THE BUYER'S FLYER

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IN THIS ISSUE:

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"Intelligence is the ability to adapt to change." ~ Stephen Hawking ~

There is question as to whether Stephen Hawking actually made the above statement. It is often attributed to Hawking, a brilliant theoretical physicist and cosmologist. You will find it on mugs, t-shirts and posters. Regardless of whether it came from Hawking or not, it is evidence of the intelligence of my peers. You have proven as much in your ability to adapt to change in the last four months. Kudos to each of you and may you continue to serve your entities with ingenuity and integrity in the coming months and years.

ETPA's New Website

ETPA's website has recently undergone a dramatic makeover, so if you haven't yet, please stop by and check out the new layout. While you're there, update your profile and upload a recent photo. With no in person meetings, it's very difficult to put names to faces making the photos very helpful to the ETPA leadership. Huge SHOUTOUT to Jolene Combs, ETPA's Webmaster, for her invaluable input into making this happen!

ETPA Online Forum

Don't forget, ETPA's Online Forum is available if you have questions that our member community could help answer. If you need resources we are here for you! Go to www.etpanews.org, login, go to Members, click on Forum under Quick Links, click Start a Thread at the top of the page and post your question. We look forward to hearing from you!

2020 ETPA Fall Conference

After a great deal of consideration, ETPA & TAPP have moved the Annual Joint Fall Conference to a virtual format for 2020. You will be seeing more information in the coming weeks, so please be sure to monitor our website and open your emails. We have great speakers and sessions in the planning phase and are looking forward to a creative annual social event - gone virtual, of course!

This year has been quite interesting! We appreciate the membership's resiliency and their commitment to ETPA. You make this organization great! Thank you!

We look forward to seeing you all very soon!

Stay Safe & Healthy!

Hazel

Member News & Announcements

Congratulations to Knox County on earning Accreditation for Quality Public Procurement Departments!!

Meet James McKeehan, the new Assistant Procurement Agent for the City of Knoxville.

James has a background in Retail Purchasing, acting as Senior Buyer and General Manager for Knoxville's oldest Outdoor Specialty Retailer for over nine years. Prior to working in retail management James worked in Television Production as a writer and producer. He as a Bachelor of Science Degree in Business and Technology from East Tennessee State University. When not working he can usually be found outside, boating, hiking, camping, running, or getting lost in the mountains.

Happy Retirement

Tom Seagle has been serving as the Construction and Contract Specialist for Knox County. Tom started his career with Knox County on April 27, 1992. After serving 28 years, Tom decided to retire on July 17, 2020. Congratulations on your retirement!!

2020 ETPA Leadership Team

President	Hazel Orick Gibson
Vice President	Jay Garrison
Secretary	Kris Davis
Treasurer	Lynn Farnham
Webmaster	Jolene Combs
Recognition Committee Chair	David Griffin
Newsletter Committee Chair	Nikisha Eichmann
Professional Development Committee Chair	Valerie Harless
Membership Committee Chair	Carol Maines
Outreach to other Professional Associations	Dustin Shearin
Reverse Trade Show Chairs	Heather Whitehead
Nominating Committee Chair	Brent Morelock
Mentoring Committee Chair	Penny Owens

We are still looking for one final position to fill for the Leadership Team. Please contact Brent Morelock, City of Kingsport, Or Hazel Gibson, Knoxville's Community Development Corporation, if you are interested in filling this position, we'd love to have you on the Leadership Team!

- **Fundraising Committee**
  The Fundraising Committee is a new committee developed to secure ETPA's sustainability well into the future. The committee will be responsible for planning specific fundraising events and activities and researching non-profit grant opportunities. The goal is for the committee to consist of 3 – 4 members and serve a term of 2 years. If you are interested in research (as in grant opportunities) or planning exciting events, this committee is for you!

STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

July 24, 2020

Opinion No. 20-14

Constitutionality of Governmental Mandate to Wear Face Coverings

Question

Is a governmental mandate that requires the general population to wear face coverings in public during a state of emergency caused by COVID-19 constitutionally permissible?

Opinion

As a general proposition, a governmental mandate that requires the general population to wear face coverings in public due to the health emergency caused by COVID-19 would be constitutionally defensible. The constitutionality of any particular governmental mandate, though, would depend on its specific terms and the underlying authority of the governmental entity issuing it.

ANALYSIS

The United States is in a public health crisis due to COVID-19.[1] On January 31, 2020, the United States Department of Health and Human Services determined that, as of January 27, 2020, COVID-19 constituted a nationwide public health emergency.[2] On March 11, 2020, the World Health Organization classified COVID-19 as a global pandemic.[3] The pandemic remains ongoing and is currently surging.[4]

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[1] COVID-19 is the infectious disease caused by the most recently discovered coronavirus, severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). *See* World Health Org., *Naming the Coronavirus Disease (COVID-19) and the Virus That Causes It*, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it (last visited July 16, 2020).

[2] *See* U.S. Department of Health & Human Servs., *Determination that a Public Health Emergency Exists*, https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx (last visited July 16, 2020).

[3] *See* World Health Org., *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19-11 March 2020*, *https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020* (last visited July 16, 2020).

[4] *See* Adam Martin, *As U.S. Surge in Coronavirus Cases Continues, Some States Tighten Rules*, Wall Street Journal, July 14, 2020, https://www.wsj.com/articles/coronavirus-latest-updates-071420-11594716924 (last visited July16, 2020).

Symptoms of COVID-19 can include fever, cough, shortness of breath, fatigue, loss of the senses of taste and smell, and body aches, among others.[5] And the health effects of the disease can be severe, including serious damage to the lungs and other internal organs, and death.[6] People with certain underlying health conditions and older adults have a heightened vulnerability to severe illness and death if they contract the virus.[7]

As of July 16, 2020, at least 3,416,428 people in the United States have been infected with the virus and over 135,991 people have died from the disease that it causes.[8] In Tennessee, there have been 68,441 confirmed cases, 3,434 hospitalizations, and 755 deaths[9] since the first case was reported by the Tennessee Department of Health on March 5, 2020.[10]

COVID-19 is particularly dangerous not only because it results in severe illness, but also because it is easily and rapidly transmitted. The disease is believed to be transmitted through respiratory droplets produced by an infected person, close personal contact, or touching a surface with the virus on it.[11] The virus spreads very easily through "community spread."[12] While infected individuals are thought to be the most contagious when they are showing symptoms, asymptomatic individuals are also capable of spreading the virus,[13] which makes response efforts particularly daunting. *See Mays v. Dart*, No. 20 C 2134, 2020 WL 1987007, at *2 (N.D. Ill. Apr. 27, 2020) ("Those who contract the virus may be asymptomatic for days or even for the entire duration of the infection but can still transmit the virus to others, making it more challenging to readily identify infected individuals and respond with necessary precautions.").

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[5] *See* Centers for Disease Control and Prevention, *Symptoms of Coronavirus*, https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (last visited July 16, 2020).

[6] *See* Meredith Wadman et al., *How Does Coronavirus Kill? Clinicians Trace a Ferocious Rampage Through the Body, from Brain to Toes*, Science, Apr. 17, 2020, https://www.sciencemag.org/news/2020/04/how-does-coronavirus-kill-clinicians-trace-ferocious-rampage-through-body-brain-toes (last visited July 16, 2020).

[7] *See* Centers for Disease Control and Prevention, *People Who Are at Increased Risk for Severe Illness*, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html (last visited July 16, 2020).

[8] *See* Centers for Disease Control and Prevention, *Cases in the U.S.*, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited July 16, 2020).

[9] *See* Tenn. Dep't of Health, *Tennessee COVID-19 – July 12, 2020 Epidemiology and Surveillance Data*, https://www.tn.gov/content/tn/health/cedep/ncov/data.html (last visited July 16, 2020).

[10] *See* Tenn. Dep't of Health, *TDH Announces First Case of COVID-19 in Tennessee*, https://www.tn.gov/health/news/2020/3/5/tdh-announces-first-case-of-covid-19-in-tennessee.html (last visited July 16, 2020).

[11] *See* Centers for Disease Control and Prevention, *How COVID-19 Spreads*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last visited July 16, 2020).

[12] *See* Centers for Disease Control and Prevention, *Frequently Asked Questions: Spread*, https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Basics (last visited July 16, 2020).

[13] *See supra* note 11.

Because there is currently no vaccine, cure, or proven effective treatment for COVID-19,[14] the best way to prevent illness is to avoid being exposed to the virus. The Centers for Disease Control and Prevention ("CDC") recommends frequent hand washing, maintaining good social distance (at least 6 feet), routinely cleaning and disinfecting frequently touched surfaces, and covering mouth and nose with a cloth face covering when around others.[15]

Tennessee's Response to the COVID-19 Pandemic

On March 12, 2020, Governor Lee declared a state of emergency in response to the COVID-19 pandemic. Since then, he has issued a series of emergency management executive orders designed to slow the spread of the disease and to protect the health of Tennessee residents.[16] The orders have been issued pursuant to the "emergency management" powers granted to the governor by the General Assembly. *See* Tenn. Code Ann. § 58-2-107; Tenn. Att'y Gen. Op. 20-07 (Apr. 27, 2020) (discussing the statutory sources of the Governor's emergency management powers, including his authority during this public health emergency to issue executive orders that have the force of law and his power to delegate authority to local governmental entities and local health departments). In issuing the orders, the Governor has relied on the advice of acknowledged health professionals and has considered data related to the rate and number of infections and hospitalizations in Tennessee.[17]

Pertinent here, on May 22, 2020, Governor Lee issued Executive Order 38 which provides, among other things, that people are strongly urged to wear face coverings in public in accordance with CDC guidelines. Executive Order 38 also authorizes the six counties with locally-run county health departments—i.e., Davidson, Hamilton, Knox, Madison, Shelby, and Sullivan—to issue "additional orders or measures related to the containment or management of the spread of COVID-19, which may permit to a greater degree, or restrict to a greater degree, the opening, closure, or operation of businesses, organizations, or venues in those counties or the gathering of persons," with certain exceptions, such as measures regarding places of worship.[18]

Executive Order 54, issued on July 6, 2020, expanded the scope of Executive Order 38 by specifically delegating authority to county mayors in the 89 counties that do not have locally-run county health departments to issue orders or measures requiring—with specified limitation—or recommending the wearing of face coverings within their jurisdictions. Executive Order 54 also

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[14] *See* Centers for Disease Control and Prevention, *How to Protect Yourself & Others*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited July 16, 2020); U.S. Food & Drug Admin., *COVID-19 Frequently Asked Questions*, https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-frequently-asked-questions (last visited July 16, 2020).

[15] *See supra* note 11.

[16] *See* Governor's Executive Orders Nos. 14-38, 49-54 found at https://sos.tn.gov/products/division-publications/executive-orders-governor-bill-lee (last visited July 16, 2020).

[17] *See id.*; Office of the Governor, https://www.tn.gov/governor/covid-19.html (last visited July 16, 2020).

[18] Executive Order 38 was recently extended until August 29 by Executive Order 50. Both orders found at https://sos.tn.gov/products/division-publications/executive-orders-governor-bill-lee (last visited July 16, 2020).

provides that nothing in Executive Order 38 (or Executive Order 54 itself) preempts or supersedes the authority of bodies in the six counties with locally-run county health departments to issue or enact orders, ordinances, rules, or laws regarding face coverings to mitigate the spread of COVID-19.

This extension of authority to local governmental entities to issue orders or measures that are more restrictive than those provided for by executive order has raised the question whether a governmental mandate to wear face coverings in public is constitutionally permissible.

Constitutionality of Governmental Mandates to Wear Face Coverings

For more than a century, the United States Supreme Court has recognized that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905). Moreover, during an epidemic, the traditional tiers of judicial scrutiny do not apply. *Id.*; *see The Local Spot, Inc. v. Lee,* No. 3:20-cv-00421, 2020 WL 3972747, at *2 (M.D. Tenn. July 14, 2020); *see also League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, No. 20-1581, 2020 WL 3468281, at *2 (6th Cir. June 24, 2020) ("All agree that the police power retained by the states empowers state officials to address pandemics such as COVID-19 largely without interference from the courts."). In these narrow circumstances, courts are to overturn only those orders that (1) have no "real or substantial relation" to protecting public health or (2) are "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Antietam Battlefield KOA v. Hogan*, No. CCB-20-1130, 2020 WL 2556496, at *5 (D. Md. May 20, 2020), appeal docketed, No. 20-1579 (4th Cir. May 22, 2020) (quoting *Jacobson*, 197 U.S. at 31).

A governmental mandate that requires the general population to wear face coverings in public due to the health emergency caused by COVID-19 satisfies this two-prong *Jacobson* test.[19] *First*, a governmental mandate to wear face coverings in public has a "real or substantial relation" to the COVID-19 health crisis. In considering whether a governmental measure has a "real or substantial relation" to a public health crisis, the inquiry is whether the measure is arbitrary or unreasonable. *Jacobson*, 197 U.S. at 28, 38. The governmental decision as to how best to protect the public is afforded great deference. Unless the measure adopted by the government is arbitrary or unreasonable, a court's interference is not justified. *Id. See The Local Spot,* 2020 WL 3972747, at *2.

The United States Supreme Court recently emphasized *Jacobson's* teachings regarding the limited role of courts when officials are responding to a public health crisis, especially when those "officials are actively shaping their response to changing facts on the ground." *South Bay*, 140

[19]Over the last few months, courts have regularly applied *Jacobson's* principles to uphold measures designed to prevent the spread of COVID-19. *See South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613, 1614 (2020); *League of Indep. Fitness Facilities,* 2020 WL 3468281, at *2; *The Local Spot,* 2020 WL 3972747, at *2; *Antietam Battlefield*, 2020 WL 2556496, at *5 *Calvary Chapel v. Mills*, No. 1:20-cv-00156-NT, 2020 WL 2310913 at *7 (D. Me. May 8, 2020), appeal docketed, No. 20-1507 (1st Cir. May 14, 2020); *Cassell v. Snyders*, No. 20 C 50153, 2020 WL 2112374, at *6-7 (N.D. Ill. May 3, 2020), appeal docketed, No. 20-1757 (7th Cir. May 6, 2020); *but cf. Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020) (enjoining enforcement of orders to close all organizations that were not "life-sustaining" because the restriction was "inexplicably" applied to some organizations, including plaintiff church, but not others).

S.Ct. at 1614. In denying an application for injunctive relief from a COVID-19 preventive measure, the Court said:

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S.Ct. 358, 49 L.Ed. 643 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974). 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. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985).

Id. at 1613-14.

Under these precepts, a measure requiring the general population to wear face coverings in public would have a "real or substantial relation" to the COVID-19 health crisis. Health professionals have advised that COVID-19 is "spread mainly through close contact from person to person," primarily "[t]hrough respiratory droplets produced when an infected person coughs, sneezes, or talks."[20] Face coverings reduce the chances that respiratory droplets containing the virus will infect others.[21] Even though some may be unconvinced that wearing face coverings is an effective way to thwart the spread of COVID-19, courts may not second-guess governmental officials when the measures they enact in response to a public health emergency are not arbitrary or unreasonable. *See South Bay*, 140 S.Ct. at 1613-14; *Jacobson*, 197 U.S. at 28.

Second, a governmental mandate to wear face coverings in public does not amount to a "plain, palpable invasion of rights secured by the fundamental law." Under the minimal scrutiny required by *Jacobson*, a governmental mandate to wear face coverings in public during the current COVID-19 health crisis does not amount to a "plain, palpable" invasion of clearly protected rights. *Jacobson* itself supports this conclusion. At issue in *Jacobson* was a law that required all adults to get a smallpox vaccination following a smallpox outbreak in Cambridge, Massachusetts. *Jacobson*, 197 U.S. at 12-13. The Court determined that "[w]hatever may be thought about the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution." *Id.* at 31. Requiring a person to wear a face covering during a comparable public health crisis is no more invasive—indeed is arguably less invasive—than requiring a person to be vaccinated.

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[20] *See supra* note 11.

[21] *See* Centers for Disease Control and Prevention, *About Cloth Face Coverings*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html (last visited July 16, 2020).

Even if traditional constitutional scrutiny applied, the governmental mandate would not impermissibly infringe on a person's constitutional right to liberty or freedom of speech.

Some members of society view a governmental requirement to wear a face covering as a threat to personal liberty, [22] a right guaranteed by the Fourteenth Amendment to the United States Constitution and by the Tennessee Constitution. The Fourteenth Amendment prohibits the deprivation of "liberty . . . without due process of law." Similarly, article I, section 8 of the Tennessee Constitution prohibits the taking of liberty without due process: "That no man shall be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land." The "law of the land" phrase is synonymous with the "due process of law" provision in the Fourteenth Amendment to the United States Constitution. *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997).

The liberties secured by the Constitution do "not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good." *Jacobson,* 197 U.S. at 26. Even the right to liberty—the "greatest of all rights"—is subject to constraints. *Id.* at 26-27; *Crowley v. Christensen*, 137 U.S. 86, 89-90 (1890). *See Kansas v. Hendricks*, 521 U.S. 346, 356-57 (1997). It is a "fundamental principle that persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state." *Id.* (internal quotations marks omitted). Thus, as the *Jacobson* Court found, a State has the authority to enact laws to protect the safety of its citizens in the face of an epidemic, including a vaccination mandate.

In sum, "the Constitution does not recognize an absolute and uncontrollable liberty." *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937). The liberty safeguard by the Constitution is "liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people." *Id.* Thus, liberty is subject to regulation that is reasonable in relation to its subject and is adopted in the interests of the community. *Id.*

Tennessee courts have regularly embraced the principles espoused in *Jacobson* and *West Coast Hotel* when considering governmental regulations concerning the health, safety, and welfare of the public. *See Mascari v. International Bhd. of Teamsters*, 187 Tenn. 345, 354, 215 S.W.2d 779, 782 (1948) ("In forbidding the deprivation of liberty without due process of law, the Constitution does not recognize an absolute and uncontrollable liberty, but a safeguarded liberty, in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people."); *State v. Greeson*, 174 Tenn. 178, 186, 124 S.W.2d 253, 256 (1939) (liberty rights are subject to give way to power of State to legislate if the object is preservation of public health, safety, morals or general welfare); *Moyers v. City of Memphis*, 135 Tenn. 263, 290, 186 S.W. 105, 112 (1916) ("The possession and enjoyment of

[22] *See* Sarah Mervosh et al., *Mask Rules Expand Across U.S. as Clashes over the Mandates Intensify*, The New York Times (July 17, 2020), https://www.nytimes.com/2020/07/16/us/coronavirus-masks.html (last visited July 17, 2020).

'liberty' and 'property' are, of course, subject to such reasonable conditions as may be essential to the safety, health, peace, good order, and morals of the community.").

For instance, challenges to Tennessee's mandatory safety belt law, Tenn. Code Ann. § 55-9-603, have been rejected. Requiring seat belts to be used did not violate the constitutional prohibition against taking liberty without due process. *State v. Crandall*, No. M2012-00299-CCA-R3-CD, 2012 WL 5378003 (Tenn. Crim. App. 2012); *McKinney v. Jarvis*, No. M1999-00565-COA-R9-CV, 2000 WL 279902 (Tenn. Ct. App. 2000).

Similarly, challenges to Tennessee's motorcycle helmet law, Tenn. Code Ann. § 55-9-302, have been rejected. *Arutanoff v. Metropolitan Gov't*, 223 Tenn. 535, 448 S.W.2d 408 (1969); *State v. Vaughn*, 29 S.W.3d 33 (Tenn. Crim. App. 1998). The challengers viewed the motorcycle helmet law as "encroaching on their fundamental right to be left alone vis-à-vis the State." *Vaughn*, 29 S.W.3d at 36-37. They insisted that the decision to wear a safety helmet should be a personal one and they viewed the law as "paternalistic legislation" that constituted an "unwarranted governmental intrusion" into citizens' lives. *Id.* at 37. The courts, however, found the law to be a regulatory safety measure that constituted a valid exercise of the State's police power. *Arutanoff*, 223 Tenn. at 539-43, 448 S.W.2d at 410-12; *Vaughn*, 29 S.W.3d at 37.

It follows that a challenge to a governmental face-cover mandate as violating the constitutional right to liberty is almost certain to be rejected by the courts. The face-cover mandate is likely to be held to be a reasonable regulation to mitigate the transmission of COVID-19 and would not constitute an unconstitutional infringement on liberty interests.

Some people object to wearing a face covering because, since they view the mask as a political and cultural symbol, they believe the government is compelling them to "speak" in a certain way, thereby infringing on their right of free speech.[23] The right to free speech is guaranteed by the First Amendment to the United States Constitution and by article I, section 19 of the Tennessee Constitution.

While a governmental mandate to wear face coverings in public does not regulate speech on its face, it does regulate conduct. The free speech protected by the First Amendment includes not just speech but also "expressive conduct." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 702 (1986) (First Amendment is implicated when a statute regulates conduct which has the incidental effect of burdening expression). Not all conduct, though, is protected speech under the First Amendment simply because the person engaging in the conduct "intends thereby to express an idea." *Id.* As explained by the United States Supreme Court, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the first protection of the First Amendment." *City of Dallas v. Stranglin*, 490 U.S. 19, 25 (1989).

To qualify as "expressive conduct" there must be an intent to convey a particularized message, which others are likely to understand. *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

[23] *See id.*

Wearing a face covering during the COVID-19 pandemic is first and foremost understood as a means of preventing the spread of the virus. Therefore, others would not likely understand that the wearer was displaying a particular political or cultural symbol. *See Antietam Battlefield*, 2020 WL 2556496, at *12 (rejecting First Amendment challenge to face covering requirement during COVID-19 pandemic on these grounds).

Even assuming that refusing to wear a face covering constituted conduct sufficient to implicate constitutional principles of free speech, a governmental mandate to wear a face covering in public during the COVID-19 pandemic would not violate the First Amendment.

The United States Supreme Court has held that

> when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms . . . a government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 376–77.

When the face-cover mandate is analyzed under the four-part *O'Brien* test, it survives a First Amendment challenge. First, the mandate is clearly within the State's power to protect the safety of its citizens against an epidemic. *See Jacobson*, 197 U.S. at 27. Second, the mandate serves the important governmental interest of protecting the safety of the public by mitigating the spread of COVID-19. *Id.* Third, the State's interest in protecting the safety of its citizens is unrelated to the suppression of free speech. The mandate's purpose is not to suppress expression; its purpose is to mitigate the spread of COVID-19. Fourth, the incidental restriction on freedom of expression imposed on those who do not wish to wear a face covering during the COVID-19 pandemic is no greater than necessary to further the State's interest. "[A]n incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985). Here, the State's interest in protecting the safety of the public would indeed be less effectively achieved without a mandate that requires the wearing of a face covering in public during the COVID-19 pandemic.[24]

Accordingly, a governmental mandate to wear face coverings in public during the COVID-19 pandemic is constitutionally defensible against a free speech claim.

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[24] The Tennessee Court of Criminal Appeals in *State v. Vaughn*, *supra*, applied the *O'Brien* test in an identical manner when it considered the challengers' claim that the motorcycle helmet law violated their right to free speech. *Vaughn*, 29 S.W.3d at 38–39. In similar fashion, the court determined that all four elements were easily satisfied. *Id.*

In sum, as a general proposition a governmental mandate that requires the general population to wear face coverings in public due to the health emergency caused by COVID-19 would be constitutionally defensible. The constitutionality of any particular governmental mandate, though, would depend on its specific terms and the underlying authority of the governmental entity issuing it.

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Tennessee Enacts New Construction Legislation in 2020
Bass Berry & Sims Publications
July 28, 2020
Firm Publication

The Tennessee Construction Industry Payment Protection Act was signed into law on June 22. The Act addresses or reallocates certain risks associated with non-payment on construction projects under Tennessee's Prompt Pay Act (PPA) and is intended to increase clarity and consistency in the PPA and in Tennessee's mechanics' lien law, Truth in Construction and Consumer Protection Act, and construction defect notice statutes, as well as amending Tennessee's statute of repose for construction and design defects.

The changes took effect July 1, and apply to actions occurring and contracts entered into, amended, or renewed on or after that date. Highlights of the Act include the following.

Clarifications Regarding Payment and Retainage Requirements
The PPA requires retainage to be deposited into a separate, interest-bearing escrow account with a third party and generally requires the release of retainage within 90 days after substantial completion of the project. Failure to comply with these requirements is a Class A misdemeanor, subject to potential criminal fines of $3,000 per day. Failure to properly escrow retainage also exposes the withholding party to civil damages of $300 per day. Revisions to the PPA include:

The civil damages accrue from the date retained funds were first withheld until properly escrowed or paid.
The bankruptcy or insolvency of a party is not an excuse for failing to release sums allocated by, or provided or committed to, an owner (including retainage) when those sums otherwise become due (note the federal Bankruptcy Code might affect this).
The fines and damages do not apply to public entities, including the state, counties, municipalities, the University of Tennessee, and other departments, agencies, and subdivisions of the state, or banks and financial institutions.

Injunctive Relief and Stopping Work
The PPA permits parties who have not timely received payment to send a notice to the nonpaying party. If the party does not respond within 10 days with "adequate legal reasons" for not paying, the unpaid party, among other things, may seek injunctive relief—presumably requiring payment. Previously, the unpaid party had to furnish a bond in double the amount claimed before obtaining injunctive relief. The multiple now has been removed, and the bond must equal the amount claimed. The PPA also now provides that an arbitration provision does not prevent a party from seeking injunctive relief in court.

New language also permits a party to stop work if it does not receive payment or adequate legal reasons for nonpayment and entitles the party to an extension of the contract schedule.

Contractors May Request Adequate Assurance of Owners' Financial Arrangements
A new provision requires a project owner, upon written request from the contractor, to furnish reasonable evidence the owner has procured a loan or made financial arrangements sufficient to make payments under the contract. The contractor also may include the request with a notice under the PPA (discussed above), and there is a statutory form for the notice that can be used. If the owner responds with reasonable

evidence of its financial arrangements, it may not materially vary those arrangements without prior notice to the contractor. The consequences of the owner's failure to respond to the request are unclear.

Interest on Late Payments

If a written construction contract does not include an interest rate for late payments, the default rate is now 1.5% per month (18% per annum). This rate was previously determined using the formula for interest on judgments, which, as of this writing, was 5.25% per annum.

Notice to Owner of Beginning Work No Longer Required on Commercial Projects

Before beginning work on any project, the Truth in Construction and Consumer Protection Act previously required a contractor to deliver a written notice to the owner it was about to begin improvements and there would be a lien on the property to secure payment. That section has been revised to apply only to improvements of residential real property (defined as a building consisting of one to four dwelling units where the owner intends to reside in one of the units).

Applicability of Construction Defect Notice Statute

Tennessee's construction defect notice statute has detailed procedures to be followed in seeking to remedy defects on commercial projects. Revisions now provide that the requirements do not limit or replace any rights, obligations, or duties under a contract that provides for notice and opportunity to cure construction defects. Those contractual provisions take precedence and are in lieu of any obligations or rights provided under the statute.

Applicability of Construction Statute of Repose

Under Tennessee's statutes of limitation and repose, "actions" to recover damages for deficiencies in the design and construction of improvements to real property generally must be brought within three years after the deficiency is discovered, but in no event later than four years after substantial completion. The four-year statute of repose, in addition to "actions," now includes "arbitrations" and "other binding dispute resolution proceedings" to recover such damages, all of which must be brought within the required period. A similar change was not made to the three-year statute of limitations, which still applies only to "actions."

Limitations of Liability Not Against Public Policy

A new provision states it is not against public policy for agreements related to the design or construction of improvements to real property to limit the liability of the person furnishing the labor, materials, or services to a reasonable monetary amount.

Lien Subordination Agreements Possibly No Longer Enforceable

A provision in the PPA states that certain provisions of the Act may not be waived by contract. Added to that list is the provision in the mechanics' lien statutes that establishes the time of attachment of mechanics' liens. Those liens attach upon "visible commencement of operations," which generally means the start of construction (with some exceptions). The intent of the addition is not clear, but it calls into question the enforceability of "subordination agreements," by which project lenders seek to assure the priority of their liens when construction has commenced before the recording of a mortgage or deed of trust.

If you have any questions about how this legislation will impact your company, please contact one of the authors or any member of the firm's Construction Contracts & Litigation Practice Group.

Brian Dobbs is a member at Bass, Berry & Sims PLC where he represents clients in the drafting and negotiation of construction and design contracts for real estate projects throughout the United States. Brian also defends clients in various types of construction-related claims and disputes, including contractor licensing matters, pre- and post-award bidding disputes, among other matters. He can be reached at bdobbs@bassberry.com.

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The authors would like to thank summer associate Bruce Johnson for his contributions to this article. Bruce is a law student at Vanderbilt Law School and is not licensed to practice law.

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Global Best Practices with Terry McKee

Terry McKee, CPPO, CPPB
Knoxville's Community Development Corporation IT & Procurement Director
The Public Housing and Redevelopment Authority for the City of Knoxville and County of Knox

The Evaluation Process for a Request for Proposals

Standard:

The receipt, handling, and evaluation of proposals must be carried out in accordance with all applicable laws, the process outlined in the Request for Proposals (RFP), as well as ethical principle including accountability, impartiality, professionalism, service and transparency. The entity must keep all proposals secure and must maintain the confidentiality of those proposals subject only to public records laws.

Key points:

- The Evaluation Committee:
  - The evaluation committee should be vetted in advance by the procurement professional to ensure that all members are free of bias or conflict of interest.
  - Evaluation committee members must possess the required expertise to apply the published evaluation criteria to identify the best value solution and recommend a proposal for award.
  - Members should be notified in advance of their involvement and the evaluation schedule.
  - The procurement professional should serve as the chairperson of the evaluation committee.
  - Local laws, entity policies and procedures will determine how the evaluation committee operates.
  - Committee members must act in a manner that best serves the public interest, ensures the fairness of the evaluation process, and does not manipulates or unfairly influences other team members.
  - All evaluation committee members, including procurement staff should sign a declaration of impartiality and non-disclosure before they are given the proposals and related RFP materials.

- Receipt and Responsiveness
  - Once the deadline for proposal receipt has passed, the proposer names are recorded and the proposals are reviewed for responsiveness.
  - Responsive proposals are then provided to members of the evaluation committee for review and evaluation according to the established criteria.
  - The procurement professional is responsible for steps in receiving and securing proposals including:
    - Documenting the date and time the proposals were received.

        - Safeguarding the unopened proposals in a secured location.
        - Maintaining confidentiality by ensuring that information concerning the identity and number of submissions is only made available to the public as required and to those entity employees involved in the evaluation process.
        - Rejecting any proposals received after the submission deadline.
    - The procurement professional must determine proposal responsiveness.
    - After the procurement professional has determined responsiveness, the proposals are then provided to members of the evaluation committee for evaluation and scoring.
    - If a proposal is rejected, the reasons should be documented in the evaluation report.

- Evaluation

  Following the check for responsiveness, the evaluation committee must use the published evaluation criteria to score the proposals.
    - Use a consistent approach when scoring each criterion and each proposal.
    - Record scores with the rationale or justification and include the scores with the evaluation report.
    - Provide written comments regarding each proposal's strengths and weaknesses.
    - Prices may be calculated by the procurement professional or considered by the evaluation committee in relation to the technical proposal.
    - After each member of the committee has completed initial scoring of the technical proposals, the committee may reconvene to discuss the scores.
    - Once discussions are completed, scores are finalized and recorded for the public record.
    - The committee then selects a short list of proposers that will be invited to give presentations or participate in interviews as established in the RFP.
    - After presentations and interviews have been completed, members of the evaluation committee may adjust their original scores and comments.
    - Before making the recommendation for award, the evaluation committee must determine if a proposer is responsible.

- Evaluation Report and Recommendation for Award

  In accordance with applicable laws, the evaluation committee will:
    - Issue the recommendation for award.
    - Have the chair prepare the evaluation report as justification for the recommendation for award.
    - Submit the report through the proper reporting/approval chains at the entity.

Take Away:

The behavior of the members of the evaluation committee and the evaluation process they follow directly impact the efficiency and effectiveness of the RFP process. Adherence to the guidance provided in this practice will ensure that evaluation committee members conduct a fair and impartial process thereby decreasing the likelihood of a protest filed due to conflicts of interest or perceived bias. Evaluating responsive proposals according to the published evaluation criteria will result in the selection of a responsible supplier that provides the entity with the best value proposal.

Treasurer's Report: January – December 2020

Lynn Farnham, CPPO, CPPB | Roane County

TREASURER'S REPORT
January - December 2020

January	Beginning Balance	24,724.96	May	Beginning Balance	23,711.08	Sep	Beginning Balance	
	Revenue	1,925.00		Revenue	475.00		Revenue/Adjustment	
	Expenses	(513.65)		Expenses	(105.83)		Expenses	
	Ending Balance	26,136.31		Ending Balance	24,080.25		Ending Balance	
February	Beginning Balance	26,136.31	June	Beginning Balance	24,080.25	Oct	Beginning Balance	
	Revenue	2,441.00		Revenue	0.00		Revenue	
	Expenses	(1,685.36)		Expenses	(156.75)		Expenses	
	Ending Balance	26,891.95		Ending Balance	23,923.50		Ending Balance	
March	Beginning Balance	26,891.95	July	Beginning Balance		Nov	Beginning Balance	
	Revenue	440.00		Revenue			Revenue	
	Expenses	(2,642.85)		Expenses			Expenses	
	Balance 3/12/2020	24,689.10		Ending Balance			Ending Balance	
April	Beginning Balance	24,689.10	Aug	Beginning Balance		Dec	Beginning Balance	
	Revenue	25.00		Revenue			Revenue	
	Expenses	(1,003.02)		Expenses			Expenses	
	Ending Balance	23,711.08		Ending Balance			Ending Balance	

BALANCES OF FUNDS AS OF 05/21/2020	
General Fund	1,429.59
Business Matching	5,000.00
Fall Conference	2,908.55
Scholarship*	13,000.00
Diversity Expo	1,742.11
TOTAL	**24,080.25**

Membership Information for 2019	
NIGP & Chapter Members	79
Chapter Only Members	45
Student Members	2
Retired Members	24
TOTAL MEMBERS	**150**

2020 AGENCY MEMBERS

Blount County	City of Kinsport	Metro Knoxville Airport Authority
Bristol TN E-911	City of Kinsport Schools	Morristown Housing Authority
Chattanooga Housing	City of Knoxville	Public Building Authority
City of Alcoa	City of Oak Ridge	Roane County
City of Bristol	Hamilton County	Roane State Community College
City of Chattanooga	Hamilton County DOE	Rutherford County
City of Clarksville	Johnson County	Rutherford County BOE
City of Cleveland	KCDC	Sullivan County
City of Decatur, AL	Knox County	Union County
City of Elizabethton	Knox County Sheriff	University of TN - Knoxville
City of Johnson City	Knoxville Utilities Board	UTK Facilities
	Loudon County	

*A transfer was made from the scholarship fund of $2666.30 to give the General Fund a positive balance.

Calendar of Events

Get ready for 2020, here we go!

August 13th	3rd Quarterly Meeting (Zoom)
August 23rd – 26th	NIGP Virtual Forum & Expo, Chicago, IL
October 28th – 30th	Virtual Fall Professional Development Conference, Pigeon Forge

September	October	November
Melinda Carroll – 1st City of Cleveland	Judy Peffley – 6th Blount County	Donnie Fawver II – 2nd Knox County
Dustin Shearin – 9th Johnson County	Terry McKee – 15th KCDC	Madelyn Kelly – 5th City of Decatur
Julie Maxwell – 10th Knoxville	Hugh Holt – 17th Knox County Sheriff's Office	Pamela Cotham – 6th City of Knoxville
Luis Garcia – 12th City of Knoxville	Lori Holmann – 22nd Knox County	Karisa Scott – 7th City of Knoxville
Valerie Harless – 17th Johnson City	Kristi Powers – 28th City of Cleveland	Tom Seagle – 10th Knox County
James Tucker – 26th Knoxville		Robert Genno – 17th Claiborne Count Finance
Michele Oran – 27th Roane State Community College		Roger Kane – 28th University of TN
Lynn Farnham – 30th Roane County		

August 13, 2020—3rd Quarterly Meeting

Date:	August 13, 2020
Time:	3:00 p.m.
Location:	Zoom
Educational Topic:	Supply Chain Disruptions
Speaker:	Zach Wise with Fastenal
Registration:	Join Zoom Meeting https://zoom.us/j/96780924167?pwd=YUlaTW5IR0pueW1iSTVCclYvc3paZz09 Meeting ID: 967 8092 4167 Password: 719965 One tap mobile +13126266799,,96780924167#,,1#,719965# US (Chicago) +16468769923,,96780924167#,,1#,719965# US (New York) Dial by your location +1 312 626 6799 US (Chicago) +1 646 876 9923 US (New York) +1 301 715 8592 US (Germantown) +1 346 248 7799 US (Houston) +1 408 638 0968 US (San Jose) +1 669 900 6833 US (San Jose) +1 253 215 8782 US (Tacoma) +1 647 558 0588 Canada +1 778 907 2071 Canada +1 438 809 7799 Canada +1 587 328 1099 Canada +1 647 374 4685 Canada Meeting ID: 967 8092 4167 Password: 719965 Find your local number: https://zoom.us/u/acgQ6Jc7m