVERNMENT HAS THE AUTHORITY TO COMPEL CITIZENS TO COMPLY WITH COVID-19 MANDATES THAT, IN SUBSTANCE AND EFFECT, ARE MOTIVATED AND SUSTAINED BY THE POLITICAL WHIMS OF THOSE IN POWER.

No President, Governor, Executive Agency, or Legislature (neither state nor federal) has the authority to mandate that citizens (including businesses such as The Daily Wire) comply with vaccine mandates, nor do such institutions have the authority to generally force citizens to wear masks. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). The mere existence of SARS-COV-2 as a matter of public health does not endow politicians and government officials with such authority.

The intent behind medical mandates is marketed as a concern for “public health.” However, the constantly shifting stances of our public health officials and politicians abandons the notion that these mandates are data-driven -- they are motivated by personal gain. To say that American public health officials’ stances on COVID mitigation measures have been all over the map is an understatement. Below is a small sampling of notable contradictions by Federal Government officials on major aspects of COVID-19 mitigation policies.

- In a May 22, 2019 interview on the David Rubenstein show, Anthony Fauci dismissed the practice of wearing face masks to prevent disease as “paranoid.” (Bleau, June 2, 2021).
- In a February 2020 email, Anthony Fauci discouraged the use of personal face masks found in stores, writing that such masks were ineffective at stopping transmission of the coronavirus. (Richard, June 2, 2021). Today, Dr. Fauci is a staunch mask proponent. Less than a month ago, he claimed that COVID-19 case numbers need to go “way down”

before most vaccinated Americans can safely gather indoors maskless. (Salo, October 10, 2021).

- In April 2021, the Centers for Disease Control (“CDC”) publicly walked back Director Walensky’s prior claim that people vaccinated against COVID-19 were no longer contagious. (Guzman, April 2, 2021). Then, in August 2021, CDC Director Walensky publicly admitted on CNN that no COVID vaccine can prevent a person from getting or transmitting the disease. (Hains, August 6, 2021).
- In September 2021, the Food and Drug Administration (“FDA”) advisory panel on vaccines overwhelmingly rejected the expanded use of the Pfizer-BioNTech COVID vaccine. (Miller, September 17, 2021). Just days later, CDC Director Walensky unilaterally overruled the advisory panel. (Pezenik *et al.*, September 24, 2021).
- Upon the public realizing that the available SARS-COV-2 ‘vaccines’ did not “produce immunity” to COVID-19 and, thereby, “protect” individuals from the disease, the CDC fundamentally changed the government’s definition of the term ‘vaccine.’ (Steiber, November 3, 2021). Instead of “protecting the person from [a specific] disease[,]” a ‘vaccine’ now merely amounts to “[a] preparation that is used to stimulate the body’s immune response against diseases.” Note, the use of the former definition’s singular subject, ‘disease,’ and the latter use of the plural, ‘diseases.’ Meaning, that a substance now qualifies as a ‘vaccine,’ so long as it generally stimulates an immune response for any disease.

The constant hedging and contradictory policy statements issued by Director Walensky, alone, are enough to destroy the confidence generally given in government public health policy.

To believe anything the CDC Director says about COVID-19, after she personally contradicted her own statements, is to display a faith in public health officials that borders on religious devotion. That is, to blindly follow a public leader even in the presence of evidence that they are wrong. In an environment of historically low public confidence, Americans cannot be compelled to agree, by their physical compliance, with the opinions of “experts” who have repeatedly lied about nonexistent data supporting the necessity of these policies.

The inability of the “experts” to agree on policy, data, and messaging, coupled with the unmistakable partisan bent of those officials pushing COVID-19 mandates, places the decision of whether to comply squarely in the hands of individual American Citizens as a matter of opinion, conscience, and personal choice as protected by the First Amendment.

A. REGARDING MATTERS OF OPINION, CONSCIOUS, AND PERSONAL CHOICE, NO GOVERNMENT OFFICIAL, HIGH OR PETTY, MAY PRESCRIBE WHAT SHALL BE ORTHODOX.

When it comes to matters of opinion, conscience, and personal choice, the Supreme Court of the United States holds that no government official, high or petty, may prescribe what shall be orthodox. *Barnette*, 319 U.S. 624, 643. By its actions, the Biden Administration demonstrates that the Executive Branch’s decision-making regarding COVID-19 is driven entirely by its desire to compel orthodoxy—not science.

In the same breath, the Administration justifies its actions by claiming that: (1) the weight of available evidence demonstrates that COVID-19 vaccines are effective insofar as they protect fully-vaccinated individuals¹ from any statistically significant threat stemming from

¹ This is apparently true so long as the vaccinated individual continues to comply with the continuously shifting standard of what it means to be “fully-vaccinated.” How useful, after all, is a vaccine if it continuously requires boosters as is being recommended by the Biden Administration ahead of the FDA’s announcements?

breakthrough cases; and (2) the threat of COVID-19 is sufficiently dangerous to the vaccinated to justify forcing other citizens to make irreversible changes to their bodies. To the extent that the evidence supports the need for such actions, it has been gathered and and clearly manipulated² by the very officials now telling us to trust them. (Zweig, May 25, 2021; Schechtman *et al.*, May 25, 2021).

In effect, COVID-19 mandates require that individuals and businesses make a statement in how they respond. By acquiescing, one communicates a clear message: “I agree to abdicate all autonomy. I am incapable of making decisions. I am a subject. I am not free.” In effect, compliance conveys acceptance of the Government’s illegitimate claim of authority. Comparatively, refusing to comply sends an equally clear message: “I do not accept the State’s lies. I will make my own decisions. I am not a subject. I am free.” As a citizen entity, The Daily Wire is entitled to refuse to comply with

2. REFUSING TO COMPLY WITH THESE MANDATES AMOUNTS TO SYMBOLIC SPEECH SUFFICIENT TO INVOKE FIRST AMENDMENT PROTECTIONS

Expressive conduct sufficient to invoke First Amendment protections is generally speech without words. In *Spence v. Washington*, the Supreme Court explained that conduct is protected by the First Amendment if the action is intended to convey meaning, which is likely to be understood by a reasonable observer, based on the context of the situation. 418 U.S. 405, 410–11 (1974). In other words, one’s conduct is granted First Amendment protection if it is inherently expressive. *See e.g., Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969)

² It is worth noting that nearly all available evidence regarding the efficacy and dangers related to COVID-19 vaccinations was gathered (and often intentionally neglected) by the very Government Agencies seeking to justify their own fascist grab at unlimited power. Indeed, the systems established by the Government for gathering information from the population regarding the mortality rate associated with COVID-19 vaccinations, VAERS, appears to have been recklessly (or perhaps intentionally) constructed to gather untrustworthy evidence given that anyone can report to the system without any verification measures.

(wearing an armband in support of the Vietnam War is inherently communicative given the proper context); *United States v. O'Brien*, 391 U.S. 367 (1968) (burning the American Flag is protected speech because the action is inherently communicative).

Conduct that is not inherently expressive is not protected. For instance, without additional facts, burning a white flag in public is not expressive conduct. Comparatively, publicly burning a foreign nation's flag to protest its recent invasion of another country is expressive conduct. Similarly, the act of refusing to participate in both mask and vaccination mandates conveys a message of protest regarding the safety, efficacy, and necessity of such measures.

Notably, not all law-breaking is protected by the First Amendment, even if the actor intends to thereby convey meaning. *Id.*, at 376. Instead, the circumstances must be such that a reasonable person viewing the action would understand the refusal to convey the intended meaning.

For example, refusing to wear a seatbelt is not expressive conduct, regardless of communicative intent. Notably, COVID-19 mandates are comparable to seatbelt laws insofar as both are intended to protect citizens from the potential “public health” consequences of the recipient’s non-use. However, refusing to wear a seatbelt is not protected speech, even if the refusing party intends to convey meaning with the action. This is because a reasonable observer of such conduct, in nearly all imaginable contexts, would not view the act as inherently expressive. Rather, most observing the refusal would likely attribute the act to forgetfulness, laziness, stupidity, or otherwise. Comparatively, those witnessing The Daily Wire’s open refusal to comply with COVID-19 mandates, are likely to understand the action as conveying its intended meaning: “Let’s go Brandon!”

A. REFUSING TO COMPLY WITH COVID-19 MANDATES IS PROTECTED SPEECH BECAUSE, TO A REASONABLE OBSERVER TODAY, COMPLIANCE CONVEYS ACCEPTANCE OF THE IDEALS UNDERLYING THE MANDATE

In *Barnette*, the Supreme Court held that refusing to comply with a ceremonial act compelled by the State is free speech protected by the First Amendment if, to a reasonable observer, participation would convey acceptance of the ideals underlying the ceremony. 319 U.S. at 632.

In the early 1940s, the West Virginia State Legislature, “for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism,” directed the State Board of Education to “prescribe the courses of study covering these subjects for public schools.”³ *Id.*, at 638. In 1942, the West Virginia Board of Education adopted a resolution “ordering that the salute to the flag become a regular part of the program of activities in the public schools, that all teachers and pupils shall be required to participate in the salute [and offer the pledge of allegiance] honoring the Nation represented by the flag: provided, however, that refusal to salute the flag [and offer the pledge] be regarded as an Act of insubordination,” dealt with by expulsion. *Id.*, at 626–29 (some internal punctuation omitted).

Under the resolution, expelled students were denied readmission until compliance, and were considered “unlawfully absent” such that the child could be proceeded against as a delinquent and the parents could be liable to prosecution. If convicted, the parents could be punished with a \$50 fine and up to thirty-days in jail. *Id.*, at 629. No exceptions were provided from mandatory participation, and a number of Jehovah’s Witness students brought suit for

³ The Act also extended to private, parochial and denominational schools by requiring such institutions to prescribe similar courses of study.

injunctive relief declaring that the law violated their First Amendment rights by denying freedom of speech.

In *Barnette*, the Court concluded that forced participation in a ceremony (like the pledge of allegiance) amounts to a “symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas that [the flag] bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.” *Id.*, at 633.

Just like forced participation in a ceremony such as the pledge of allegiance communicates the participant’s acceptance of the ideals inherent to the flag (*e.g.*, patriotism, nationalism, etc.), one’s participation in a vaccination or mask mandate communicates acceptance of the political ideas that the mandates bespeak—that the vaccine is safe, effective, and that masks and vaccinations are the only justifiable solution to our current societal problems related to COVID-19 (that being, acceptance of the policies adopted in response to COVID-19 and the purported justifications for such policies).

Noting the conflict between the claimed authority of the State and individual autonomy, the Court explained that the constitutionality of the mandate hinged upon “whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution.” *Id.*, at 635.

In its analysis, the Court refused to consider the relative utility of the policy. In fact, the Court explained, “[w]hether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise

we would think it to be good, bad, or merely innocuous.” *Id.*, at 634. The Court further noted, the “validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents a question of power that must be considered independently of any idea [that a court] may have as to the utility of the ceremony in question.” *Id.* Thus, in considering whether a policy forcing participation in a ritual violates the First Amendment, the Court’s belief as to whether the policy is “good, bad, or merely innocuous[.]” is irrelevant. *Id.*

Given the contextual symbolism of the flag (*e.g.*, unity and nationalism), in connection with the forced salute and pledge of allegiance, the Court held that the mandate sought to compel speech in violation of the First Amendment. This is because participation in the ceremony amounted to “a form of utterance” on a matter of personal opinion given that participation constitutes acceptance of the ideals underlying the policy. *Id.*, at 632–33. Similarly, the ideals underlying vaccinations (efficacy, safety, risk benefit analysis, efficacy and safety of alternative treatments, etc.) are all profound matters of opinion. In effect, COVID-19 vaccination and mask mandates violate the First Amendment because, becoming vaccinated and wearing masks are “forms of utterances,” given that participation communicates acceptance of the ideals underlying these policies.

Unity on a political and opinion issues is “an end which officials may foster by persuasion and example[.]” *Id.*, at 640. However, unity on such matters may not be forced. The consequences of coercion are artfully explained by the Court in *Barnette*:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, *support of a dynasty or*

regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever increasing severity. Id.

The Court further explained, “[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only unanimity of the graveyard. *Id.*, at 641.

Clearly, compelled participation in a vaccination program exceeds the State’s constitutional limitations on its power as it “invades the sphere of intellect and spirit which is the purpose of the First Amendment of our Constitution to reserve from all official control.” *Id.*, at 642.

B. GIVEN THAT THESE MANDATES ABRIDGE THE FIRST AMENDMENT, THE GOVERNMENT BEARS THE BURDEN OF JUSTIFYING ITS ACTIONS UNDER INTERMEDIATE SCRUTINY ANALYSIS.

Under the First Amendment, if a law suppresses one's ability to engage in Free Speech, the burden shifts to the government to establish that: (1) the mandate is within the constitutional authority of the acting party; (2) the policy furthers an important or substantial government interest, (3) such interest is unrelated to the suppression of free speech, and (4) that any incidental restriction on the expressive conduct is no greater than is essential in furtherance of that interest. *O'Brien*, 391 U.S. at 377.

As an initial matter, it should be noted that the Federal Government cannot even satisfy the first prong of this analysis because police powers (*i.e.*, the authority of government to protect public health and safety) is expressly granted to the states by the Tenth Amendment of the United States Constitution. Setting aside the fact that the current Administration can cite no Constitutional justification for its authority to prescribe these mandates, even if these types of

mandates were to originate from a State or local Executive (*e.g.*, Governor, Mayor, City Council, or School Board) or Legislature (state or local), such still fail intermediate scrutiny analysis.

Irrespective of whether the State or Federal Government has the right to exercise police powers, it is axiomatic that “no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, only the gravest abuses, endangering [a] paramount [State] interest, give occasion for permissible limitation.” *Id.*, at 406 (citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). In other words, to justify an infringement upon the First Amendment, the Government must justify its actions by showing a “clear public interest, threatened not doubtfully or remotely, but by clear and present danger.” *Thomas*, 323 U.S. 516, 530.

Up until this point, the Biden Administration has refused to clearly define the objectives of — or necessity for — its “COVID-19 Action Plan.” (<https://www.whitehouse.gov/covidplan/>). Insofar as the Biden Administration defines its objectives, the Administration claims that the goal is to “combat COVID-19” and “save even more lives.” The Administration has not, however, clearly demonstrated that a public interest is threatened by a clear and present danger. Rather, the Administration merely asserts ambiguous and arbitrary goals as it seeks to nationalize millions of American bodies based on substandard evidence.

Conceding, *arguendo*, that the second prong of the constitutional framework is satisfied (given that public health and safety is an important and substantial government interest, at least of States), vaccination, masking, and testing mandates still fail the fourth prong of the analytical framework because one can easily conceive alternative regulations that would not incidentally restrict one’s capacity to free expression and choice. *Sherbert v. Verner*, 374 U.S. 398, 407

(1963). That various other therapeutic treatments for COVID-19 are widely available, is enough to demonstrate the unconstitutionality of COVID-19 health mandates.

CONCLUSION

Government actors lack authority to compel citizens to comply with mandates that are motivated solely by the whims of those in power. The government cannot prescribe acceptance of ideals on matters of opinion, conscious, and personal choice. Under our present circumstances, refusing to comply with COVID-19 mandates is expressive conduct protected by the First Amendment of the United States Constitution. Accordingly, because the subject mandate infringes upon the First Amendment rights of the Petitioner, the Government bears the burden of justifying its actions under intermediate scrutiny, which it cannot do because alternative solutions are conceivable to achieve its utterly ambiguous and arbitrary standard to save “even more” lives.

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VERIFICATION OF SERVICE

I certify that on November 8, 2021, I electronically filed the foregoing Motion with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties of record.

DATED: November 8th, 2021

THE GAVEL PROJECT



By: Ryan L. Heath
President & CEO
The Gavel Project

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that this document contains a total of 3,480 words (per the word count of the word-processing system used in its drafting).

DATED: November 8th, 2021

THE GAVEL PROJECT



By: Ryan L. Heath
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