2020-2021

SOUTHERN ILLINOIS UNIVERSITY

NATIONAL HEALTH LAW MOOT COURT COMPETITION

Transcript of Record
Docket No. 20-1964

Karen Smith,
Petitioner and Cross-Respondent,

v.

Hamilton Heights Veterans Home and
the State of Lincoln,
Respondents and Cross-Petitioners.

COMPETITION PROBLEM

SPONSORED BY:

Southern Illinois University School of Law

AND

Department of Medical Humanities
Southern Illinois University School of Medicine

The American College of Legal Medicine

The American College of Legal Medicine Foundation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF LINCOLN

KAREN SMITH	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil action no. 1:20-cv-430999-JD
	)	
HAMILTON HEIGHTS VETERANS HOME AND THE STATE OF LINCOLN	)	
	)	
	)	
Defendant	)	

MEMORANDUM OPINION

Jane Douglas, District Judge

Plaintiff Karen Smith, a citizen of the State of Lincoln, filed this proceeding on May 29, 2020, against Defendants Hamilton Heights Veterans Home ("Hamilton Heights") and the State of Lincoln.[1] Smith alleges that Lincoln Executive Order 2020-16 violates her rights under the Fourteenth Amendment Due Process and Equal Protection Clauses. Specifically, Section 2(a) of the Order requires staff at nursing home facilities to wear either a surgical mask, cloth facial mask, or an N95 mask, without providing any exceptions for individuals medically unable to wear masks. Medical exceptions are provided for all other citizens in Lincoln. *See* Appendix A. Smith further alleges that she was terminated from her employment at Hamilton Heights because of her inability to wear a face mask, in violation of the Americans with Disabilities Act. Smith alleges she has claustrophobia, which prevents her from being able to wear a mask. In response, Hamilton Heights filed a counter-claim under 28 U.S.C. § 2201(a) seeking a declaration from the

[1] The State of Lincoln operates Hamilton Heights. For sake of simplicity, from herein out, the Court will simply refer to the defendants as Hamilton Heights.

Court that Executive Order 2020-16 properly declares a state of public health emergency in Lincoln and that Section 2(a) bears a real and substantial relationship to the public emergency, thus making it a valid exercise of the State's police power under *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Hamilton Heights additionally filed a motion for summary judgment on Smith's ADA claims, arguing that 1) Smith is not a person with a disability; 2) Smith is not a "qualified" individual with a disability because she cannot meet the face mask requirement; and 3) Smith has failed to show Hamilton Heights could have reasonably accommodated her.

The Court will treat Hamilton Height's request for declaratory relief as a motion for summary judgment. *See e.g., Kam–Ko Bio–Pharm Trading Co., Ltd. v. Mayne Pharma Inc.*, 560 F.3d 935, 943 (9th Cir. 2009) (upholding district court's decision to construe a motion for declaratory judgment as a motion for summary judgment). The Court finds there was a public health emergency warranting Executive Order 2020-16, including Section 2(a). The Executive Order was, therefore, a valid exercise of the State's police power, warranting dismissal of Smith's Fourteenth Amendment claims under *Jacobson*. The Court also grants Hamilton Heights's motion for summary judgment on the ADA claim.[2]

Factual and Relevant Procedural History

The following facts, as well-pleaded in the complaint, are treated as undisputed for purposes of the instant motion to dismiss. The State of Lincoln owns thirty nursing homes, including Hamilton Heights, which it constructed in 2016 and opened that same year as a home for elderly residents who served in the military. Hamilton Heights is home to around 300 residents, with an average age of eighty-two, and aims to preserve and promote its residents'

[2] Editors note: This problem is not intended to raise any issues regarding procedure or jurisdiction. The problem is also not intended to raise any substantive issues regarding due process or equal protection other than within the scope of a state's authority under *Jacobson v. Massachusetts*.

capacities for independent living. Hamilton Heights obtains approximately fifteen percent of its revenue in the form of financial assistance from the United States Veterans Administration, which funds care and rehabilitation for veteran residents and another seventy five percent of its revenue from Medicaid funding.

Smith was on the custodial staff of the Hamilton Heights facility from the day it opened in 2016 until she was discharged on May 7, 2020, due to her refusal to wear a mask. Smith alleges she refused to wear a mask because she has claustrophobia, an anxiety disorder that she asserts is a disability under the Americans with Disabilities Act. Smith's employment required her to clean residents' rooms, including their bathrooms, and common areas used by all residents. When Smith refused to wear a mask due to her claustrophobia, Hamilton Heights' management informed her she could no longer work at the facility during the COVID-19 pandemic due to Executive Order 2020-16 requiring face masks to be worn by all workers at nursing homes and long-term care facilities.

Governor Lacey Wu issued Executive Order 2020-16 on April 30, 2020, in response to the COVID-19 pandemic. COVID-19 is a novel respiratory disease that can cause severe complications, including respiratory failure and death, and it has spread rapidly around the world, resulting in more than 100,000 deaths in the United States alone as of the end of May, 2020, and leading to numerous restrictions ordered by states to try to curb this extraordinary public health crisis. Although COVID-19 presents risks to the entire population, people who have underlying medical conditions, such as diabetes or hypertension, or who are over 65, have substantially higher risk of developing severe cases or dying of COVID-19. *See* Centers for Disease Control, Cases in the US (2020), https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html. "At this time, there is no known cure, no effective treatment, and no

vaccine." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (May 29, 2020) (Roberts, C.J., concurring).

Although there was fear that Lincoln would become a hotbed of COVID-19 cases, in fact, unlike states such as New York, Florida, and Texas, Lincoln's COVID-19 case numbers remained relatively low with 700 cases and 15 deaths to date. Indeed, COVID-19 has been successfully suppressed in the state of Lincoln due to swiftly implemented testing, tracing, and quarantine measures. The last detected in-state transmission occurred on April 23, 2020. However, the virus continues to be transmitted and to cause fatalities in other states in the United States. As of the date of this filing, Lincoln has no active COVID-19 cases. Like the other states outside the contiguous United States, Hawaii and Alaska, Governor Wu, who was a practicing epidemiologist prior to entering politics, has issued a number of executive orders related to COVID-19 in order to protect Lincoln residents by preventing the spread of COVID-19 and avoiding an overwhelmed health care system.

Governor Wu issued Executive Order 2020-16 effective May 1, 2020. The general provisions of 2020-16 (1) require face coverings for everyone ages 8 and older in all public places except for the following:

- Anyone who has a medical condition that prevents the wearing of a face covering
- Anyone who is consuming a drink or food
- Anyone who is trying to communicate with a person who is hearing impaired
- Anyone who is giving a speech for broadcast or to an audience
- Anyone temporarily removing his or her face covering for identification purposes
- Anyone who is a resident of a town within Lincoln without a high COVID-19 incidence that has opted out of the masking mandate.

Linc. Exec. Order No. 2020-16(1) (April 30, 2020).

However, Governor Wu specifically ordered "[a]ll staff, volunteers, vendors, and visitors when permitted, shall be required to cover their nose and mouth with an appropriate face covering (e.g., surgical mask, N95 mask, cloth face covering) at all times when they are inside the facility." *Id.* § 2. This face covering must "cover [the individual's] nose and mouth. . . ." *Id.* Governor Wu publicly announced that the Executive Order 2020-16 will remain in force until there is an effective vaccine for COVID-19. Nursing homes failing to comply with local health orders are subject to fines up to $1000 and loss of their state licensure. *Id.* § 3

Smith alleges that the Governor's executive order exceeds her authority and thus violates her rights under the Fourteenth Amendment because there is no public health emergency in the State of Lincoln related to nursing homes and Covid-19. Like many states, Lincoln has an Emergency Management Act that allows the Governor to declare a public health emergency:

> In the event of actual or impending emergency or disaster of natural or human origin, or pandemic influenza emergency, or impending or actual enemy attack, or a public health emergency, within or affecting this state or against the United States, the Governor may declare that a state of emergency or disaster exists. The state of disaster emergency shall continue until the governor finds that the threat or danger has passed, or the disaster has been dealt with to the extent that emergency conditions no longer exist, and when either or both of these events occur, the governor shall terminate the state of disaster emergency by executive order or proclamation. All executive orders or proclamations issued under this subsection shall indicate the nature of the disaster, the area or areas threatened, the area subject to the proclamation, and the conditions which are causing the disaster. An executive order or proclamation shall be disseminated promptly by means calculated to bring its contents to the attention of the general public.

Linc. Rev. Stat. §44-9(a) (2019). Smith acknowledges that while government officials may take coercive steps to address public health emergencies under *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Executive Order in this case was arbitrary, because there was no public health emergency in Lincoln that requires all employees in nursing homes wear one of the listed face coverings without the exemption for individuals who medically were unable to wear them that is

available in all other situations. Smith further argues that Hamilton Heights based its decision to terminate her employment on her failure to comply with the Order, instead of reasonably accommodating her disability as required by the Americans with Disabilities Act.

Hamilton Heights argues the order is a valid exercise of the State's police power because there was a nationwide declaration of emergency due to the COVID-19 pandemic. Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020). While Lincoln currently is not one of the states facing rising COVID-19 cases, that is only because of the vigorous steps Governor Wu has taken to declare the state-wide emergency.[3] In her signing remarks, Governor Wu referenced guidance from the Centers for Disease Control that cloth face masks can help prevent a person infected with COVID-19 from spreading air droplets and spreading the disease to others as compared to wearing no face covering. CDC, Considerations for Wearing Cloth Face Coverings (2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html. In regard to nursing homes specifically, Governor Wu noted reporting that nursing home workers have been disproportionately infected with COVID-19 in other states. *See* CMS, Trump Administration Issues Key Recommendations to Nursing Homes, State and Local Governments (Apr. 2, 2020), https://www.cms.gov/newsroom/press-releases/trump-administration-issues-key-recommendations-nursing-homes-state-and-local-governments (observing that nursing homes "have become an accelerator for the virus").

As to her ADA claim, Smith asserts that her claustrophobia is a disability under the ADA. She asserts that, when required to wear something covering her face, she feels a sense of being trapped in a confined space that she desperately needs to escape, and that she starts to panic out of fear she will suffocate. She asserts that claustrophobia is a form of anxiety disorder,

[3] Besides Executive Order 2020-16, Governor Wu also issued Executive Order 2020-12 directing all non-essential workers stay at home and that individuals arriving in the State of Lincoln self-quarantine for fourteen days.

and that anxiety disorders are a mental impairment as defined by the EEOC's ADA regulations. 29 C.F.R. § 1630.2(h)(2) (2019). She alleges that her claustrophobia substantially limits her ability to breathe, think, concentrate, interact with others, and work. *Id.* § 1630.2(i)(1)(i). In support of her disability claim, Smith submitted a note from Dr. Reina Patel, M.D., which stated that Smith cannot tolerate wearing a facial mask because of her feelings of anxiety and fear. Dr. Patel indicated Smith could wear a face shield but not anything that would press up against her mouth or nose. Hamilton Heights argues that Smith has not presented sufficient evidence to support her claim that her alleged claustrophobia meets the definition of a disability. Hamilton Heights notes that Smith has not presented any evidence of how long her claustrophobic episodes last, how often she experiences them, or how they actually interfere with the major life activities she identifies as compared to most people in the general population when wearing a face covering.

Smith next argues that Hamilton Heights was required to accommodate her inability to wear a face mask but refused to engage in any interactive process with her to determine whether there were alternative means to meet the nursing home's safety concerns. Hamilton Heights asserts that being able to wear a face mask is a qualification standard that is job-related and consistent with business necessity, and that it properly relied on the Governor's executive order requiring all nursing home employees to wear face masks. Smith argues that Hamilton Heights cannot merely assert that face masks are a qualification standard but instead must prove, as an affirmative defense, that her inability to wear a face mask made her a direct threat to the health and safety of individuals in the facility that cannot be reduced by reasonable accommodations such as wearing a face shield instead of a mask, keeping social distance, hand washing, and temperature checks. Smith further argues that Hamilton Heights could institute routine testing of

facility employees and ask screening questions to detect symptoms. Smith also argues that her personal circumstances (she lives alone and avoids areas where she cannot socially distance) mean that she has a very low risk of contracting COVID-19, and she, therefore, does not pose a substantial enough threat to the health and safety of anyone in a nursing home so as to warrant her termination.

Hamilton Heights argues in response that the accommodations suggested by Smith are not reasonable as they do not sufficiently mitigate the risks faced in nursing home facilities. The efficacy of face shields is questionable compared to face masks. Given the nature of Smith's job, it would not be possible for her to maintain social distancing at all times. Further, temperature checks are of limited use and Hamilton Heights does not currently have the ability to routinely test all employees of the facility. Screening questions are also of limited use because many infected people are asymptomatic. Therefore, Hamilton Heights argues, because Smith cannot meet an essential qualification standard to work in the nursing home, and she has produced no modifications that would be reasonable in light of Hamilton Heights' obligation to comply with Executive Order 2020-16, Hamilton Heights properly terminated her employment.

I. EXECUTIVE ORDER 2020-16 IS A REASONABLE EXERCISE OF STATE POLICE POWERS UNDER *JACOBSON v. MASSACHUSSETTS*.

Hamilton Heights asks this Court to declare Executive Order 2020-16 a reasonable exercise of state police powers under *Jacobson v. Massachusetts* and dismiss Smith's Fourteenth Amendment challenges. The Federal Declaratory Judgment Act provides that federal courts considering a case of actual controversy "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201. As a rule, the court has broad discretion to grant declaratory relief. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995).

Jacobson is the controlling case related to a state's authority to enact coercive measures that protect its residents' health even if those measures infringe on liberties that may be otherwise protected under the Fourteenth Amendment. *Jacobson* notes that constitutional liberties are not absolute. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905). The Court reasoned that it is "a fundamental principle that persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state. . . ." *Id.* (internal quotation omitted). It is true that the Supreme Court has found states to have exceeded their police powers when the laws in question are unreasonable. *See, e.g., Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) (striking down ordinance that served legitimate goals of preventing overcrowding, etc., only marginally at best); *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding no legitimate state interest justified the statute's intrusion into personal lives). But in *Jacobson*, the Court articulated the limited role of courts when evaluating a public health-related measure. Only if there is "no real or substantial relation" to the public health objective, or if the measure is "beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge . . . ." *Jacobson*, 197 U.S. at 31. Put another way, only if the police power was exercised in a way that was "so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression," should the court question the state's intervention. *Id.* at 38.

In order to declare the validity of Governor Wu's order, this Court must, therefore, be convinced that the requirement for cloth or N95 face coverings by nursing home workers without medical exceptions is reasonable and not arbitrary. The Court is so convinced.

First, as to the issue of face coverings themselves, it is not the Court's place to determine in detail what is to be done in the face of a public health emergency, such as indeed exists in the

United States. The State legislature has lodged the authority to determine what is to be done in such a crisis at least partly in the Governor, just as in *Jacobson* the legislature had lodged it in a Board of Health. *Id.* at 27. Furthermore, as the power of the State extends to "laws to prevent persons . . . suffering under contagious or infectious diseases . . . from coming within its borders," *id.* at 28, it surely includes authority to prevent the spread within the State of infectious diseases which pose a real threat of entering the State undetected. The public has the power "to guard itself against imminent danger" as well as ongoing danger. *Id.* at 29. "Nor . . . can anyone confidently assert that the means prescribed by the State [have] no real or substantial relation to the protection of the public health and the public safety." *Id.* at 31. The Court takes judicial notice that the science of COVID-19 transmission and the efficacy of masks is in its infancy and subject to change. The effectiveness of masks in reducing the spread of COVID-19 is thus "at least debatable." *United States v. Carolene Products*, 304 U.S. 144, 154 (1938).

Governor Wu's action bears a "real or substantial relation" to protecting public health and is not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *See Jacobson*, 197 U.S. at 31. A growing number of states have orders similar to 2020-16. The fact that there are no active cases in this state may be because of the many Executive Orders put in place. Thus, they may be proof the orders are working and thus have a "real or substantial relation" to the public health crisis. Requirements for face coverings reduce the chance that respiratory droplets containing the virus will infect others. The Governor is a trained epidemiologist and the Governor's measures are informed, based on science, and substantially related to the COVID-19 pandemic. The court's role is not to "usurp the functions of another branch of government" in deciding how best to protect public health, as long as the measures are not arbitrary or unreasonable. *Id.* at 28. If the Governor's orders have at least a real and

substantial relation to protecting public health, it does not matter that an alternative method is available. The exemptions discussed in the order are clear and constitute common sense.

Having established that the face mask requirement itself bears a real and substantial relation to the protection of public health, the Court now turns to the governor's decision to disallow exceptions to that requirement for all staff at nursing home facilities. The Court here takes judicial notice of the disproportionate effect the virus has had on nursing homes. *See* CMS, Trump Administration Issues Key Recommendations to Nursing Homes, State and Local Governments (Apr. 2, 2020), https://www.cms.gov/newsroom/press-releases/trump-administration-issues-key-recommendations-nursing-homes-state-and-local-governments (describing effect on nursing homes). The Executive Order reasonably identifies nursing home residents as particularly vulnerable and in need of additional protection. Under ordinary rational basis review, there would be no question that the tighter restrictions on nursing homes bears a real and substantial relation to the particular risks to the residents of those facilities. It is well established that the court should uphold a regulation "if there is any reasonably conceivable state of facts that could provide a rational basis" for it. *See, e.g.*, *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (rejecting plaintiff's Equal Protection claim under rational basis review).

Smith suggests, however, that Section 2(a) of the Executive Order is arbitrary because individuals employed in other places with heightened risk, such as prisons and hospitals, are permitted the medical exemption to the face covering rule, and the State has presented no evidence why similar medical exemptions could not be implemented safely in nursing homes. The Court appreciates that the Executive Order as it applies to nursing homes is particularly draconian, but the Court will nonetheless defer to the decision of the Governor in light of the

uncertain evidence, the heightened risk in nursing homes, and the role in crisis response that the legislature has seen fit to confer on her office. The Court cannot say that Section 2(a) bears no rational relationship to the stated reason of promoting public health.[4]

The Court is not insensible of the risk of government overreach. In this case, however, the Court finds that the powers of the State are not being abused or deployed as a pretext for pursuing goals unrelated to public health. Requiring masks to be worn for the protection of others is a requirement much less invasive of the individual's sphere of liberty than was the vaccination mandate in *Jacobson*. The Governor is entitled to our deference to her decision in response to an emergency that rests on a precautionary approach to uncertain evidence about what measures will avail the State in the battle against COVID-19.

II. ALTHOUGH SMITH CAN ESTABLISH SHE HAS A DISABILITY, HER ADA CLAIM FAILS BECAUSE SHE IS NOT A "QUALIFIED" INDIVIDUAL.

In Count II of her complaint, Smith alleges Hamilton Heights violated the Americans with Disabilities Act by failing to reasonably accommodate her inability to wear the type of face covering required by Section 2(a) of the Executive Order. In order to establish a prima facie case of discrimination under the ADA, Smith must show "(1) she is disabled within the meaning of the ADA, (2) she is qualified to perform the essential functions of her job either with or without reasonable accommodation, and (3) she has suffered from an adverse employment decision because of her disability." Spurling v. C & M Fine Pack, Inc., 739 F.3d 1055, 1060 (7th Cir. 2014) (quoting Dvorak v. Mostardi Platt Assoc., Inc., 289 F.3d 479, 483 (7th Cir.2002)).

[4] Smith points to the fact that Governor Wu is up for reelection this year and her opponent has raised criticisms of the governor's handling of nursing home safety in other respects, including several high-profile cases of abuse. Even if the governor has a political motive for treating nursing homes differently, as long as we find there is at least some relationship to public safety in Section 2(a), we must uphold it. *See, e.g., Bervid v. Alvarez*, 647 F.Supp.2d 1006, 1013 (N.D. Ill. 2009) (rejecting plaintiff's argument that defendant's proffered reason for his termination was pretextual because "in the constitutional context, . . . the state need not demonstrate any factual basis to support its classification, so long as some conceivable rational basis exists").

A plaintiff claiming under the ADA must, therefore, first demonstrate as part of her prima facie case that she has a disability as the term is understood under the ADA: "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A).[5] An impairment is substantially limiting if it "limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting." 29 C.F.R. § 1630.2(j)(1)(ii) (2019). Under the ADA as amended by the ADA Amendments Act of 2008, the question of whether plaintiff has a disability should not require extensive evaluation. 42 U.S.C. § 12102(4)(A) ("The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.")

Smith alleges she suffers from claustrophobia when required to cover her face with a mask. Claustrophobia easily meets the definition of a mental impairment under the EEOC's regulations interpreting the ADA, a fact that Hamilton Heights concedes. *See* 29 C.F.R. § 1630.2(h)(2) (2019) ("Physical or mental impairment means . . . [a]ny mental or psychological disorder . . . affecting one or more body systems . . ."). Hamilton Heights contends, however, that Smith has not shown that her impairment substantially limits a major life activity. Smith alleges her claustrophobic response to wearing a tight-fitting face mask causes her to panic, interfering with her ability to breathe, think, concentrate, interact with others, and work. *See* 42 U.S.C. § 12101(2)(A) ("[M]ajor life activities include . . . breathing, . . . concentrating, thinking, and working."); 29 C.F.R. § 1630.2(i)(1)(i) (2019) (adding "interacting with others" to list).

[5] Smith has not alleged a disability under either of the two other prongs of the definition, the so-called "record of" and "regarded as" prongs found in 42 U.S.C. § 12102(1)(B) & (C).

Although this response may be short term, while it is on-going, Smith describes it as intense. The ADAAA provides that impairments that are episodic or in remission should be evaluated in their active state. 42 U.S.C. § 12102(4)(D). Dr. Patel's letter supports Smith's assertion that she cannot wear a face mask without experiencing panic attacks, and that she needs to be able to work without one. Most people can breathe, concentrate, think, interact with others, and work while wearing a face mask without significant limitation. The Court is satisfied that Smith has met the reduced threshold for showing a disability in this case. *See Feshold v. Clark Cnty.*, No. 2:10-CV-00003-RLH, 2011 WL 2038732, at *3 (D. Nev. May 25, 2011) (finding sufficient evidence that the plaintiff's claustrophobia substantially impacted various major life activities, including concentrating, speaking, and performing manual tasks, while in enclosed environments).

However, even though Smith has met the threshold for proving she has a disability, Hamilton Heights argues it is nonetheless entitled to summary judgment because Smith cannot show she is a qualified individual who can perform the essential functions of the job in question. *See, e.g.*, *Ivey v. First Quality Retail Serv.*, 490 F. App'x 281, 285 (11th Cir. 2012) (setting out requirement that to show she is a qualified individual, plaintiff must show she can perform the essential functions of the job in question). Hamilton Heights argues that the face mask requirement is a qualification standard that is job-related and consistent with business necessity under 42 U.S.C. § 12113(a), and plaintiff must meet that standard in order to be qualified for the janitorial position. Hamilton Heights argues it is not required to accommodate under *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), because Executive Order 2020-16 is an obligation with which it is mandated to comply.

Smith argues that Hamilton Heights erroneously relies on the general provision regarding qualification standards, but must instead specifically prove that she posed a direct threat to the health and safety of others in the workplace. *See Id.* § 12113(b). Under the direct threat defense, the employer must show that the plaintiff posed "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id*. § 12111(3). The employer must base its decision on medical or other objective evidence; the employer's good faith belief regarding the risk posed by the plaintiff is not sufficient. *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998). Smith asserts Hamilton Heights failed to engage in an individualized assessment of the actual risk she posed, which would have determined any risk was purely speculative. Smith suggests several modifications that would have sufficiently reduced the risk of viral transmission, including face shields, temperature checks and screening questions, and implementation of wide-scale workplace testing.

This Court rejects Smith's argument that Hamilton Heights must prove she posed a direct threat based on an individualized assessment of her particular circumstances. Instead, the Court adopts the Fifth Circuit's ruling that safety requirements applied generally to all employees need only meet the standard for a qualification standard, not the heightened standard for direct threat. *EEOC v. Exxon Corp.*, 203 F.3d 871, 873-875 (5th Cir. 1998) ("business necessity applies to across-the-board rules, while direct threat addresses a standard imposed on a particular individual. . . . The direct threat test applies in cases in which an employer responds to an individual employee's supposed risk that is not addressed by an existing qualification standard.") The face covering requirement applies to all employees at Hamilton Heights generally. For that reason, this Court will evaluate the face mask requirement as a qualification standard.

A qualification standard may screen out or tend to screen out individuals with disabilities as long as they are job-related and consistent with business necessity, and there is no reasonable accommodation available that allows the employer to meet its safety concerns. 42 U.S.C. § 12113(a). There is no dispute that Smith can perform all of the essential functions of her janitorial position except for the face mask requirement. For purposes of its summary judgment motion, Hamilton Heights concedes that the mask requirement excludes or tends to exclude individuals with disabilities (although it argues Smith herself has not established a disability). Hamilton Heights thus bears the burden to show the mask requirement is job-related and consistent with business necessity. *See Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 995 (2007).

The mask requirement is clearly job-related and a business necessity. This case is controlled by the Supreme Court decision in *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). In *Albertson's*, the plaintiff challenged his employer's refusal to seek a waiver of a Department of Transportation vision standard that the plaintiff could not meet due to his amblyopia, an uncorrectable vision impairment. *Id.* at 560. Relevant to this case, the Court in *Albertson's* indicated that the employer would ordinarily not be in violation of the ADA if it acts according to a governmental regulation that it had an obligation to follow. *See id.* at 570. That rule applies here. Hamilton Heights as the operator of a nursing home in Lincoln is required to follow the face covering rule, which has no exceptions. Thus, Hamilton Heights had no obligation to consider Smith's proposed alternatives to the face covering requirement. Smith is not qualified to perform the janitorial job unless she can meet the terms of Executive Order 2020-16. Because she cannot, her termination did not violate the ADA.

For these reasons, I grant the Hamilton Heights's motion for summary judgment on both claims.

It is so ordered.

June 17, 2020

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

KAREN SMITH,
Appellant,

v.

HAMILTON HEIGHTS VETERANS HOME
AND THE STATE OF LINCOLN,
Appellee,

No. 20-2295
July 30, 2020

On appeal from the United States District Court for the District of Lincoln.

Before: Fletcher, Wong, and Cramby, Circuit Judges.

OPINION

Wong, C.J., delivered the opinion of the Court, in which Fletcher, C.J., joined.
Cramby, C.J., filed an opinion concurring in Part I and dissenting in Part II.

This appeal comes to us from the United States District Court for the District of Lincoln, where Appellee Hamilton Heights and the State of Lincoln (Hamilton Heights) sought a declaration regarding the validity of Lincoln Executive Order 2020-16, which required staff at nursing homes to wear certain identified types of face masks.[6] The lower court treated Hamilton Heights' request as a motion for partial summary judgment, which the court granted, declaring the Executive Order to be valid. The court below also granted summary judgment to Hamilton Heights dismissing Smith's ADA claim. For the reasons set forth below, we reverse the district court's decision on the validity of the Executive Order, Section 2(a), but uphold the grant of summary judgment on the ADA claims, albeit for a different reason than articulates by the lower court.

[6] This Court granted the parties' Joint Motion for Expedited Appeal under Fed. R. App. P. 27(a).

We review a grant of summary judgment de novo. Because the facts of this case are well set out in the District Court's opinion, we only recite facts of the case where absolutely necessary proceed to the legal analysis.

I. EXECUTIVE ORDER 2020-16, SECTION 2(A) UNREASONABLY RESTRICTS APPELLEE'S RIGHTS UNDER THE FOURTEENTH AMENDMENT.

We start by acknowledging courts are extremely deferential to the actions of state and local officials during a public health emergency. Not only do judges defer to the expertise and judgment of officials, but they tend to give officials a great deal of slack for having to make judgments quickly and under substantial pressure as a result of an emergency. The mandate in *Jacobson v. Massachusetts* required all adults to get a smallpox vaccination. 197 U.S. 11, 12–13 (1905). The regulation was enacted after a smallpox outbreak in Cambridge, Massachusetts, pursuant to a state law that provided the board of health such power. *Id.* at 28. In reviewing the law, the Court counseled against infringing on the legislature's power to decide the best way to protect public safety. *Id.* at 30.

At the same time, however, the Supreme Court in *Jacobson* did not rule out a court finding the government action went too far, even in light of an acknowledged public health emergency. *Jacobson* indicated that if the police power was exercised in a way that was "so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression," courts should question the public health intervention. *Id.* at 38. Public health law scholar Wendy Parmet has noted that "although deferential to the need to protect public health, courts must also be vigilant against abuses of public health powers. To do that they must ask what is reasonable, look at the public health evidence, and be alert to pretext or abuse

of power." Wendy E. Parmet, *Rediscovering Jacobson in the Era of COVID-19*, 100 B.U. L. Rev. Online 117, 132 (2020), http://www.bu.edu/bulawreview/parmet/.

We must thus look with particularity at the specific claim Smith raises, to determine if the State's actions arbitrarily intrude on rights protected under the Fourteenth Amendment. We can agree with the district court that the Executive Order to the extent it declares a state of emergency in Lincoln is not arbitrary or oppressive. But Smith's claim asks more specifically whether Section 2(a), which strips nursing home staff of the medical exceptions available to all other citizens of Lincoln, including individuals who work in other high risk environments, exceeds the governor's authority.

The Supreme Court has found governmental regulations that otherwise address matters of grave public concern to be arbitrary when they discriminate against a particular group without sufficient explanation. For example, in *Smith v. Cahoon,* the Court invalidated a state statute that exempted carriers of agricultural, horticultural, dairy, and fish products, but not other motor carriers transporting other consumer food products, from compliance with carrier certification regulations. *Smith v. Cahoon*, 283 U.S. 553, 567 (1931). The Court found the distinctions drawn in the statute arbitrary:

> In determining what is within the range of discretion and what is arbitrary, regard must be had to the particular subject of the state's action. In the present instance, the regulation as to the giving of a bond or insurance policy to protect the public generally, in order to be sustained, must be deemed to relate to the public safety. This is a matter of grave concern as the highways become increasingly crowded with motor vehicles, and we entertain no doubt of the power of the state to insist upon suitable protection for the public against injuries through the operations on its highways of carriers for hire, whether they are common carriers or private carriers. But, in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier

> such as the appellant, was wholly arbitrary, and constituted a violation of the appellant's constitutional right.

Id.

Here the Executive Order purports to be acting to protect vulnerable populations, but provides no explanation as to why only nursing homes do not have any exemptions from the mask order. Prisons, hospitals, and other congregate facilities are exempted. We would give the governor wide latitude to act in the public interest, but not to discriminate in an arbitrary fashion. *Cf. City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 448-450 (1985) (examining the underlying basis of a city's decision to reject group home application by individuals with intellectual disabilities to find it was irrational and violated equal protection of the law). Section 2(a) of the Executive Order is arbitrary and, thus, violates Smith's Fourteenth Amendment rights of Due Process and Equal Protection.

Given this finding, we reverse the district court's grant of summary judgment to Hamilton Heights. We note that this means the district court's ruling that Smith's ADA claim is controlled by *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), is also erroneous. *Cf. Samson v. Fed. Exp. Corp.*, 746 F.3d 1196, 1205 (11th Cir. 2014), (reasoning that if the driving job in question was not subject to the Federal Motor Carrier Safety Regulations, FedEx's medical examination requirement that screened out insulin-dependent diabetics would amount to an impermissible qualification standard because FedEx had made no attempt to otherwise show it medical examination requirement was job-related or consistent with business necessity).
If we agreed that Smith has otherwise stated an ADA claim, we would be compelled to reverse the lower court's grant of summary judgment on this issue as well. However, as we establish below, we uphold that part of the decision on other grounds and as a result, uphold dismissal of Smith's ADA claim.

II. APPELLEE HAS FAILED TO SHOW THAT SHE HAS A DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT.

Although the district court dismissed Smith's ADA claim for an erroneous reason, we can nonetheless uphold that decision on any sufficient alternative grounds raised by the record. *See Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987) ("Although the district court based its dismissal of the complaint on other grounds, we are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court.") We find such alternative grounds in Smith's failure to establish that she is a person with a disability as defined under the ADA.

Smith asserts that she meets the definition of disability set forth under 42 U.S.C. § 12102(1)(A), namely that she has a mental impairment (claustrophobia) that substantially limits one or more major life activities (breathing, concentrating, thinking, interacting with others, and working). She points to Dr. Patel's letter as well as her own testimony about the panic she experiences when forced to wear a face mask. While Hamilton Heights concedes that claustrophobia is a mental impairment, it argues the impairment as Smith describes it does not substantially limit any of the asserted major life activities.

The Eastern District of New York ruled on similar facts that the plaintiff had failed to sufficiently allege a disability claim. *See Weiss v. Cnty. of Suffolk*, 416 F. Supp. 3d 208, 215 (E.D.N.Y. 2018). Like the doctor's letter in that case, Dr. Patel's letter fails to provide any information about the frequency or duration of the alleged attacks, or how those attacks impact the major life activities alleged by Smith. There is no evidence to show that Smith experiences limitations in her breathing, concentrating, thinking, or any other major life activity that are substantial as compared to most people in the general population. *See* 29 C.F.R. §

1630.2(j)(1)(ii) (2019). We agree with *Weiss* that "[t]his lack of evidence is fatal to Plaintiff's claims." *See Weiss*, 416 F. Supp. at 215.

Not every impairment is a disability, even under the lowered threshold of the ADA Amendments Act. *See* 29 C.F.R. § 1630.2(j)(1)(ii) (2019) (recognizing "not every impairment will constitute a disability within the meaning of this section"). The Court, therefore, reverses the judgment of the lower court that Smith has a disability under the ADA. For the reasons stated above, the judgment of the District Court is REVERSED as to Count I and AFFIRMED as to Count II.

Judge Cramby, concurring in part and dissenting in part.

I agree with this Court's conclusion on Count I that Section 2(a) of the Executive Order is arbitrary but would go further and hold the whole Executive Order exceeded the governor's authority. *Jacobson* gives broad authority but nonetheless confirms that it is the court's role to ensure that state measures in the name of public health are reasonable. The court below rubber stamped Governor's Wu's measure without engaging in a reasonableness analysis. The Executive Order is overly broad and not responsive to a true public health emergency. The last COVID-19 transmission in Lincoln was in April. Lincoln, as an island state, is not in the same position as other states that may fear the spread of the virus. Restricting the liberties of Lincoln's residents by forcing them to wear face coverings, in light of the questionable science supporting such a requirement, is unreasonable in light of the minimal, at best, risk of viral transmission of COVID-19 within the state. I would, therefore, not only find Section 2(a) to be arbitrary and unreasonable, but declare the same as to the entire Executive Order.

I disagree, however, that Smith failed to establish she has a disability under the ADA. The majority applies too demanding a standard. The EEOC's regulations provide that plaintiffs

do not need to present "scientific, medical, or statistical analysis" in order to establish that their impairment is substantially limiting as compared to most people in the general population. 29 C.F.R. § 1630.2(j)(1)(v) (2019). Smith's own testimony as to what she experienced when wearing a face covering was well within the ability of a lay jury to understand without a medical expert's opinion. *See Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 997 (10th Cir. 2019) (indicating that plaintiffs do not necessarily need medical evidence when plaintiff alleges an impairment "that a lay jury can fathom without expert guidance") (citation omitted)). But, she also has a medical expert's opinion. Dr. Patel's letter was sufficient to establish that one or more of the major life activities Smith alleged, e.g., breathing, concentrating, interacting with others, was substantially limited during the panic attacks she experiences while being forced to wear a face covering. *See Feshold v. Clark Cnty.*, No. 2:10-CV-00003-RLH, 2011 WL 2038732, at *1 (D. Nev. May 25, 2011) (finding sufficient a doctor's note requesting a more open work area for employee with claustrophobia). I would have followed the ADAAA's admonition to construe the definition of disability broadly and find Smith met that threshold in this case. *See* 42 U.S.C. § 12102(4)(A).

Because I would find Smith to have established a disability under § 12101(1)(A), I would then move on to address the merits of her claim. Contrary to the district court, I do not believe this case is controlled by *Albertson's, Inc. v. Kirkingburg*. *Albertson's* involved a unique situation where the plaintiff sought to require his employer to allow him to apply for a waiver from an otherwise valid DOT visual acuity standard that he could not meet due to his disability. *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 560 (1999). The waiver was part of a DOT experimental program to determine whether certain individuals who did not meet the visual acuity standard could nonetheless safely operate commercial vehicles. *See id.* Much of the

Supreme Court's analysis was about how it did not think it reasonable to require the employer to "justify *de novo* an existing and otherwise applicable safety regulation issued by the Government itself" in order to defend its decision to apply that standard and not accept the waiver. *Id.* at 577. Unlike in this case, no one in that case questioned the validity of the visual acuity regulation. *See id.* As all members of this Court agree, the government mandate for nursing homes in this case is arbitrary. Beyond that, the State has issued the very rule which the State is now asserting as justification for not complying with federal law. I would say there are serious Supremacy Clause concerns if a state can regulate itself out of complying with a mandate of federal law. *See* U.S. Const., Art. VI, cl. 2. The duty to accommodate is the core protection provided under the ADA and the State's actions directly undermine the purpose of the Act. *Cf.. Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 636 (2013) ("A State may not evade the pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect.")

I would further find that Hamilton Heights bore the burden of proving that even with the accommodations suggested by Smith, she posed a direct threat to the health and safety of others in the workplace. The ADA defines a direct threat as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). The EEOC's regulations further provide that:

> The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:
>
> (1) The duration of the risk;
> (2) The nature and severity of the potential harm;
> (3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

29 C.F.R. § 1630.2(r) (2019). Employers bear the burden of proving the employee posed a direct threat. *Rizzo v. Children's World Learning Centers, Inc*., 84 F.3d 758, 764 (5th Cir. 1996). Whether an individual poses a direct threat is "a complicated, fact intensive determination, not a question of law." *Id.*

The direct threat analysis is particularly suited to the fact intensive issue at hand, namely whether a person who cannot wear a facial covering can nonetheless mitigate the risk of exposing the nursing home residents and other staff to the virus by taking several other steps such as wearing a face shield, maintaining social distancing, and hand washing, to name only some of the steps Smith has suggested. "To protect disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, the Supreme Court has required an individualized direct threat inquiry that relies on the best current medical or other objective evidence." *Nunes v. Wal-Mart Stores, Inc*., 164 F.3d 1243, 1248 (9th Cir. 1999) (citing *Bragdon v. Abbott*, 524 U.S. 624, 649-50 (1998); *Sch. Bd. of Nassau Cnty, Fla. v. Arline*, 480 U.S. 273, 287 (1987); 29 C.F.R. § 1630.2(r)) (2019). There is at least a fact question whether Hamilton Heights has relied on the best current medical evidence to reject any other means of mitigating the risk in nursing homes other than by mandating a face mask.

Finally, I would note that even if the face mask requirement were to be evaluated as a qualification standard regardless of the validity of Executive Order 2020-16, the employer is still required to consider if the plaintiff can be reasonably accommodated. *See* 42 U.S.C. § 12113(a). In this case, Hamilton Heights made no effort whatsoever to evaluate the specific risk that Smith posed or whether any of the accommodations she proposed were reasonable. Smith was entitled to that interactive process, and because Hamilton Heights wholly failed to engage in it, I would

find there is at least a jury question raised on Smith's ADA claims in this case. *See Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 219 (2d Cir. 2001) (finding "an outright refusal to accommodate" precluded summary judgment for the employer).

For these reasons, I dissent.

Appendix A: EXECUTIVE ORDER 2020-16

April 30, 2020

WHEREAS, protecting the health and safety of Lincolnians among the most important functions of State government; and,

WHEREAS, it is critical that Lincolnians who become sick are able to be treated by medical professionals, including when a hospital bed, emergency room bed, or ventilator is needed; and,

WHEREAS, it is also critical that the State's health care and first responder workforce has adequate personal protective equipment (PPE) to safely treat patients, respond to public health disasters, and prevent the spread of communicable diseases; and,

WHEREAS, Coronavirus Disease 2019 (COVID-19) is a novel severe acute respiratory illness that has spread among people through respiratory transmissions, the World Health Organization declared COVID-19 a Public Health Emergency of International Concern on January 30, 2020, and the United States Secretary of Health and Human Services declared that COVID-19 presents a public health emergency on January 27, 2020; and,

WHEREAS, on March 11, 2020, the World Health Organization characterized the COVID-19 outbreak as a pandemic, and has reported more than 3 million confirmed cases of COVID-19 and 200,000 deaths attributable to COVID-19 globally as of April 30, 2020; and,

WHEREAS, a vaccine or treatment is not currently available for COVID-19 and, on April 24, 2020, the World Health Organization warned that there is currently no evidence that people who have recovered from COVID-19 and have antibodies are protected from a second infection; and,

WHEREAS, despite efforts to contain COVID-19, the World Health Organization and the federal Centers for Disease Control and Prevention (CDC) indicated that the virus was expected to continue spreading and it has, in fact, continued to spread rapidly, resulting in the need for federal and State governments to take significant steps; and,

WHEREAS, the CDC currently recommends that all United States residents take precautions to contain the spread of COVID-19, including that they: (1) stay home as much as possible; (2) if they must leave their home, practice social distancing by maintaining 6 feet of distance from others and avoiding all gatherings; (3) wear cloth face coverings in public settings where other social distancing measures are difficult to maintain; (4) be alert for symptoms such as fever, cough, or shortness of breath, and take their temperature if symptoms develop; and (5) exercise appropriate hygiene, including proper hand-washing; and,

WHEREAS, the CDC also recommends the following precautions for household members, caretakers and other persons having close contact with a person with symptomatic COVID-19, during the period from 48 hours before onset of symptoms until the symptomatic person meets the criteria for discontinuing home isolation: (1) stay home until 14 days after last exposure and maintain social distance (at least 6 feet) from others at all times; (2) self-monitor for symptoms,

including checking their temperature twice a day and watching for fever, cough, or shortness of breath; and (3) avoid contact with people at higher risk for severe illness (unless they live in the same home and had the same exposure); and,

WHEREAS, as circumstances surrounding COVID-19 rapidly evolve, there have been frequent changes in information and guidance from public health officials as a result of emerging evidence; and,

WHEREAS, as of April 30, 2020, there have been nearly 700 confirmed cases of COVID-19 in 90 Lincoln counties and 15 deaths from COVID-19; and,

WHEREAS, studies suggest that for every confirmed case there are many more unknown cases, some of which are asymptomatic individuals, meaning that individuals can pass the virus to others without knowing; and,

WHEREAS, I declared all counties in the State of Lincoln as a disaster area on April 30, 2020 because the current circumstances in Lincoln surrounding the spread of COVID-19 constitute an epidemic and a public health emergency under Section 9(a) of the Lincoln Emergency Management Act; and,

WHEREAS, I declared all counties in the State of Lincoln as a disaster area on April 30, 2020 because of potential future shortages of hospital beds, ICU beds, ventilators, and PPE, and critical need for increased COVID-19 testing capacity constitute a public health emergency under Section 4 of the Lincoln Emergency Management Act; and,

WHEREAS, the Lincoln Constitution, in Article IV, Section 6, provides that "the Governor shall have the supreme executive power, and shall be responsible for the faithful execution of the laws," and states, in the Preamble, that a central purpose of the Lincoln Constitution is to "provide for the health, safety, and welfare of the people;" and,

WHEREAS, for the preservation of public health and safety throughout the entire State of Lincoln, and to ensure that our healthcare delivery system is capable of serving those who are sick, I find it necessary to take measures consistent with public health guidance to slow and stop the spread of COVID-19 and to prevent shortages of hospital beds, ICU beds, ventilators, and PPE and to increase COVID-19 testing capacity;

THEREFORE, by the powers vested in me as the Governor of the State of Lincoln, pursuant to the Lincoln Constitution and Sections 9(a) of the Lincoln Emergency Management Act, and consistent with the powers in public health laws, I hereby order the following, effective May 1, 2020:

Section 1. Face Covering Order. Every individual in Lincoln shall wear a face covering that covers one's face and nose when in any establishment open to the public whether indoors or outdoors. The only exceptions to this requirement are:

1) Children 8 and under
2) Anyone who has a medical condition that prevents the wearing of a face covering
3) Anyone who is consuming a drink or food
4) Anyone who is trying to communicate with a person who is hearing impaired
5) Anyone who is giving a speech for broadcast or to an audience
6) Anyone temporarily removing his or her face covering for identification purposes
7) Anyone who is a resident of a town within Lincoln without a high COVID incidence that has opted out of the masking mandate

Section 2. Public Health Requirements for Individuals Working in Nursing Homes.

a) All staff, volunteers, vendors, and visitors when permitted, shall be required to cover their nose and mouth with an appropriate face covering (e.g., surgical mask, N95 mask, cloth face covering) at all times when they are inside the facility. All individuals shall be required to cover their nose and mouth with a face-covering when in a nursing home or long-term care facility. A nursing home or long-term care facility must provide workers with appropriate face coverings if they do not have such coverings. When the work circumstances require nursing home or long-term care facility must provide other PPE in addition to face coverings. Due to the vulnerable situation of those in these facilities, none of the exceptions in Section 1 apply to this Section 2.

b) Facilities shall screen all persons who enter the facility (including volunteers, vendors, and visitors when permitted) for signs and symptoms of COVID-19, including temperature checks. Facilities shall refuse entrance to anyone screening positive for symptoms of COVID-19.

c) To the extent possible, residents should wear face coverings in the following circumstances:

(i) If they leave their rooms or when they are within close proximity (under six feet) of others inside the facility; and

(ii) For any trips outside of a facility (e.g. such as for a medical appointment).

Section 3. Penalties. A person who knowingly and wilfully fails to comply with this Order and Directive is guilty of a misdemeanour and on conviction is subject to imprisonment not exceeding one year or a fine not exceeding $5,000 or both. A facility who fails to comply this Order and Directive is guilty of a misdemeanour and on conviction is subject to loss of licensure and/ or a fine not exceeding $5,000 per incident or both.

Section 4. Severability. If any provision of this Directive and Order or its application to any person, entity, or circumstance is held invalid by any court of competent jurisdiction, all other provisions or applications of this Directive and Order shall remain in effect to the extent possible without the invalid provision or application. To achieve this purpose, the provisions of this Directive and Order are severable.

Supreme Court of the United States

Karen SMITH, Petitioner and Cross-Respondent,

v.

HAMILTON HEIGHTS VETERANS HOME
And the STATE of LINCOLN, Respondents and Cross-Petitioner.

No. 20-1964

August 6, 2020

On August 3, 2020, Petitioner Smith petitioned for review of the United States Court of Appeals for the Twelfth Circuit's decision affirming summary judgment dismissal of her Americans with Disabilities Act claim. On August 4, 2020, Respondents Hamilton Heights Veterans Home and the State of Lincoln cross-petitioned for review of the United States Court of Appeals for the Twelfth Circuit's decision that Lincoln Executive Order 2020-16, Section 2(a), is invalid and violates Petitioner's rights under the Fourteenth Amendment. The cross-petitions for Writ of Certiorari to the United States Court of Appeals for the Twelfth Circuit are granted limited to the following Questions:

1) Is Executive Order 2020-16 a valid exercise of state police powers under *Jacobson v. Massachusetts* or an unreasonable restriction of Petitioner's Fourteenth Amendment rights?
2) Were Respondents required under Title I of the ADA to accommodate Petitioner's inability to wear a face mask?