



Refusal to Wear a Face Mask May Leave You Constitutionally Unprotected

Feb 29, 2024

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Is there a constitutional free speech right to refuse to wear a face mask in public indoor spaces during a recognized public health emergency? The Third Circuit Court of Appeals recently determined there is not, as part of a precedential decision in the consolidated cases of [Falcone v. Dickstein, et al. and Murray-Nolan v. Rubin, et al.](#)

The Third Circuit addressed the First Amendment issue in the Murray-Nolan case. Specifically, the issue the court confronted was whether, during the COVID-19 pandemic, plaintiff Gwyneth Murray-Nolan, an “advocate for parental choice in masking children at school,” was protected under the First Amendment in her refusal to wear a mask during a Board of Education (“BOE”) meeting, despite the BOE’s mask requirement and the Governor’s Executive Order mandating that New Jersey schools require the use of face masks. (The Falcone case, though likewise arising from an individual’s opposition to a mandatory masking policy, was decided on different grounds.)

The plaintiff’s refusal to wear a mask was intended by her as a silent protest against the BOE’s masking policy and its lack of action to unmask children in schools. While the court recognized that the First Amendment protects some conduct in some settings, the court held that the refusal to wear a mask failed to satisfy the constitutional standard for “inherently expressive” conduct warranting First Amendment protection. To qualify as “inherently expressive,” conduct must satisfy two elements: (1) the actor must intend to convey a particularized message; and (2) [there must be a high likelihood that the message will be understood by those who view it.](#) The second element, which the Third Circuit acknowledged was the “trickier” of the two, requires that the viewer be able to understand the message from the conduct alone, without any explanatory speech.

Here, while the plaintiff intended to convey a specific message through her conduct – opposition to the BOE’s masking policy – the court held that the second element was not met because it was unlikely that a reasonable observer would understand this message from simply seeing her unmasked at a BOE meeting. “[G]oing maskless is not usually imbued with symbolic meaning.” People would not know whether the plaintiff’s unmasked face was meant to convey her intended message, or, for example, due to a medical condition, an act of general defiance of the government, skepticism toward government healthcare experts, or some other reason.

Because her message was subject to multiple interpretations, “explanatory speech” was required to understand it. Thus, the Third Circuit agreed with the District Court, finding that the plaintiff’s refusal to wear a mask was not constitutionally protected.

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