

NOTE

Fashion, Fear, and the First: Why Neoteric Shiesty Mask Bans Are Unconstitutional

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The First Amendment to the United States Constitution safeguards citizens from governmental intrusions on their freedom of expression. This freedom protects an individual's right to express themselves through their clothing, irrespective of the expression's popularity amongst the people as a whole. Unfortunately, mask bans across the country have infringed on this right. Local governments have become convinced that they cannot protect their citizens without controlling their fashion. For this reason, mask bans have been implemented, notwithstanding their constitutional ramifications or their likelihood of further criminalizing Black men and other vulnerable groups. This Note identifies why such bans violate the First Amendment right to freedom of expression. In so doing, it aims to protect individual agency and freedom by redressing legal infringements on the art, creativity, and expressions of marginalized people.

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INTRODUCTION

In 1789, when the First Congress debated whether to add a Bill of Rights to the U.S. Constitution, there was considerable disagreement over what we now know as the First Amendment. Some representatives were convinced that the Amendment’s protections of speech and assembly were unnecessary because they were “self-evident, unalienable right[s] which the people possess,” “certainly a thing that never would be called in question,” and even “derogatory to the dignity of the House to descend to such minutiae.”¹ Thankfully, congressmen like John Page of Virginia had better judgment. Page responded with the following:

The gentleman from Massachusetts, (Mr. Sedwick,) who made this motion, objects to the clause, because the right is of so trivial a nature. He supposes it no more essential than whether a man has a right to wear his hat or not; but let me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights. If the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause.²

1. ANNALS OF CONG. 759 (1789) (Joseph Gales ed., 1834).

2. *Id.* at 760.

Today, it is unlikely that you will find anyone unwilling to acknowledge the wisdom of Congressman Page or the need to “guard against such stretches of authority.”³ This is because the federal government and state and local governments have routinely demonstrated their propensity to bow to the will of the majority of their constituents while simultaneously disregarding the rights of electorally inconsequential minorities. After all, in a democratic society with winner-take-all elections, it behooves any legislator seeking reelection to act in accordance with the will of the majority of their constituents, lest they get replaced by another. And since just about every demographic and interest group in our country has at some point been, or has felt like they have been, in the minority with regard to their voting strength or viewpoint on a controversial issue, constitutional declarations like those found in the First Amendment are paramount to ensuring that the loss of an election never amounts to the loss of liberty. Neoteric Shiesty mask bans are yet another flashpoint between these two Goliaths: the will of the majority and the safeguards of the Constitution.⁴ When, as here, minority rights are flagrantly disregarded, the Constitution unfailingly prevails.⁵

Part I of this Note details the rise of Shiesty masks in pop culture and the reasons many people wear them today. It begins by describing the longstanding stigmatization of hip-hop-inspired fashion, which is prevalent in the Black community. It explains how a young Black man from Memphis, Tennessee, informally known as Pooh Shiesty, became a hip-hop star and ignited this nationwide fashion trend.

In most cases, Shiesty masks are worn for the purpose of sending the message “*I wish to be concealed*” or “*I wish to remain anonymous*.” Part I therefore proceeds by highlighting recently enacted and proposed ordinances that ban masks worn for this purpose. It explains the circumstances that prompted these legislative efforts and recounts the hotly contested debates that followed.

3. *Id.*

4. Shiesty masks are face coverings, very similar to balaclavas, that conceal most of a person’s face while only leaving an opening for the wearer’s eyes. See Joel Umanzor, *How the ‘Shiesty’ Ski Mask Became the San Francisco Accessory of Choice*, S.F. STANDARD (Apr. 17, 2024, 4:03 PM), <https://sfstandard.com/2024/04/17/san-francisco-shiesty-mask-fashion-trend/> [<https://perma.cc/L3SS-S3C7>]. Shiesty masks began trending during the pandemic and are named after the rapper Pooh Shiesty, “who popularized the casual wearing of this type of ski mask.” *Id.* Because Shiesty masks have notoriously been used during the commission of crimes, several municipalities have sought to ban the masks. See *id.* The controversy surrounding these bans is the inspiration behind this Note.

5. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (First Amendment prohibits laws banning flag burning); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 537 (2001) (First Amendment prohibits funding restrictions prohibiting certain arguments); *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (First Amendment prohibits laws forbidding judicial candidates from announcing their views on disputed legal and political issues); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 557 (2011) (First Amendment prohibits laws restricting certain uses of pharmaceutical records); *Brown v. Ent. Merch. Assn.*, 564 U.S. 786, 805 (2011) (First Amendment prohibits restrictions on certain sales of violent video games to children); *Reed v. Town of Gilbert*, 576 U.S. 155, 159 (2015) (First Amendment prohibits codes restricting signs); *Minn. Voters All. v. Mansky*, 585 U.S. 1, 23 (2018) (First Amendment prohibits laws banning political apparel inside polling places).

Part II expounds on the constitutional implications of mask bans under the First Amendment's promise of freedom of expression. This Part explains the purpose and reach of freedom of expression and delineates how and when this constitutional protection may be extended to clothing and why Shiesty masks satisfy these prerequisites. Part II further explains why any attempt to include the messages masks deliver in a category of unprotected speech, specifically "true threats," is misguided. It then identifies the content-centered objectives of these bans that disqualify them as permissible time, place, and manner restrictions under the First Amendment. For this reason, Part II concludes by analyzing these violations under strict scrutiny, given that the referenced bans significantly impinge upon a fundamental right protected by the Constitution—freedom of expression under the First Amendment.

This Note focuses on a highly controversial issue that disproportionately impacts Black men.⁶ Since Shiesty masks are more commonly worn by Black men, these bans seem like yet another attempt to criminalize a group that has been unjustly targeted since our nation's inception.⁷ From the stigmas surrounding durags and hoodies, to the dress codes prohibiting baggy pants and sagging, to the mask bans we see today, our country has never ceased to disparage the fashion trends of Black men.⁸ But Black men are not alone. Mask bans endanger other vulnerable groups such as protesters, targeted celebrities, disabled and ill persons, and even past and prospective victims of violence. Thankfully for us all, we find refuge in the First Amendment.

I. THE ORIGINS OF BANS ON SHIESTY MASKS

A. THE STIGMATIZATION OF HIP-HOP-INSPIRED FASHION

Before discussing the popularization of Shiesty masks and the bans thereof, it is helpful to understand our nation's history of stigmatizing the fashion choices of Black people. In the past few decades, fashion trends have led us to substitute our overt declarations of freedom and liberty for covert expressions of prejudice and racism. In the 1980s, an uncle's choice to grow a mullet or Jheri curls was simply seen as reflective of their desire to be cool at the time, but now one's choice to wear a durag or baggy pants is seen as reflective of their desire to be a gangster. How did we get here?

6. See Sunny Sone, *The U.S.'s Far-Reaching, Dangerous History of Policing Fashion*, TRACE (June 30, 2023), <https://www.thetrace.org/newsletter/ski-mask-ban-racism-policing-fashion/> [<https://perma.cc/J75W-JPH2>].

7. See *id.*

8. See *id.*; Ernest Owens, *Banning "Shiesty" Ski Masks on SEPTA Won't Reduce Crime*, PHILADELPHIA (June 1, 2023, 1:15 PM), <https://www.phillymag.com/news/2023/06/01/ski-masks-shiesty-septa/> [<https://perma.cc/P8K7-NXSS>] ("Throughout my elementary-, middle- and high-school years, I encountered campus-wide bans on wearing Dickies cargo pants, bandanas, hoodies, earrings, neck chains, and any type of sagging pants.").

Many hold the rise of hip-hop music responsible for this change.⁹ Hip-hop music, known for its unfiltered and unapologetic articulations of the social issues, life experiences, and cultural trademarks of Black people, has been the subject of controversy since its inception.¹⁰ Many people view the musical genre as distasteful and even cancerous to our society due to its popularity and influence on our nation's youth.¹¹ They view hip-hop music as promoting a lifestyle that conflicts with their traditions, morals, and sense of decency.¹²

However, there are many who have a different outlook. Many hip-hop fans around the world have come to appreciate the genre for the very same reasons others hate it. They appreciate hip-hop artists' refusal to sugarcoat their messages or water down their personalities for broader acceptance.¹³ They view the success of hip-hop artists as emblematic of their dream of becoming successful while remaining true to themselves.¹⁴ Because of hip-hop, they believe that regardless of where they come from, they can make it in society without trading in their Jordans for oxfords.

So, they don't. Fashion, being one of the ways people most clearly convey their values and identity, has been one of the means hip-hop fans have exercised most in showcasing their allegiance, not just to the genre itself but to the sentiment for which it stands: that anyone can become successful without compromising their

9. See Antonia Sardone, *50 Years of Hip Hop: A Fashion Revolution*, UNIV. OF FASHION BLOG (Oct. 28, 2023), <https://www.universityoffashion.com/blog/50-years-of-hip-hop-a-fashion-revolution/> [https://perma.cc/565M-NE6P]; Max Berlinger, *How Hip-Hop Fashion Went From the Streets to High Fashion*, L.A. TIMES (Jan. 26, 2018, 12:20 PM), <https://www.latimes.com/entertainment/la-et-ms-ig-hip-hop-fashion-streets-couture-20180125-htmlstory.html>; Gene Demby, *Sagging Pants and the Long History of 'Dangerous' Street Fashion*, NPR: CODE SW!TCH (Sept. 11, 2014, 8:18 AM), <https://www.npr.org/sections/codeswitch/2014/09/11/347143588/sagging-pants-and-the-long-history-of-dangerous-street-fashion> [https://perma.cc/3CMS-D833]; Marvin Guevara, *The Battle Over Baggy Clothes/Teenagers Say They're Just Expressing Themselves by the T-Shirts and Jeans They Wear, but – as with Every Generation – Parents Still Give Them Grief Over It*, S.F. GATE (Sept. 22, 1996), <https://www.sfgate.com/bayarea/article/The-Battle-Over-Baggy-Clothes-Teenagers-say-2966036.php>; see also Manuel Roig-Franzia, *What Became of Trayvon Martin's Hoodie?*, WASH. POST (Mar. 17, 2022, 6:00 AM), <https://www.washingtonpost.com/lifestyle/2022/03/17/trayvon-hoodie-in-smithsonian/> (stating that Trayvon Martin's mother did not like her son wearing hoodies at first, "but came around once she realized that hoodies were in style for teenagers . . . where they lived," and that her son was simply "making a 'fashion statement'").

10. See Berlinger, *supra* note 9; *50 Years of Hip-Hop: Exploring the Transformative Influence of Hip-Hop on the Field of Social Work*, COLUM. SCH. SOC. WORK BLOG (Aug. 25, 2023), <https://socialwork.columbia.edu/news/50-years-hip-hop-exploring-transformative-influence-hip-hop-field-social-work> [https://perma.cc/E7T6-LRHU].

11. See Demby, *supra* note 9.

12. See *id.*

13. See Aaron P. Williams, *What Does Authenticity Mean in Today's Hip-Hop and How Much Does It Still Matter?*, MEDIUM (Aug. 23, 2018), <https://medium.com/@AaronSmarter/what-does-authenticity-mean-in-todays-hip-hop-and-how-much-does-it-still-matter-ae685b3e617c> [https://perma.cc/4UB9-2FM3] ("Rap audiences—and consequently, the major labels and media outlets that purvey the music to their potential consumers—have long insisted on authenticity as the cardinal rule of hip-hop. In hip-hop, 'keeping it real' is a badge of honor, prerequisite, and code of ethics all at once.").

14. See Mena Sancken, *The Power of Self-Love and Authenticity: Lessons from Hip-Hop Music on How to Stay True to Yourself*, JAQUAN GRAND (May 4, 2023), <https://www.jaquangrand.com/post/the-power-of-self-love-and-authenticity-lessons-from-hip-hop-music-on-how-to-stay-true-to-yourself> [https://perma.cc/7VQZ-LW3Z].

identity for others to accept. It is for this reason that when hoodies, baggy pants, sagging, durags, bandanas, and Shiesty masks became popular amongst hip-hop artists, they subsequently became popular amongst hip-hop fans.¹⁵ And since hip-hop's notoriety has only grown since its founding in the 1970s, so has the number of people imitating these trends.¹⁶

Unfortunately, so has the number of people seeking to restrict these trends. Schools, restaurants, and even municipalities have outlawed (or attempted to outlaw) these fashion choices in an effort to reinforce Eurocentric standards of decency.¹⁷ As justification for these restrictions, they say that these fashion trends are improper, unprofessional, and denotative of criminal activity.¹⁸ Such flimsy justifications for restricting the fashion choices of our fellow citizens have led me to great self-reflection. What is improper, and who gets to decide this? Furthermore, what makes something unprofessional? Most importantly, if a durag is indicative of being a drug dealer or gang banger, why isn't a three-piece suit indicative of participating in white-collar crime?

When weighing in on the issue, President Barack Obama agreed that these restrictions were "a waste of time."¹⁹ However, he emphasized that "brothers should pull up their pants" because "[s]ome people might not want to see [their] underwear, . . . [him being] one of them."²⁰ While I agree with President Obama that brothers should indeed pull up their pants, I recognize that my beliefs are simply just that, and I appreciate the fact that I live in a country whose founding documents champion such individuality. Therefore, I do not think people should feel compelled to conform to the fashion preferences of others simply because their choices make them uncomfortable, especially when the discomfort has seemingly prejudicial origins.

When it comes to Shiesty mask bans, I believe it is important to keep this context in mind. We should ask: Are these fashion trends hurting people, or merely

15. See Berlinger, *supra* note 9.

16. See Sardone, *supra* note 9.

17. See Demby, *supra* note 9; Tanasia Kenney, *California High School Students Stage Mass Walkout Over Policy Banning Durags*, ATLANTA BLACK STAR (Feb. 26, 2019), <https://atlantablackstar.com/2019/02/26/california-high-school-students-stage-mass-walkout-over-policy-banning-durags/> [<https://perma.cc/99J2-BC8H>]; Karolena Rubio, *Du-Rag Controversy Resolved: Administration Stops Enforcing Du-Rag Prohibition Following Student Advocacy*, OURCITY NEWS (Dec. 13, 2018), <https://web.archive.org/web/20201130224930/https://raidervoice.com/uncategorized/2018/12/13/du-rag-controversy-resolved/>; Nina Rangel, *Activist Says San Antonio Bar's Dress Code Banning 'Saggin' Pants and 'Durags' Is Anti-Black*, SAN ANTONIO CURRENT (Jan. 27, 2022, 11:00 AM), <https://www.sacurrent.com/food-drink/activist-says-san-antonio-bars-dress-code-banning-saggin-pants-and-durags-is-anti-black-28080004> [<https://perma.cc/684T-5G6B>]; Eric Sturgis, *Atlanta Task Force Against Saggy Pants Ban*, ATLANTA J.-CONST. (Sept. 5, 2010), <https://www.ajc.com/news/local/atlanta-task-force-against-saggy-pants-ban/Ln1B3FjS6ULf3kc1qeGY8M/> [<https://perma.cc/L3YH-XMJT>].

18. See Demby, *supra* note 9.

19. Clyde Haberman, *Can Obama Help Kill Baggy Pants Look?*, N.Y. TIMES (Nov. 13, 2008), <https://www.nytimes.com/2008/11/14/nyregion/14nyc.html>.

20. *Id.*; see also Larry Frankel, *Are Calls for the Death of Baggy Pants a Positive Sign of Obama's Governing Style?*, ACLU (Nov. 17, 2008), <https://www.aclu.org/news/free-speech/are-calls-death-baggy-pants-positive-sign-obamas-governing-style> [<https://perma.cc/E8TD-5D5N>].

making them uncomfortable? Are they posing a threat to anyone, or merely threatening the status quo? Because while it may be true that some of us are not particularly fond of hip-hop-inspired fashion trends, we should be “even less fond of policing what people wear.”²¹ This sort of acceptance is one that our fellow citizens deserve, but more importantly, it is what our Constitution demands.

B. THE RISE OF SHIESTY MASKS IN POP CULTURE

In response to the global pandemic, face masks permeated our society.²² Face masks became mandatory to prevent the spread of COVID-19 and are still considered effective safeguards against the virus and similar illnesses.²³ However, given that these safeguards are worn on a person’s face, they also offer a unique opportunity for self-expression, including the chance for an individual to express that they wish to remain concealed.

While face masks and COVID-19 were being introduced globally, so was Memphis-based rapper Pooh Shiesty. In November 2020, at the height of the pandemic, Pooh Shiesty released his hit single “Back in Blood” and became a well-known hip-hop figure throughout America.²⁴ The single went five-times platinum and was just the tip of the iceberg with regard to the commercial success he would soon realize.²⁵ In the following months, Pooh Shiesty dropped additional singles that, along with “Back in Blood,” would be included in his platinum-selling debut mixtape, “Shiesty Season.”²⁶ These included “Guard Up,” “Neighbors,” and “SUVs (Black on Black),” all going either platinum or gold themselves.²⁷ This commercial success led to sold-out performances across the country and appearances on nationally syndicated radio shows like “The Breakfast Club” in New York City.²⁸ In sum, all eyes were on Pooh Shiesty. He developed a dedicated fanbase, particularly amongst young Black men, who viewed his music as relatable and his success as inspirational.

21. Jennifer R. Povey, *The Controversy over Sagging Pants*, MEDIUM (May 17, 2021), <https://medium.com/the-illusion-of-choice/the-controversy-over-sagging-pants-70f5f977e30e>.

22. See Stephanie Kramer, *More Americans Say They Are Regularly Wearing Masks in Stores and Other Businesses*, PEW RSCH. CTR. (Aug. 27, 2020), <https://www.pewresearch.org/short-reads/2020/08/27/more-americans-say-they-are-regularly-wearing-masks-in-stores-and-other-businesses/> [https://perma.cc/27QG-TFUY].

23. Eram Abbasi, *State by State Face Mask Mandates*, LEADING AGE (June 9, 2022), <https://leadingage.org/state-state-face-mask-mandates/> [https://perma.cc/PE3S-5LUV].

24. See Chris Mench, *Chart Climber: How Pooh Shiesty & Lil Durk Found a Winning Street Rap Hit with “Back in Blood,”* GENIUS (Feb. 19, 2021), <https://genius.com/a/chart-climber-how-pooh-shiesty-lil-durk-found-a-winning-street-rap-hit-with-back-in-blood> [https://perma.cc/K63R-NR4T].

25. *Gold & Platinum*, RIAA, <https://www.riaa.com/gold-platinum/> (choose “Advanced Search”; then type “Pooh Shiesty” in Artist box; then hit “Search”) [https://perma.cc/Z59S-VJJ4] (last visited Oct. 28, 2024).

26. *Id.*; Brandon Callender, *Shiesty Season*, PITCHFORK (Feb. 10, 2021), <https://pitchfork.com/reviews/albums/pooh-shiesty-shiesty-season/> [https://perma.cc/JHD2-WQ9B].

27. See RIAA, *supra* note 25. “SUVs (Black on Black)” appeared on “Shiesty Season: Certified,” a subsequent edition of “Shiesty Season.”

28. Breakfast Club Power 105.1 FM, *Pooh Shiesty on Signing with Gucci Mane, Southern Energy, New Music + More*, YOUTUBE (Feb. 5, 2021), <https://www.youtube.com/watch?v=Bm5j6EHVvEU&t=998s>.

Hence, it is unsurprising that when Pooh Shiesty began wearing ski masks in his music videos and public appearances, his fans followed suit. In video after video, including his two platinum singles “Back in Blood” and “Neighbors,” Pooh Shiesty was seen sporting what are now commonly referred to as “Shiesty masks” or “Shiestys.”²⁹ It did not take long for Shiestys to trend amongst young people, particularly young Black men, as they provided a fashionable alternative to wearing the generic medical face masks that were popularized during the pandemic.³⁰

Today, Shiesty masks and balaclavas³¹ are worn by commoners and celebrities alike. Many have been attracted to them because they kill multiple birds with one stone: (1) similar to medical face masks, they offer protection from particles carrying infectious agents, such as bacteria and viruses;³² (2) they allow individuals to conceal their identity from those they do not wish to reveal it to;³³ and (3) they provide a platform to showcase one’s own sense of fashion.³⁴ Ultimately, these masks empower people by granting them sole discretion over how and how much they present to the strangers they come across in public spaces.

C. THE RISE OF MASK BANS IN STATE AND LOCAL GOVERNMENTS

Unfortunately, the above-mentioned empowerment has made many others fearful. Many people feel extremely uncomfortable about masks being used as a means of concealing one’s identity. Perhaps this is related to a deeper fear of Black men in general, given that they are the predominant group wearing these

29. See Pooh Shiesty, *Pooh Shiesty – Back in Blood (feat. Lil Durk)* [Official Music Video], YOUTUBE (Jan. 2, 2021), <https://www.youtube.com/watch?v=0-Tm65i96TY>; Pooh Shiesty, *Pooh Shiesty - Neighbors (feat. Big 30)* [Official Music Video], YOUTUBE (Feb. 4, 2021), <https://www.youtube.com/watch?v=xtJauZnp3xY>; Umanzor, *supra* note 4.

30. See Sone, *supra* note 6; 6abc Philadelphia, *Philadelphia’s Ski Mask Ban Becomes Law | Everything You Should Know About Possible Fines*, YOUTUBE (Dec. 15, 2023), <https://www.youtube.com/watch?v=XKDkncvJWa0>.

31. Balaclavas are similar to Shiesty masks in how they completely cover one’s face and are therefore also capable of sending the message “*I wish to be concealed*” or “*I wish to remain anonymous*.” See Leah Dolan, *Behold the Balaclava: Why a 19th-Century Army Accessory Has Taken Over Social Media*, CNN (Dec. 28, 2021, 4:19 AM), <https://www.cnn.com/style/article/balaclava-gen-z-internet-culture/index.html> [<https://perma.cc/39ZA-U7L9>]; André-Naquian Wheeler, *All the Cool Kids Are Wearing Balaclavas*, VOGUE (Feb. 14, 2023), <https://www.vogue.com/article/all-the-cool-kids-are-wearing-balaclavas> [<https://perma.cc/GT9T-NVGC>].

32. See Mayo Clinic Staff, *How Well Do Face Masks Protect Against COVID-19?*, MAYO CLINIC (Nov. 4, 2023), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-mask/art-20485449> [<https://perma.cc/C9ZT-67HJ>] (discussing the protections that cloth masks, which include Shiesty masks, provide). It should be mentioned that medical face masks are certainly more effective at protecting against infectious agents than Shiesty masks. See *id.*

33. See Wheeler, *supra* note 31.

34. See Nikki Main, *Masked Up: Why Does Kanye West Wear a Mask?*, U.S. SUN (Feb. 15, 2022, 10:12 AM), <https://www.the-sun.com/entertainment/4690742/why-does-kanye-west-wear-a-mask/> [<https://perma.cc/4EQ4-UCPM>].

masks.³⁵ Or perhaps this is related to a lack of understanding as to why anyone would wear, year-round and irrespective of the day's temperature, a garment traditionally designed for warmth in the winter. But most likely, their fear stems from the fact that masks have notoriously been used to avoid law enforcement detection during the commission of crimes, and some who wear Shiesty masks today have reenforced this stereotype.³⁶ This is especially true considering that Pooh Shiesty himself was arrested for firearms conspiracy in April 2021, right in the midst of Shiesty masks'—and his own—rise to fame.³⁷ He was convicted of these charges the following year, and now watches the controversy surrounding the masks he made famous unfold from a federal prison, where he is currently serving a five-year sentence.³⁸

But Pooh Shiesty was not the first to ignite a mask-wearing trend that led to categorical mask bans. In fact, neoteric mask bans create a strong sense of déjà vu. In 1845, New York enacted a mask ban to prevent vulnerable tenants from protesting attempts by state officials to collect back rent during the state's Renters' War.³⁹ About a century later, between 1950 and 1953, Georgia, Florida, North Carolina, South Carolina, and Virginia all enacted mask bans as part of an effort to finally combat the Ku Klux Klan.⁴⁰ As stated by the Supreme Court of Georgia, laws like the one enacted in Georgia were “preceded by a period of increased harassment, intimidation and violence against racial and religious minorities carried out by mask-wearing Klansmen and other ‘hate’ organizations. These groups operated as vigilantes and were responsible for numerous beatings and lynchings.”⁴¹

While each of these bans came in response to different problems, they have all been fiercely debated, as state and federal courts across the country have disagreed with regard to their constitutionality. And although this Note focuses exclusively on neoteric Shiesty mask bans, the decades-old jurisprudence determining the validity of bans in the past guides this Note's analysis now.⁴²

35. See Sone, *supra* note 6.

36. See Cierra Jordan, *Gas Stations Across Memphis Starting to Ban Facial Coverings*, FOX13 (May 1, 2024), https://www.fox13memphis.com/news/gas-stations-across-memphis-starting-to-ban-facial-coverings/article_a2019794-0800-11ef-8b04-2b820d0c965d.html [<https://perma.cc/2JFH-6BDY>].

37. See Press Release, U.S. Att'y's Off., S. Dist. of Fla., Rapper Pooh Shiesty Pleads Guilty to Federal Conspiracy Charge (Jan. 4, 2022), <https://www.justice.gov/usao-sdfl/pr/rapper-pooh-shiesty-pleads-guilty-federal-conspiracy-charge> [<https://perma.cc/WL66-QPCU>].

38. See Paul Meara, *Pooh Shiesty Issues Message from Prison*, BET (Oct. 11, 2023, 9:54 AM), <https://www.bet.com/article/qg568k/pooh-shiesty-issues-message-prison> [<https://perma.cc/K85L-AQUG>].

39. See Rob Kahn, *The Long Road Back to Skokie: Returning the First Amendment to Mask Wearers*, 28 J.L. & POL'Y 71, 89 (2019).

40. GA. CODE ANN. § 16-11-38; FLA. STAT. § 876.13; N.C. GEN. STAT. ANN. § 14-12.8; S.C. CODE ANN. § 16-7-110; VA. CODE ANN. § 18.2-422.

41. *State v. Miller*, 398 S.E.2d 547, 550 (Ga. 1990).

42. See *id.* at 553; *Gates v. Khokar*, 884 F.3d 1290 (11th Cir. 2018); *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004); *Ryan v. Cnty. DuPage*, 45 F.3d 1090 (7th Cir. 1995); *Hernandez v. Superintendent, Fredericksburg-Rappahannock Joint Sec. Ctr.*, 800 F. Supp. 1344 (E.D. Va. 1992); *Schumann v. New York*, 270 F. Supp. 730 (S.D.N.Y. 1967). But see *Am. Knights of*

The remainder of this Section lays out the mask bans that serve as the basis for this Note. The Southeastern Pennsylvania Transportation Authority (SEPTA) and the Philadelphia City Council have both enacted far-reaching mask bans criminalizing those who wish to wear them. The Atlanta City Council attempted to follow suit, but public outrage persuaded councilmembers to hold off at least for the time being. Though other municipalities have considered—and even enacted—mask bans in recent years, these three legislative efforts are responsible for setting the stage for the modern debate regarding mask bans, which is why this Note foremostly addresses them.

1. SEPTA Ban

The controversy commenced in May 2023, when the South Pennsylvania Transportation Authority (SEPTA) announced that Shiesty masks were banned from SEPTA property.⁴³ SEPTA's police chief Charles Lawson boldly proclaimed that "[i]f you come on SEPTA property wearing your [S]hiesty, you will be engaged by police."⁴⁴ When asked why, the Chief responded by saying that "[t]hese full-head coverings are a major issue because we are seeing it routinely being worn in 80-degree weather in Philadelphia. There is no legitimate reason, pandemic withstanding, to wear a full head covering in public for anything."⁴⁵ The ban came after video surveillance showed shootings and other crimes in Philadelphia involving individuals wearing masks, including a fatal shooting of a fifteen-year-old Philadelphia high school student on a SEPTA bus.⁴⁶

But there were those who spoke out against the ban. Philadelphia journalist Ernest Owens characterized it as "just another performative anti-crime stunt that won't change a damn thing."⁴⁷ To illustrate his point, Owens referenced an ordinance the city passed in 2000 banning facial coverings during the Republican National Convention, which the city hosted that year.⁴⁸ The ordinance was specifically enacted to "prevent known hate groups like the Ku Klux Klan from being able to 'intimidate or threaten another person' or 'hide' their identity when

the Ku Klux Klan v. City of Goshen, Ind., 50 F. Supp. 2d 835 (N.D. Ind. 1999); Church of Am. Knights of the Ku Klux Klan v. City of Erie, 99 F. Supp. 2d 583 (W.D. Pa. 2000); Aryan v. Mackey, 462 F. Supp. 90 (N.D. Tex. 1978); State v. Gates, 576 P.2d 1357 (Ariz. 1978); Robinson v. State, 393 So.2d 1076 (Fla. 1980); Ghafari v. Mun. Ct., 150 Cal. Rptr. 813 (Cal. Ct. App. 1978).

43. *Ski Masks Banned from SEPTA Property, Transit Police Chief Says: 'You Will Be Engaged by Police,'* FOX 29 PHILA. (May 25, 2023, 5:38 PM), <https://www.fox29.com/news/ski-masks-banned-from-septa-property-transit-police-chief-says-you-will-be-engaged-by-police> [https://perma.cc/4W4X-BAL5]. SEPTA is "one of the largest transit systems in the country." *About, SEPTA*, <https://www.septa.org/about/> [https://perma.cc/BZ5G-BRTF] (last visited Oct. 28, 2024). It "support[s] five counties in the Greater Philadelphia area" and "connect[s] to transit systems in Delaware and New Jersey." *Id.*

44. Andre Ellington, *Pooh Shiesty Namechecked by Philadelphia Authorities in Mask Ban Initiative*, HIP HOP DX (May 26, 2023, 9:15 PM), <https://hiphopdx.com/news/pooh-shiesty-philadelphia-authorities-mask-ban> [https://perma.cc/N62E-DH73].

45. *Id.*

46. See Owens, *supra* note 8.

47. *Id.*

48. *Id.*

attempting to harm residents.”⁴⁹ Owens argued that now looking back, “[b]anning hoods did no more to curb white supremacy than banning [S]hiestys will to reduce crime.”⁵⁰

The ban, which is listed on SEPTA’s website, reads as follows: “SEPTA bans . . . from its property . . . [which] includes, but is not limited to stations, vehicles stops, trains, buses, subways, and trolleys . . . [m]asks or other articles of clothing worn to disguise the wearer’s identity, except for bona fide religious observance or expression.”⁵¹

2. Philadelphia Ban

In December 2023, the Philadelphia City Council enacted a similar ordinance.⁵² The council introduced their mask ban proposal in June 2023, asserting that the prevalence of ski masks in Philadelphia “corresponded with an uptick of individuals wanted by the Police Department who wore ski masks in the commission of a crime.”⁵³ As proof, the council referred to several incidents between June 2021 and May 2023 where individuals wearing masks were either found, or suspected of, participating in shootouts that resulted in the deaths of teenagers throughout the city.⁵⁴ The council recognized that “[i]n most cases, perpetrators’ use of a ski mask to conceal their identity impeded law enforcement’s ability to identify and apprehend the individual,”⁵⁵ and that this was “both a public safety issue and a quality-of-life issue.”⁵⁶ Councilmember Anthony Phillips, who introduced the bill, expressed his belief that “[w]e move forward and we make progress as a people and city when we remove our masks and show who we are with all of our beautiful potential.”⁵⁷ The ordinance states:

No person shall, with the specific intent to intimidate or threaten another person, or with the specific intent to hide one’s identity during the commission of unlawful activity, wear a mask, hood, ski mask, balaclava, or other device or means of hiding, concealing, or covering any portion of the face for the purpose of concealing their identity on public property or private property in this City.⁵⁸

49. *Id.*

50. *Id.*

51. *Prohibited Items*, SEPTA, <https://www.septa.org/about/policies/prohibited-items/> [https://perma.cc/TM43-WR2H] (last visited Oct. 28, 2024).

52. See Anna Orso, *Philly Ski Mask Ban Becomes Law Without Mayor Jim Kenney’s Signature*, PHILA. INQUIRER (Dec. 14, 2023), <https://www.inquirer.com/news/philadelphia-ski-mask-ban-balaclava-20231214.html>.

53. PHILA., PA., ORDINANCE 230510 § 1(1).

54. *Id.* § 1(2).

55. *Id.*

56. *Id.* § 1(3).

57. Stay Tuned (@staytunednbc), INSTAGRAM (Dec. 1, 2023), https://www.instagram.com/reel/COVDqtXx3B_/?igsh=MXR6NzUzdXZIMWFhag== [https://perma.cc/6MMK-8UVN].

58. PHILA., PA., CODE § 10-613(1). As expounded in Section II.F., I take no issue with legislation of this kind, which criminalizes mask wearing only when it is specifically used to “intimidate,” “threaten,” or “hide one’s identity during the commission of unlawful activity.” *Id.* I invoke this portion of the ordinance only to demonstrate that the legislature’s objective was, and remains, to prevent masks that

It further demands that “[n]o person shall wear a ski mask or balaclava in any school building, recreation center, daycare, park, [c]ity-owned building, or on any mode of public transportation, including, but not limited to, buses, trains, trolleys, and subways.”⁵⁹ It lists only the following exceptions for when wearing a ski mask or balaclava is acceptable:

- (a) Wearing a traditional holiday costume; (b) Worn for a religious purpose;
- (c) Engaged in a trade or employment where they are worn for the purpose of ensuring the physical safety of the wearer; (d) In a theatrical production; (e) Protecting the wearer from the elements while participating in a winter sport; or (f) Lawfully engaged in First Amendment activities.⁶⁰

The ordinance’s enactment was not without criticism. Philadelphia Mayor Jim Kennedy decided neither to veto nor sign (endorse) the bill.⁶¹ Instead, he wrote to the council that the ban would be “difficult . . . to enforce” and that “wearing a ski mask by itself does not represent intent to engage in criminal activity.”⁶² Kennedy further voiced concern that the ban would disproportionately target young people of color, and that the council’s time could be better spent on prevention of gun violence itself.⁶³ As did Councilmember Jamie Gauthier, who tweeted after the vote, “I could not [in] good conscience vote for something that I feel criminalizes and marginalizes young Black men.”⁶⁴

A staff attorney from the American Civil Liberties Union, Solomon Furious Worlds, expressed similar discontent.⁶⁵ While testifying before the Council regarding the ordinance, Worlds emphasized that “[s]afety is important, but there’s no evidence to suggest that ski masks cause or encourage violent crime.”⁶⁶ Worlds further stated that “[i]f you’d like to address violent crime, I’d suggest housing, food assistance, childcare, things like that.”⁶⁷ Notably, Worlds also questioned the ordinances’ constitutionality by arguing that the ordinance “purports to give . . . officers the authority to stop civilians without suspicion of an

are worn “for the purpose of *concealing . . . identity*.” *Id.* (emphasis added). Their objective is evidenced further in the section of the ordinance that I do take issue with, which defines a “ski mask or balaclava” as “a closefitting garment *covering* the whole head and face.” *Id.* § 10-613(4) (emphasis added). This objective, while possibly permissible when coupled with intimidation, threats, or violent criminal activity, is categorically unacceptable standing alone. *See infra* Sections II.B–C.

59. PHILA., PA., CODE § 10-613(4). Notably, the ordinance’s “but not limited to” language leaves open the possibility of transportation other than “buses, trains, trolleys, and subways” being included within the provision’s reach. *See id.*

60. *Id.* § 10-613(5)(a)–(f).

61. *See* Chris Compendio, *Philly’s Ski Mask Ban Became Law Last Week, But There Are Questions About Its Effect—and Its Constitutionality*, PHILLYVOICE (Dec. 21, 2023), <https://www.phillyvoice.com/ski-mask-ban-philly-constitutionality-effectiveness-enforcement/> [https://perma.cc/8CHU-5GF9].

62. *Id.*

63. *Id.*

64. Councilmember Jamie Gauthier (@CouncilmemberJG), X (Nov. 30, 2023, 2:47 PM), <https://x.com/CouncilmemberJG/status/1730312656001654947> [https://perma.cc/7LYR-7GSC].

65. Compendio, *supra* note 61.

66. *Id.*

67. *Id.*

actual unlawful activity,” which “violates the U.S. and Pennsylvania [C]onstitutions’ requirement that officers have reasonable and particularized suspicion of criminal activity.”⁶⁸

3. Potential Atlanta Ban

Due to similar concerns, a potential mask ban brought forth in the Atlanta City Council failed to pass.⁶⁹ The proposed ordinance stated:

It shall be unlawful for a person to wear a ski mask, facial barrier covering, mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer and is upon any public way or public property or upon the private property of another without the written permission of the owner or occupier of the property to do so.⁷⁰

It offered only the following exceptions:

(1) A person wearing a traditional holiday costume on the occasion of the holiday; (2) A person lawfully engaged in trade and employment or in a sporting activity where a mask is worn for the purpose of ensuring the physical safety of the wearer, or because of the nature of the occupation, trade, or profession, or sporting activity; (3) A person using a mask in a theatrical production including use in Mardi gras celebrations and masquerade balls; or (4) A person wearing a gas mask prescribed in emergency management drills and exercises or emergencies.⁷¹

The proposal’s sponsor, Councilman Antonio Lewis, strongly believed it would hinder crime by making it more difficult for criminals to conceal themselves during the commission of crimes.⁷² But city residents responded to the proposal in uproar, accenting that the ordinance would increase racial profiling.⁷³ “The fact that any one of you took this proposal seriously is pathetic,” a resident told councilmembers during a meeting discussing the proposal.⁷⁴ Another stated, “I want to see systemic solutions that keep Atlanta residents safe, and this mask ordinance is not it If they’re committed to doing a crime, a mask ordinance is not going to stop them”⁷⁵ After the meeting, several councilmembers originally listed as co-sponsors of the proposal moved to rescind their sponsorship.⁷⁶

68. *Id.*

69. See Courtney Martinez, *Proposal to Ban Ski Masks, Hoodies in Atlanta Won’t Move Forward For Now*, YAHOO! NEWS (Dec. 12, 2023), <https://news.yahoo.com/proposal-ban-ski-masks-hoodies-130939967.html> [<https://perma.cc/4NUJ-VT7E>].

70. ATLANTA, GA., CITY COUNCIL PROPOSED ORDINANCE 23-O-1681 § 1(b) (2023).

71. *Id.* § 1(c)(1)–(4).

72. See Martinez, *supra* note 69.

73. See Joi Dukes, *Atlanta’s Proposed Ski Mask Ban Loses Support After Opposition From Residents*, FOX 5 ATLANTA (Dec. 12, 2023, 5:52 AM), <https://www.fox5atlanta.com/news/atlantas-proposed-ski-mask-ban-loses-support-opposition> [<https://perma.cc/8KCW-AMWB>].

74. *Id.*

75. *Id.*

76. Martinez, *supra* note 69.

As of December 2023, the council voted to table the proposal.⁷⁷ But Councilman Lewis remained adamant that “[i]t will come back as a changed piece. It will be ski masks. It will be public locations. That’s going to be a thing in the city of Atlanta we’ll be fighting for. It will come back.”⁷⁸

II. WHY SHIESTY MASK BANS VIOLATE THE FIRST AMENDMENT

Part II of this Note lays out the legal framework governing the constitutionality of mask bans. It begins by detailing the fundamental principles of the First Amendment and how far its protections extend. It then grapples with neoteric Shiesty mask bans and demonstrates why Shiesty mask wearers are entitled to First Amendment protection. It proceeds by expounding on why this entitlement is reasonable considering the Supreme Court’s age-old willingness to protect anonymity. It then illustrates the constitutional boundary separating protected First Amendment speech and the limited classes of unprotected speech; it then articulates why Shiesty masks deliver messages that fall into the former category. The final Section analyzes why the aforementioned ordinances and proposals are not permissible time, place, and manner restrictions under the First Amendment and why, therefore, they will fail under strict scrutiny.

A. THE FUNDAMENTALS OF THE FIRST AMENDMENT

The First Amendment to the United States Constitution commands that “Congress shall make no law . . . abridging the freedom of speech.”⁷⁹ This clause, as all others within our Bill of Rights, was specifically enacted to prevent a newly empowered federal government from overreaching into individual freedoms.⁸⁰ It anticipates that a sovereign government will attempt to forbid speech that it does not like and that a majority of the people may seek to silence the voices of the minority.⁸¹ For this reason, the First Amendment outlaws a “free speech for me, but not for thee”⁸² approach to legislating.

The right protects speech even if it is “unpopular and offensive.”⁸³ The guiding principle behind this comprehensive protection is our belief that the free and open exchange of diverse opinions fosters a more informed and democratic society.⁸⁴ Thus, even if speech is meritless, offensive, and downright stupid, it

77. *Id.*

78. *Id.*

79. U.S. CONST. amend. I.

80. See DAVID L. HUDSON JR., *LEGAL ALMANAC: THE FIRST AMENDMENT: FREEDOM OF SPEECH* 3 (2012) (“Many political leaders failed to support the [Constitution]; some because it gave too much power to the central government, and others because it failed to include a Bill of Rights.”).

81. See *id.* at 2.

82. *Id.* (quoting NAT HENTOFF, *FREE SPEECH FOR ME—BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER* (1992)).

83. *Church of the Am. Knights of the Ku Klux Klan v. Erie*, 99 F. Supp. 2d. 583, 592 (W.D. Pa. 2000).

84. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”).

remains helpful in allowing us to distinguish fact from fiction and right from wrong. And in 1868 we doubled down on this conviction by adopting the Fourteenth Amendment, which extended this constitutional mandate to state and local governments.⁸⁵

This means that in traditionally public forums across the entire country, such as “streets, sidewalks, and parks,”⁸⁶ all citizens can expect to freely and fully exercise their First Amendment rights. And even in non-public forums like military bases, airports, and, in our case, subway stations like SEPTA, officials are prohibited from regulating speech in hopes of silencing any “speaker’s viewpoint.”⁸⁷ When officials violate any of these constitutional mandates, they can rightfully expect courts to strike down their invalid regulation.

B. WHY SHIESTY MASKS ARE ENTITLED TO FIRST AMENDMENT PROTECTION

The First Amendment safeguards not only the nature of speech but also its means. This protection gives people the right to express their ideas through many mediums of their choosing.⁸⁸ The Universal Declaration of Human Rights states that freedom of expression fully encompasses the “freedom . . . to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁸⁹ And, if Congressman Page had not already made it clear, since 1969 the

85. John Bingham, U.S. Rep. from Ohio, *One Country, One Constitution, and One People* (Feb. 28, 1866) (transcript available from the Library of Congress at <https://tile.loc.gov/storage-services/public/gdcmassbookdig/onecountryonecon00bing/onecountryonecon00bing.pdf>) (“The [proposed Amendment] pending before the House is simply a proposition to arm the Congress of the United States . . . with the power to enforce the bill of rights as it stands in the Constitution today.”); *see also* *Gitlow v. New York*, 268 U.S. 652, 666 (1925) ([W]e may and do assume that freedom of speech . . . [is] among the fundamental personal rights and ‘liberties’ protected by the . . . Fourteenth Amendment from impairment by the States.”); *Timbs v. Indiana*, 586 U.S. 146, 156 (2019) (“[T]he First Amendment’s Free Speech Clause was ‘applicable to the States under the Due Process Clause of the Fourteenth Amendment.’” (quoting *Packingham v. North Carolina*, 582 U.S. 98, 101 (2017))); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 749 n.1 (1976) (“The First Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment.”).

86. Jordana Schreiber, *Begging Underground? The Constitutionality of Regulations Banning Panhandling in the New York City Subway System*, 27 CARDOZO L. REV. 1517, 1530 (2006).

87. *See id.* at 1531–33.

88. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507–08 (1969) (finding First Amendment rights in clothing); 303 *Creative LLC v. Elenis*, 600 U.S. 570, 600 (2023) (finding First Amendment protection in the works of “speechwriters, artists, and website designers”); *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (finding First Amendment protection in license plates); *Texas v. Johnson*, 491 U.S. 397, 399 (finding First Amendment rights in flag burning).

89. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. XIX (Dec. 10, 1948). The Universal Declaration of Human Rights was adopted by the United Nations General Assembly after World War II to formally articulate the rights that should be freely accessible to all human beings. *See generally* “My Most Important Task” *Eleanor Roosevelt and the Universal Declaration of Human Rights*, ROOSEVELT HOUSE, <https://www.roosevelthouse.hunter.cuny.edu/exhibits/my-most-important-task> [<https://perma.cc/BWQ2-AZRA>] (last visited Oct. 28, 2024). Due to her service as Chairman of the Universal Declaration of Human Rights Drafting Committee, First Lady Eleanor Roosevelt received a standing ovation from the United Nations General Assembly upon the Declaration’s adoption and was proclaimed “First Lady of the World” for her human rights achievements. *Id.*

Supreme Court has held that this right extends to the clothes an individual chooses to wear.⁹⁰

To activate this protection, clothes need only satisfy one requirement: they must be expressive.⁹¹ An article of clothing is expressive if it “convey[s] a message independently” of the other clothes being worn by an individual, such that the “expressive force of the [clothing]” is not “redundant” or “optional” to the message being conveyed.⁹²

For example, in *Church of the American Knights of the Ku Klux Klan v. Kerik*, the Second Circuit considered whether Ku Klux Klan masks, designed to be worn with the organization’s distinctive robes and hoods, were independently expressive and thus necessitated First Amendment protection.⁹³ The court answered no.⁹⁴ A unanimous panel—including then-Judge Sotomayor—held that the masks were not entitled to First Amendment protection because they did not “convey a message independently of the robe and hood.”⁹⁵ The court noted that “the robe and hood alone clearly serve[d] to identify the American Knights with the Klan,” and therefore, “the mask d[id] not communicate any message that the robe and the hood d[id] not.”⁹⁶ Accordingly, the court held that the masks were “redundant” and “optional.”⁹⁷ The court further justified its ruling by observing that “the Supreme Court ha[d] never held that freedom of association or the right to engage in anonymous speech entail[ed] a right to conceal one’s appearance in a public demonstration. Nor ha[d] any Circuit found such a right.”⁹⁸

However, applying the same reasoning, the Western District of Pennsylvania reached a different conclusion in *Church of the American Knights of the Ku Klux Klan v. City of Erie*.⁹⁹ This case involved a face-concealing *one-piece* hood without an independent or detachable mask.¹⁰⁰ Even though the case involved the same faction of the Klan as *Kerik*,¹⁰¹ the court held that the masks were protected by the First Amendment. The court reasoned that because the *one-piece* hoods came without an independent or detachable mask, they “constitute[d] a form of communicative speech” by being “an integral part of Plaintiffs’ regalia, not an

90. See *Tinker*, 393 U.S. at 510–11 (finding that targeting “black armbands worn to exhibit opposition to th[e] Nation’s involvement in Vietnam . . . is not constitutionally permissible”); see also *Cohen v. California*, 403 U.S. 15, 18 (1971) (finding free speech rights in the message a person’s “jacket reflected”).

91. See *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 205 (2d Cir. 2004).

92. *Id.* at 206–07.

93. *Id.* at 203.

94. *Id.* at 211.

95. *Id.* at 206.

96. *Id.*

97. *Id.* at 206–07.

98. *Id.* at 209. The Supreme Court denied the petitioner’s writ of certiorari. See *Church of the Am. Knights of the Ku Klux Klan v. Kelly*, 543 U.S. 1020 (2004).

99. 99 F. Supp. 2d 583, 592 (W.D. Pa. 2000).

100. *Id.* at 587 n.3.

101. Both cases concern the American Knights of the Ku Klux Klan. *Id.* at 584; accord *Kerik*, 356 F.3d at 199.

optional accessory.”¹⁰² The Court went on to note that the “public outcry” that followed these individuals underscored “public awareness of the traditional message known to be advocated by . . . the Ku Klux Klan.”¹⁰³

Although Shiesty masks are not indicative of white supremacy and bigotry, they are akin to the latter case. Unlike *Kerik*, the masks “convey a message independently” and are not “redundant” or “optional.”¹⁰⁴ For one to genuinely send the message “*I wish to be concealed*” or “*I wish to remain anonymous*,” they must cover their most identifying feature—their face—or their message will not be taken seriously, if it is even received at all. There is no other way for people to convey their wish to be concealed or anonymous without the mask, as no other article of clothing can send the message.

For example, if someone wore a t-shirt that in big and bright letters read, “*I wish to be concealed*” or “*I wish to remain anonymous*,” and they had nothing covering their face, a reasonable reader of their t-shirt might consider the message comical and unserious. The reason being that the person is a walking contradiction—the revealing of their face effectively nullifies their “*wish to be concealed*” or their “*wish to remain anonymous*.” But a mask changes this. With the mask alone, the person’s intended message is taken seriously because their action of wearing the mask conceals their identity and reflects the message “*I wish to be concealed*” or “*I wish to remain anonymous*.”

It should be further noted that neither of the above-mentioned cases was decided based on the threatening or offensive nature of the Ku Klux Klan’s regalia and message. In fact, the court in *City of Erie* recognized that “the mask will itself send a message which is intimidating or threatening to another person” but nevertheless it was “constitutionally protected, albeit unpopular and offensive.”¹⁰⁵ The court in *Kerik* similarly stated that “the First Amendment protects the rights of citizens to express their viewpoints, however unpopular.”¹⁰⁶

This is important to remember when evaluating holdings like that of the Eleventh Circuit in *Gates v. Khokar*.¹⁰⁷ There, a divided panel held that clothing is not entitled to any First Amendment protection if it is “reasonably foresee[able]” that it “would be viewed as intimidating.”¹⁰⁸ The court held that because the plaintiff was wearing a mask that “concealed his identity” during a “night-time protest,” in which he was ordered to remove the mask, the wearing of the mask in such circumstances was “sufficient by itself to suggest an intent to intimidate” and was, thus, not entitled to any First Amendment protection.¹⁰⁹ In so doing, the court focused solely on how the masks made others feel and disregarded the fact that a core purpose of the First Amendment is to protect speech that is foreseeably

102. *City of Erie*, 99 F. Supp. 2d at 587 n.3.

103. *See id.* at 587–88.

104. *Kerik*, 356 F.3d at 206–07.

105. *City of Erie*, 99 F. Supp. 2d at 592.

106. *Kerik*, 356 F.3d at 209.

107. 884 F.3d 1290 (11th Cir. 2018).

108. *See id.* at 1301.

109. *See id.*

disliked.¹¹⁰ The Eleventh Circuit failed to even pay lip service to the idea that the clothing actually expressed a constitutionally protected message. In fact, the word “express,” or any derivative thereof, is only used once in the entire majority opinion, and that is simply to state what the plaintiff’s own argument was.¹¹¹ As explained in the dissent, not only is “non-threatening political mask-wearing . . . clearly protected,” “non-criminalized, peaceful self-expression cannot be characterized as ‘threatening’ and stripped of constitutional protection simply because a police officer orders [a person] to stop” engaging in it.¹¹²

As in *Gates*, many would like to outlaw Shiesty masks because they cause confusion and fear. As exemplified by SEPTA’s Police Chief’s concern over the masks being worn in eighty-degree weather, many do not believe the masks are deserving of First Amendment protection because they do not believe a mask delivers a message with any meaningful purpose.¹¹³ Simply put, people do not understand why an individual would wish to conceal themselves and remain anonymous unless they are up to no good.¹¹⁴

Despite the fact that the First Amendment does not require us to go out of our way to explain our expressions, I urge those genuinely concerned to consider the reasoning of National Football League player David Njoku.¹¹⁵ While trying to light a firepit at his home, Njoku sustained significant injuries, including extreme burns to his face and arms.¹¹⁶ Instead of revealing his wounds to overly ambitious paparazzi and media personnel, Njoku decided to wear a mask to conceal himself during his walks to and from the locker room before and after games.¹¹⁷ Njoku recognized that his helmet could cover his wounds during games, but not at any other time. The masks empowered Njoku with privacy over his wounds and safeguarded his vulnerabilities from the public eye. But this is not novel or unique to Njoku’s situation. Many others wish to conceal themselves or remain anonymous

110. See Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 427 (2009) (identifying “the protection of unpopular viewpoints” as a “core First Amendment value[]”).

111. *Gates*, 884 F.3d at 1295.

112. *Id.* at 1308 n.6, 1309 (Williams, J., dissenting).

113. See Ellington, *supra* note 44.

114. See, e.g., Fed Up, Comment to Ellington, *supra* note 44 (“If you see someone wearing a . . . [Shiesty mask] you know they are hiding their identity because they are up to no good . . . WHAT DO YOU HAVE TO HIDE? Just like if YOU saw somebody wearing a white hood and holding a burning cross, you WOULD know they’re up to no good . . .”).

115. See generally Jack McKessy, *Browns TE Njoku Drops Mask, Shows off Facial Burns in Latest Instagram Post*, USA TODAY (Oct. 12, 2023, 10:44 AM), <https://www.usatoday.com/story/sports/nfl/browns/2023/10/12/david-njoku-burns-instagram-cleveland-browns-te/71152837007/> [<https://perma.cc/BU3H-RWX4>].

116. See Jake Trotter, *Browns TE David Njoku Questionable Due to Burn Injuries*, ESPN (Sept. 30, 2023, 1:27 PM), https://www.espn.com/nfl/story/_/id/38528715/browns-te-david-njoku-questionable-due-burn-injuries [<https://perma.cc/YC5R-QYQ9>].

117. See McKessy, *supra* note 115.

in public, due to audacious paparazzi, disabilities, or being the victims of violence.¹¹⁸ And masks alone give them the ability to do so.

C. ANONYMITY IS PROTECTED BY THE FIRST AMENDMENT

The Supreme Court “has long recognized that, under certain circumstances, anonymity may be essential to the exercise of constitutional rights.”¹¹⁹ As the Court held in *McIntyre v. Ohio Elections Commission*, “the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry,”¹²⁰ and thus “an author’s decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment.”¹²¹ As a lower court has stated, “[s]erious First Amendment question[s] arise . . . when there is such a nexus between anonymity and speech that a bar on the first is tantamount to a prohibition on the second.”¹²²

Here, actual anonymity is necessary to deliver the message “*I wish to be concealed*” or “*I wish to remain anonymous*.” In fact, being anonymous and delivering these messages are mutually inclusive. Shiesty masks are “anonymous works”¹²³ because wearing them produces expressions that can only be delivered under the guise of anonymity. Thus, there is a strong “nexus between anonymity and [the message “*I wish to be concealed*” or “*I wish to remain anonymous*” such] that a bar on the first is tantamount to a prohibition on the second.”¹²⁴

Supreme Court precedent reaching back over sixty years speaks directly to this point.¹²⁵ In 1958, the Court in *NAACP v. Alabama* held that it is unconstitutional for a state to force organizations to disclose the identities of their members.¹²⁶ The Court found that the “revelation of the identity of [the NAACP’s] rank-and-

118. See, e.g., Merle Ginsberg, *Masks Are a Blessing for Celebrities—and a Nightmare for Paparazzi*, L.A. MAG. (Dec. 17, 2020), <https://lamag.com/celebrity/masks-celebrities> [<https://perma.cc/9SP3-UDTD>] (“For certain celebrities, face masks don’t just offer protection, they offer freedom.”); Ariel Henley, *Wearing a Mask Helps Me Blend In, But My Facial Disfigurement Makes Me Who I Am*, WASH. POST (July 4, 2020, 11:29 AM), <https://www.washingtonpost.com/gender-identity/wearing-a-mask-helps-me-blend-in-but-my-facial-disfigurement-makes-me-who-i-am> (discussing stories of three people and their relationship to masking due to their appearance); D3HAV3N, Comment to Ellington, *supra* note 44 (“Say you need to get through a neighborhood with people that don’t like you or want to harm you . . . you would put on a [S]hiesty to hide your identity to avoid conflict.”).

119. See *State v. Miller*, 398 S.E.2d 547, 552–53 (upholding Georgia’s mask statute, but emphasizing that “it would be absurd to interpret the statute to prevent non-threatening political mask-wearing”).

120. 514 U.S. 334, 342 (1995); see also *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 275–76 (2003) (Thomas, J., concurring); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 480 (2010) (Thomas, J., concurring in part and dissenting in part) (“Congress may not abridge the ‘right to anonymous speech’ based on the ‘simple interest in providing voters with additional relevant information.’” (quoting *McConnell*, 540 U.S. at 276 (Thomas, J., concurring))).

121. *McIntyre*, 514 U.S. at 342.

122. *Am. Knights of the Ku Klux Klan v. City of Goshen, Ind.*, 50 F. Supp. 2d 835, 840 (N.D. Ind. 1999) (citing *Aryan v. Mackey*, 462 F. Supp. 90, 92 (N.D. Tex. 1978)).

123. *McIntyre*, 514 U.S. at 342.

124. *City of Goshen, Ind.*, 50 F. Supp. 2d at 840 (citing *Aryan*, 462 F. Supp. at 92).

125. See, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958); *Talley v. California*, 362 U.S. 60, 65 (1960).

126. 357 U.S. at 462–63.

file members . . . exposed these members to economic reprisal[s], loss of employment, threat[s] of physical coercion, and other manifestations of public hostility.”¹²⁷ The Court reasoned that under those circumstances, “compelled disclosure of [the NAACP’s] Alabama membership is likely to *affect adversely* the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate.”¹²⁸

Two years later, in *Talley v. California*, the Court struck down a Los Angeles city ordinance that forbade the distribution of anonymous handbills.¹²⁹ As support for their conclusion, the Court explained: “Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.”¹³⁰ The Court concluded that the ordinance therefore violated the First Amendment because “such an identification requirement would tend to restrict . . . freedom of expression.”¹³¹

NAACP and *Talley* demonstrated a willingness to protect anonymity, not because it was deserving of protection in and of itself, but because leaving it unprotected could “affect adversely”¹³² other unquestioned freedoms, such as the freedoms of expression and association. As in these cases, the “identification requirement”¹³³ posed by Shiesty mask bans does indeed “affect adversely”¹³⁴ the right of the people to send the constitutionally protected message “*I wish to be concealed*” or “*I wish to remain anonymous.*” These messages are protected under the First Amendment because there is no law or exception capable of barring an individual from going to their local park and telling the first person they see, “*I wish to be concealed*” or “*I wish to remain anonymous.*” Furthermore, individuals are not just free to deliver these messages orally, but they may also do so through their clothing. However, as discussed earlier, since these declarations have no genuine effect unless coupled with the state of anonymity,¹³⁵ clothing, by way of a mask, *must* be utilized as it is the only means to achieving such an end. As in *NAACP* and *Talley*, since Shiesty masks provide the anonymity necessary to effectively deliver constitutionally protected messages, courts must strike down ordinances that ban the means (Shiesty masks) necessary to achieving the end (delivering constitutionally protected speech).

Just like our Framers, who employed anonymity when publishing the Federalist Papers,¹³⁶ those who wear masks to conceal themselves today often do so for good reason. In an era where political ideologies and social advocacy may

127. *Id.* at 462.

128. *Id.* at 462–63 (emphasis added).

129. 362 U.S. at 65.

130. *Id.*

131. *Id.* at 64.

132. *NAACP*, 357 U.S. at 462.

133. *Talley*, 362 U.S. at 64.

134. *NAACP*, 357 U.S. at 462.

135. *See supra* Section II.B.

136. *Talley*, 362 U.S. at 65.

lead to school expulsion and a lack of employment, protestors have found anonymity necessary to freely exercise their First Amendment rights.¹³⁷ But that is just the tip of the iceberg. Those who suffer terrible accidents that leave their face with permanent scars, those with disabilities that paralyze or swell portions of their face, those who experience illnesses that attack the skin on their face, those who fear going anywhere in public due to paparazzi's refusal to leave them alone, and those who have suffered domestic abuse at the hands of someone they love are all likely recipients of "public hostility."¹³⁸ Whether it be for fear of judgment or personal insecurity, these individuals have strong reasons for wishing to conceal themselves, just like our Framers who anonymously published the Federalist Papers. That said, the mere desire to convey the message "*I wish to be concealed*" or "*I wish to remain anonymous*" ought to suffice, regardless of the reasoning behind it, so long as the reasons are lawful.

D. SHIESTY MASKS DO NOT CONSTITUTE "TRUE THREATS"

Shiesty masks do not deliver messages that are unprotected by the First Amendment. The First Amendment protects all speech apart from that which is (1) obscene,¹³⁹ (2) child pornography,¹⁴⁰ (3) fighting words,¹⁴¹ (4) incitement,¹⁴² (5) or true threats.¹⁴³ These classes of speech are unprotected by the First Amendment because they are all potentially harmful and fail to meaningfully contribute to the marketplace of ideas.¹⁴⁴ Shiesty masks are self-evidently not obscene, child pornography, nor do they in and of themselves constitute fighting

137. See, e.g., Annie Nova, *Student Protesters Facing Disciplinary Action May Also Deal with Financial Setbacks*, CNBC (May 7, 2024, 6:00 PM), <https://www.cnbc.com/2024/05/07/college-protests-some-students-may-also-face-financial-setbacks.html> [<https://perma.cc/DCQ8-AYD2>] (detailing expulsion of students protesting Israel's actions against Palestine); David Thomas, *Divisions Mount over US Law Firms' Response to Israel-Hamas War*, REUTERS (Nov. 14, 2023, 4:54 PM), <https://www.reuters.com/legal/legalindustry/divisions-mount-over-us-law-firms-response-israel-hamas-war-2023-11-14/> (stating that law firms have fired and rescinded offers from individuals publicly supporting Palestine or criticizing Israel); Adrian Chen, *19th Century Law Banning Masks Used to Arrest Wall Street Protesters*, GAWKER (Sept. 21, 2011, 11:21 AM), <https://www.gawkerarchives.com/5842507/19th-century-law-banning-masks-used-to-arrest-wall-street-protesters> [<https://perma.cc/G6TR-TQFG>] (describing the targeting of mask wearers during Occupy Wall Street); Nicholas Doherty, *Anti-Masking Statutes and Anonymous Protest in the Age of Surveillance*, 18 SEATTLE J. FOR SOC. JUST. 275, 279 (2020).

138. See *NAACP*, 357 U.S. at 462. Mask bans also effectively nullify privacy rights in an age of widespread public surveillance. See Doherty, *supra* note 137, at 279, 287–91.

139. See *Miller v. California*, 413 U.S. 15, 23 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973).

140. See *New York v. Ferber*, 458 U.S. 747, 765 (1982); *Osborne v. Ohio*, 495 U.S. 103, 110 (1990).

141. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

142. See *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

143. See *Watts v. United States*, 394 U.S. 705, 708 (1969); *Elonis v. United States*, 575 U.S. 723 (2015); *Counterman v. Colorado*, 600 U.S. 66, 69 (2023).

144. See *Counterman*, 600 U.S. at 73–74 (“This Court has ‘often described [those] historically unprotected categories of speech as being of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest’ in their proscription.” (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010) (internal quotation marks and emphasis omitted))).

words or incitement. However, there is considerable debate surrounding whether their mere presence amounts to a true threat. Indeed, the Second Circuit in *Kerik* articulated that if a mask “convey[s] . . . an independent ‘message’ of intimidation . . . it might constitute a ‘true threat,’ and would therefore not be protected by the First Amendment.”¹⁴⁵ Considering the messages Shiesty masks *actually* deliver, and the Supreme Court’s recent decision regarding true threats in *Counterman v. Colorado*, the masks themselves do not constitute true threats unprotected by the First Amendment.¹⁴⁶

True threats are “‘serious expression[s]’ conveying that a speaker means to ‘commit an act of unlawful violence.’”¹⁴⁷ The existence of a true threat does not depend on “the mental state of the author,” but on “what the statement conveys” to the person receiving it.¹⁴⁸ This seems to suggest that courts should employ an objective standard when deciding whether a true threat exists. But just recently, the Supreme Court held otherwise.

In *Counterman v. Colorado*, the Court held that the First Amendment mandates “a subjective mental-state requirement shielding some true threats from liability.”¹⁴⁹ The Court reasoned that an investigation into the subjective mental state of a speaker is necessary when analyzing whether a true threat exists because “[p]rohibitions on speech have the potential to chill, or deter, speech outside their boundaries.”¹⁵⁰ Thus, “unless the speaker’s words were ‘intended’ (not just likely) to produce imminent disorder,”¹⁵¹ they maintain their First Amendment protection.

Counterman held that speech may not be considered a true threat unless it is proven that the speaker possessed a subjective mental state of recklessness when speaking.¹⁵² In so doing, it sought to protect “the constitutional interest in free expression” while “‘accommodat[ing]’ . . . the ‘competing value[]’ in regulating historically unprotected expression.”¹⁵³ It reasoned that recklessness “offers ‘enough ‘breathing space’ for protected speech,’ without sacrificing too many of the benefits of enforcing laws against true threats.”¹⁵⁴

The recklessness standard is only satisfied when a person “‘consciously disregard[s] a *substantial* [and *unjustifiable*] risk that the conduct will cause harm to another.’”¹⁵⁵ With regard to true threats, “it means that a speaker is aware ‘that

145. *Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 206 n.8 (2d Cir. 2004).

146. *Counterman*, 600 U.S. at 75 (“Yet the First Amendment may still demand a subjective mental-state requirement The reason relates to what is often called a chilling effect. Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries.”).

147. *Id.* at 74 (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)).

148. *Id.* (quoting *Elonis*, 575 U.S. at 733).

149. *Id.* at 75.

150. *Id.*

151. *Id.* at 76 (citing *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (per curiam)).

152. *Id.* at 79 (“Among those standards, recklessness offers the right path forward.”).

153. *Id.* at 79–80 (alterations in original) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974)).

154. *Id.* at 82 (quoting *Elonis v. United States*, 575 U.S. 723, 748 (2015)).

155. *Id.* at 79 (all emphasis added) (quoting *Voisine v. United States*, 579 U.S. 686, 691 (2016)).

others could regard *his statements* as 'threatening violence and 'delivers them anyway.'"¹⁵⁶ When someone acts recklessly, they "have done more than make a bad mistake,"¹⁵⁷ they have engaged in "morally culpable conduct, involving a 'deliberate decision to endanger another.'"¹⁵⁸

Shiesty masks do not rise to this level. Unlike the Ku Klux Klan masks at issue in *Kerik*, the messages the masks *actually* deliver are not intimidating. The masks convey the message "*I wish to be concealed*" or "*I wish to remain anonymous*," not "I am a member of a hate group that regularly conducts acts of violence against ethnic and religious minorities." Nothing about "*I wish to be concealed*" or "*I wish to remain anonymous*" communicates a threat of violence, endangerment, or harm. Thus, an individual who feels threatened or endangered by the masks does so of their own volition.

This is critical to conducting a true threat analysis because *Counterman* limited a speaker's liability to only "*his statements*,"¹⁵⁹ not those which are made up by supposed listeners. Therefore, an individual who sees someone in a mask and believes them to be conveying the message "I am going to rob you" or "I am going to hurt you" is not under a true threat unless one of these messages is actually the message the person wearing the mask intends to convey. But if the person wearing the mask only wishes to convey "*I wish to be concealed*" or "*I wish to remain anonymous*," they are not liable for the false perceptions created in the minds of their observers. They are not liable just because *others* wearing the masks have used them for wrongful purposes in the past. They are not liable when they know that they have absolutely no intent to cause harm or pose a threat to anyone. And they are certainly not responsible for making sure everyone understands their reasons for wearing the masks, especially when most do not care to understand to begin with.

Now, this scenario is different from one where an individual actually says, "I am going to rob you" or "I am going to hurt you" but does not mean it. In that scenario, the speaker is disregarding the risks attached to the words *they spoke* and cannot blame the listener for taking them at their word and feeling threatened as a result. This necessary distinction shields speakers from being held liable for messages they did not truly convey while leaving room for accountability when an individual consciously delivers a message they knew would be threatening.

But even if a court finds that a person wearing a mask does indeed consciously deliver a message that poses a substantial risk, it could be considered justified. A person's actions are justified when they "could not have been asked to act any differently in [the] situation."¹⁶⁰ Considering the situations in which people typically

156. *Id.* (emphasis added) (quoting *Elonis*, 575 U.S. at 746 (Alito, J., concurring in part and dissenting in part)).

157. *Id.* at 80.

158. *Id.* at 79 (quoting *Voisine*, 579 U.S. at 694).

159. *Id.* at 69, 71, 79, 82 (emphasis added).

160. *Justification*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/justification> [<https://perma.cc/L4G3-MKHR>] (last visited Oct. 28, 2024).

wear masks to cover their face, who could ask them to act any differently? As mentioned previously, people wear masks to conceal their faces for genuine reasons.¹⁶¹ They wear them to protect themselves from the public's scrutiny, hostility, and appraisal.¹⁶² They wear them not to intimidate but to guard themselves from the intimidating effects of outside judgment. If this rationale for wearing masks is unjustifiable, mask wearers are victimized by intimidation in the same manner as those who claim the masks intimidate them.

E. SHIESTY MASK BANS ARE NOT TIME, PLACE, OR MANNER RESTRICTIONS

Even when speech is protected by the First Amendment, it may still be subjected to “reasonable time, place, and manner” restrictions.¹⁶³ Yet, the government “has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹⁶⁴ A law is aimed at restricting the content of speech when “‘on its face’ [it] draws distinctions based on the message a speaker conveys.”¹⁶⁵ The mask bans enacted by SEPTA and the City of Philadelphia, and the ban proposed by the Atlanta City Council, directly aim to restrict the content of speech on their face and are therefore not permissible time, place, and manner restrictions under the First Amendment.

Each of the mask bans directly aims at restricting the right of people to express the message “*I wish to be concealed*” or “*I wish to remain anonymous*” through their clothing. SEPTA’s ban prohibits “masks or other articles of clothing *worn to disguise the wearer’s identity*.”¹⁶⁶ The City of Philadelphia banned “ski mask[s], balaclava[s], or other device[s] or means of hiding, concealing, or covering any portion of the face *for the purpose of concealing their identity*.”¹⁶⁷ The Atlanta City Council’s proposed ordinance would ban “ski mask[s], facial barrier covering[s], mask[s], hood[s], or device[s] by which any portion of the face is so hidden, concealed, or covered as *to conceal the identity of the wearer*.”¹⁶⁸

Further proof that the bans are directly aimed at the message “*I wish to be concealed*” or “*I wish to remain anonymous*” lies in the fact that the ordinances list permissible exceptions for when wearing a mask is legal.¹⁶⁹ In other words, they only allow masks to be worn when they convey messages the city deems

161. See *supra* Section II.B.

162. See *supra* note 118 and accompanying text.

163. *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 591 U.S. 610, 618 (2020) (citing *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976)).

164. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (collecting cases); see also *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785 (1978); *Carey v. Brown*, 447 U.S. 455, 460, 462 (1980); *Metromedia v. City of San Diego*, 453 U.S. 490, 515 (1981) (plurality opinion); *Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984).

165. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011)).

166. SEPTA, *supra* note 51 (emphasis added).

167. PHILA., PA., CODE § 10-613(1) (emphasis added).

168. ATLANTA, GA., CITY COUNCIL PROPOSED ORDINANCE 23-O-1681 § 1(b) (emphasis added).

169. PHILA., PA., CODE § 10-613(5) (2023); ATLANTA, GA., CITY COUNCIL PROPOSED ORDINANCE 23-O-1681 § 1(c) (2023); see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510

permissible. For instance, SEPTA allows masks to be worn for “bona fide religious observance or expression.”¹⁷⁰ The City of Philadelphia and the Atlanta City Council have much more exhaustive lists. The City of Philadelphia allows masks to be worn for “traditional holiday costume[s],” “religious purpose[s],” “trade or employment where they are worn for the purpose of ensuring the physical safety of the wearer,” “theatrical production[s],” “[p]rotecting the wearer from the elements while participating in a winter sport,” and while an individual is “[l]awfully engaged in First Amendment activities.”¹⁷¹ The Atlanta City Council’s proposal would allow the masks to be worn for “traditional holiday costume[s] on the occasion of the holiday,” “trade and employment or in a sporting activity where a mask is worn for the purpose of ensuring the physical safety of the wearer, or because of the nature of the occupation, trade, or profession, or sporting activity,” “theatrical production[s] including use in Mardi gras celebrations and masquerade balls,” and “emergency management drills and exercises or emergencies.”¹⁷²

These exceptions demonstrate a willingness to allow masks when they are worn to express messages that are entertaining to others, pursuant to safety, or in adherence to one’s religion. For example, if someone wears a Shiesty mask to convey “I am a thug” on a holiday or during a theatrical performance, it is perfectly acceptable. Or if someone wears a Shiesty mask to convey “I am a security guard” while working as a bouncer at a night club—something that is particularly common in Philadelphia and Atlanta—they are shielded from incrimination. And if someone wears a mask to convey “I am a member of a religion” they are outside of the ordinances’ prohibition. But if someone wears a mask to express a message that society deems unacceptable, such as “*I wish to be concealed*” or “*I wish to remain anonymous*,” they could spend up to twelve months in jail or pay a fine of up to \$1,000.¹⁷³ This represents viewpoint discrimination as it “singl[es] out a particular opinion or perspective”¹⁷⁴ as unworthy of First Amendment protection.

Additionally, the bans are not limited to specific places like banks, schools, and courtrooms. Rather, they extend throughout the cities’ jurisdictions. Admittedly, it may be necessary to prohibit masks from being worn in banks, as

(1969) (finding it “relevant that the school authorities did not purport to prohibit the wearing of *all* symbols of political or controversial significance” (emphasis added)).

170. SEPTA, *supra* note 51.

171. PHILA., PA., CODE § 10-613(5)(a)–(e). For purposes of this Note, I disregard the ordinance’s “[l]awfully engaged in First Amendment activities” language because a proper interpretation of that exception would render the ordinance self-nullifying. As explained throughout this Note, the ordinance explicitly bans First Amendment protected activity. Therefore, it would be senseless to interpret the statute as both banning and protecting First Amendment rights.

172. ATLANTA, GA., CITY COUNCIL PROPOSED ORDINANCE 23-O-1681 § 1(c)(1)–(4).

173. *See, e.g.*, GA. CODE ANN. § 17-10-3(a)(1) (stating that misdemeanor crimes are punishable by “a fine not to exceed \$1,000.00 or by confinement in the county or other jail . . . for a total term not to exceed 12 months, or both”).

174. Kevin Francis O’Neill, *Viewpoint Discrimination*, FREE SPEECH CTR. (July 9, 2024) [<https://perma.cc/6RPB-HB53>].

they have been notoriously used in furtherance of crime in such settings.¹⁷⁵ It may also be necessary to restrict masks from being worn in courtrooms and schools to “maintain security and decorum,”¹⁷⁶ considering the sensitivity of these locations. However, this is not the case with respect to an entire public transit system or city. In fact, the Supreme Court has continually demonstrated its commitment to upholding free speech *in public*, regardless of how intimidating, or even torturous, it may be.¹⁷⁷ For these reasons, the ordinances’ attempts to restrict the freedom of expression at all times and in all places fail under the First Amendment.

F. SHIESTY MASK BANS WARRANT STRICT SCRUTINY AND FAIL TO OVERCOME IT

Since the mask bans directly aim at proscribing the content of speech, they are subject to strict scrutiny.¹⁷⁸ Strict scrutiny is the Supreme Court’s highest level of judicial scrutiny.¹⁷⁹ The Court applies strict scrutiny when the government has violated a fundamental right.¹⁸⁰ The freedom of expression is a fundamental right.¹⁸¹ When, as here, the government enacts a law that violates the freedom of expression, the law will only withstand strict scrutiny if the government can prove that it is “narrowly tailored to the government’s asserted interest.”¹⁸² While I agree that SEPTA’s, the City of Philadelphia’s, and the Atlanta City Council’s asserted interests in preventing and prosecuting violent crime are compelling, their mask bans are not narrowly tailored to achieve such interests.

A law falls short of narrow tailoring when it demonstrates a “failure to look to less intrusive means of addressing its concerns”¹⁸³ and “burden[s] substantially

175. See Chuck Goudie et al., *Masked Bank Robbers Take Advantage of COVID-19 Face-Covering Rules*, ABC 7 CHI. (Aug. 6, 2020), <https://abc7chicago.com/homewood-bank-robbery-bolingbrook-mask-requirements-banks-tcf/6356487/> [<https://perma.cc/F6AY-F5PA>]; Press Release, U.S. Att’y’s Off., S. Dist. of Tex., Bank Robbers Sentenced—Trade Masks, Hoodies and Firearms for Prison Jumpsuits (Apr. 26, 2023), <https://www.justice.gov/usao-sdtx/pr/bank-robbers-sentenced-trade-masks-hoodies-and-firearms-prison-jumpsuits> [<https://perma.cc/T88T-7VLN>].

176. *Ryan v. County of DuPage*, 45 F.3d 1090, 1095 (7th Cir. 1995).

177. See, e.g., *Snyder v. Phelps*, 562 U.S. 443 (2011) (protecting the First Amendment rights of a religious group that picketed with insulting signs at a deceased Marine’s funeral); *United States v. Grace*, 461 U.S. 171 (1983) (protecting the First Amendment rights of individuals to protest outside the Supreme Court building).

178. See *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (“A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.” (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993))); *Am. Knights of the Ku Klux Klan v. City of Goshen, Ind.*, 50 F. Supp. 2d 835, 842 (N.D. Ind. 1999) (“[T]he court may only uphold Goshen’s anti-mask ordinance if it is narrowly tailored to serve an overriding or compelling state interest.”).

179. See *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny [<https://perma.cc/B2D8-363G>] (last visited Oct. 28, 2024); Brett Snider, *Challenging Laws: 3 Levels of Scrutiny Explained*, FINDLAW (May 12, 2020), <https://www.findlaw.com/legalblogs/law-and-life/challenging-laws-3-levels-of-scrutiny-explained/> [<https://perma.cc/YA7U-89W4>].

180. Snider, *supra* note 179.

181. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (labeling the “expression of feelings” a fundamental right (quoting *Burnside v. Byers*, 363 F.2d 744, 749 (5th Cir. 1966))).

182. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 608 (2021).

183. *McCullen v. Coakley*, 573 U.S. 464, 492 (2014).

more speech than is necessary to further the government's legitimate interests."¹⁸⁴ The legislatures' categorical mask bans expose their disregard for less intrusive policy choices. On top of permissible time, place, and manner restrictions like mask prohibitions in banks, courtrooms, and schools, the legislatures could have easily limited the criminalization of masks to instances in which they are actually used in furtherance of violent crime.¹⁸⁵ Such a law would balance the interest in upholding freedom of expression while leaving room to curtail violence. Indeed, many states have laws like these currently on the books.¹⁸⁶

Rather than taking this approach, SEPTA, the City of Philadelphia, and the Atlanta City Council all overstepped their constitutional boundaries when they sought to suppress the expression of messages they disliked. Regardless of whether mask wearers seek to express the message "*I wish to be concealed*" or "*I wish to remain anonymous*" in traditional public forums or nonpublic forums, mask bans like SEPTA's fail scrutiny because they represent "effort[s] to suppress expression merely because public officials oppose the speaker's view."¹⁸⁷ SEPTA's own police chief stated that "[t]here is no legitimate reason, pandemic withstanding, to wear a full head covering in public for anything."¹⁸⁸ Thereafter, SEPTA banned passengers from wearing masks to deliver any message. When, as here, the government makes "anonymity virtually impossible, the anti-mask ordinance significantly inhibits [mask wearers'] expression" and "has the effect of directly chilling speech."¹⁸⁹ This represents a failure on behalf of government "to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."¹⁹⁰

As most obviously demonstrated by the Supreme Court's Second Amendment jurisprudence, a right's innate risks are insufficient to outlaw its exercise.¹⁹¹ In

184. *Id.* at 486 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

185. Admittedly, § 10-613(1) of the Philadelphia Code is narrowly tailored to such an end. *See* PHILA., PA., CODE § 10-613(1) (criminalizing mask wearing only when it is specifically used to "intimidate," "threaten" or "hide one's identity during the commission of unlawful activity" (emphasis added)). However, § 10-613(4), which is the focus of this Note, is not so narrowly tailored—the relevant provision in SEPTA's ban or the ban proposed by the Atlanta City Council. *See* PHILA., PA., CODE § 10-613(4) (forbidding ski masks or balaclavas in a variety of public places and transportation); SEPTA, *supra* note 51 (banning masks worn to "disguise the wearer's identity"); ATLANTA, GA., CODE 23-O-1681 §1(b) (forbidding ski masks on public property).

186. *See, e.g.*, DEL. CODE ANN. tit. 11, § 1239(a) (criminalizing masks worn "during the commission of any felony"); FLA. STAT. ANN. § 876.155(4) (criminalizing masks for those "engaged in conduct that could reasonably lead to the institution of a civil or criminal proceeding"); OKLA. STAT. tit. 21, § 1301 (criminalizing masks worn "during the commission of a crime").

187. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983).

188. FOX 29 PHILA., *supra* note 43.

189. *See* *Am. Knights of the Ku Klux Klan v. City of Goshen, Ind.*, 50 F. Supp. 2d 835, 842, 844 (N.D. Ind. 1999).

190. *Id.* at 844 (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995)).

191. *See* *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (making clear that the justices "are aware of the problem of handgun violence in this country," but "the enshrinement of constitutional rights necessarily takes certain policy choices off the table"); *McDonald v. City of Chicago*, 561 U.S. 742, 790 (2010) (holding that "the Second Amendment right will to some extent limit the legislative freedom of the States, but this is always true when a Bill of Rights provision is incorporated"); *New*

our case, this is because “our society accords greater weight to the value of free speech than to the dangers of its misuse.”¹⁹² Thus, “when constitutional rights to free speech and [expression] are at issue and there is no indication of criminal conduct by masked persons, it cannot be presumed that all, or even most, mask-wearers do so for criminal purposes.”¹⁹³ This understanding of the freedom of expression preserves the First Amendment as “a shield from the tyranny of the majority.”¹⁹⁴

CONCLUSION

Before drafting our Constitution, the Framers chose between two competing philosophies regarding the proper role of government—that of Thomas Hobbes and that of John Locke.¹⁹⁵ Thomas Hobbes believed that a strong governmental authority was necessary to maintain order in society, and that individuals must be willing to forfeit rights for the benefit of the majority.¹⁹⁶ John Locke was more optimistic. Locke argued that individuals are naturally endowed with certain unalienable rights and can coexist reasonably peacefully and protect their natural rights without an absolute ruler.¹⁹⁷ Thus, in Locke’s view, government was only necessary to the extent it aided in upholding the rights of individuals.¹⁹⁸ The Framers agreed with Locke.¹⁹⁹ For this reason, we have a Constitution that protects individual liberties by restraining a government elected and empowered by the majority of the people. As it relates to Shiesty masks and the First Amendment, this means any fear and discomfort felt by the majority of people does nothing to weaken the fundamental right to the freedom of expression afforded to the minority of people who choose to wear masks. Mask bans have the effect of further criminalizing historically marginalized people simply because their fashion choices are unpopular. Government should take a different approach. Rather than encroaching on the rights of some of the most vulnerable, build bridges, not barriers, for all citizens to unapologetically express themselves.²⁰⁰

York State Rifle & Pistol Ass’n v. Bruen, 597 U.S. 1, 70 (2022) (“The constitutional right to bear arms in public for self-defense is not ‘a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.’” (quoting *McDonald*, 561 U.S. at 780 (2010))). The Court further noted that this protection is no different than “how the First Amendment works when it comes to unpopular speech.” *Id.* at 70.

192. *City of Goshen*, 50 F. Supp. 2d at 844 (quoting *McIntyre*, 514 U.S. at 357).

193. *Id.*

194. *Id.*

195. See RANDY E. BARNETT & JOSH BLACKMAN, CONSTITUTIONAL LAW: CASES IN CONTEXT 13 (4th ed. 2021).

196. See *id.* at 14.

197. See *id.* at 15–16.

198. See *id.* at 16.

199. See *id.* at 16–17.

200. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“That to secure these rights, Governments are instituted among Men.”).