

Is Refusing to Wear a Mask Unconstitutional?



By Paul Engel

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- Are mask mandates constitutional?
- Do you have a right to refuse to wear a mask?
- Can you build a compelling argument for why you refuse?

I've spoken repeatedly about the unconstitutionality of most mask mandates. Recently, the Third Circuit Court of Appeals was asked to review two cases where people were punished for attending school board meetings while refusing to wear masks. Sadly, the cases, as described in the Circuit Court opinion, seem poorly founded, thus leading to decisions against the plaintiffs. I think a closer look will not only show the flaws in the case, but help others build better ones in the future.

Before we start, I want to state that the COVID-19 mask mandates were not only unconstitutional, but illegal as well, as I will show later in this review. However, we need to start where the Circuit Court started: With their own assumptions.

Background

The court stated their opinion with some background on the two cases they were reviewing.

On March 9, 2020, New Jersey Governor Phil Murphy declared a state of emergency in response to the quickly spreading coronavirus known as COVID-19. ... As we now know, it primarily spreads through airborne particles that accumulate in enclosed

spaces, respiratory droplets produced when a person coughs, sneezes, or talks, and occasionally through contact with objects contaminated with the virus. How COVID-19 Spreads, CDC (Aug. 11, 2022), <https://perma.cc/EPP9-AUWT>.

[Falcone v. Dickstein et. al. \(22-2701\) Opinion & Gwyneth K. Murray-Nolan et. al. \(22-2702\) Circuit Court Opinion](#)

In order to perform a fair review, we must take into consideration what was known back in 2020 even though much of it has since been proven false. We must also consider what is fact and what is opinion. For example, the court points to a statement from the Centers for Disease Control and Prevention (CDC) about how COVID-19 spreads. However, nothing in the document referenced even suggests that there are studies showing that this is how COVID spreads. This “common knowledge” may be based in some reason and logic, but that does not make it true. While later studies such as one known as the [Chocrane Report](#) found that, in general, masking made little if any difference in the transmission of SARS-COV-2, the virus that causes COVID-19.

Individuals infected with COVID-19 can spread the disease while asymptomatic or pre-symptomatic, making the virus difficult to control.

[Falcone v. Dickstein et. al. \(22-2701\) Opinion & Gwyneth K. Murray-Nolan et. al. \(22-2702\) Circuit Court Opinion](#)

Once again, we see decisions being driven by assumptions that later turn out to be untrue. For example, Asymptomatic transmission of covid-19 was published in December of 2020, and stated.

Earlier estimates that 80% of infections are asymptomatic were too high and have since been revised down to between 17% and 20% of people with infections.

[Asymptomatic transmission of covid-19](#)

How are people supposed to make informed decisions with so many opinions being treated as scientific facts? In part because of these assumptions, Governor Murphy took several steps.

Over the course of the ensuing months, Governor Murphy issued a series of Executive Orders to monitor and curb its spread. One of them mandated that New Jersey schools “maintain a policy regarding mandatory use of face masks by staff, students, and visitors in the indoor portion of the school district premises,” except, for example, when an individual qualifies for and obtains a medical exemption. ...

In preparation for the 2021-2022 school year, New Jersey School Districts—including the Freehold Township and Cranford Township School Districts—implemented mandatory indoor masking policies consistent with the Executive Order.

[Falcone v. Dickstein et. al. \(22-2701\) Opinion & Gwyneth K. Murray-Nolan et. al. \(22-2702\) Circuit Court Opinion](#)

Both Mr. Falcone and Ms. Murray-Nolan objected to the New Jersey mask mandate in schools. Both attended school board meetings unmasked, were confronted by members of the school board, and threatened by the board with contacting law enforcement. Both stated that attending the board meeting maskless was constitutionally protected political speech, and that the boards had retaliated against them for it, Mr. Falcone by the board canceling subsequent meetings and Ms. Murray-Nolan by her being arrested. Both eventually sued their respective school boards and law enforcement under 42 USC § 1983, Civil action for deprivation of rights and New Jersey Statutes Title 10. Civil Rights 10 § 6-2.

In Mr. Falcone’s case:

The District Court dismissed the amended complaint on the ground that Falcone had no standing to sue. It found his alleged injuries—the receipt of a summons and the Board’s

meeting cancellation—were not “traceable” to the BOE or Police Defendants but instead to Governor Murphy’s Executive Order that the Board had to obey. ... It followed, in the District Court’s view, that Falcone’s alleged injuries also were not “redressable” by injunctive relief because “an injunction directed at Defendants would not enjoin the Governor from implementing or enforcing a mask mandate.”

[Falcone v. Dickstein et. al. \(22-2701\) Opinion & Gwyneth K. Murray-Nolan et. al. \(22-2702\) Circuit Court Opinion](#)

The Circuit Court reversed that decision on standing, and remanded the case back to the District Court.

In Ms. Murray-Nolan’s case:

The District Court rejected the Cranford Defendants’ standing arguments but agreed Murray-Nolan failed to state a claim for First Amendment retaliation. ... Her alleged “right to appear at [the Board meetings] without a mask” was not “inherently expressive” conduct, it reasoned, but rather was expressive only “because she told Defendants that it was, and sued to prove it.”

[Falcone v. Dickstein et. al. \(22-2701\) Opinion & Gwyneth K. Murray-Nolan et. al. \(22-2702\) Circuit Court Opinion](#)

The Circuit Court found:

Amid valid government-mandated health and safety measures, refusing to wear a face mask is not expressive conduct protected by the First Amendment. Murray-Nolan’s retaliation claim also fails because the police had probable cause to arrest her, and she does not link her constitutionally protected speech activities (e.g., her social media posts) to any of the Cranford Defendants’ allegedly retaliatory actions. We thus affirm the District Court’s dismissal of her amended complaint.

[Falcone v. Dickstein et. al. \(22-2701\) Opinion & Gwyneth K. Murray-Nolan et. al. \(22-2702\) Circuit Court Opinion](#)

Analyzing the Cases

In both cases, the plaintiffs sued under both state and federal laws, claiming a deprivation of rights under the First Amendment. While the court focused on issues of standing, I see a much more fundamental issue with both cases: The claim of a First Amendment violation. That amendment reads:

Congress shall make no law ... abridging the freedom of speech,

[U.S. Constitution, Amendment I](#)

Many people claim that the Fourteenth Amendment somehow makes the First Amendment apply to the states, but the language of the Fourteenth Amendment does nothing to change the language of the First.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

[U.S. Constitution, Amendment XIV](#)

In my opinion, that makes the foundation of both of these cases very weak. They may have sued alleging violation of Article I, Section 6 of the New Jersey Constitution.

Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.

[New Jersey Constitution](#), Article I, Clause 6

That is still a weak argument, since in neither case the plaintiff was prevented from speaking. Rather, what we have here is a deprivation of both liberty and property without due process of law.

nor shall any State deprive any person of life, liberty, or property, without due process of law;

[U.S. Constitution, Amendment XIV](#)

While this argument can be laid at the feet of the School Boards, it would more properly be extended to Gov. Murphy.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

[42 U.S.C. §1983](#)

Rights Violated

Let's look at the details of my argument for the rights of Mr. Falcone and Ms. Murray-Nolan being violated. Let's start where this legal issue began, with Gov. Murphy's executive order.

The Governor shall take care that the laws be faithfully executed.

[New Jersey Constitution](#), Article V, Section 1 Clause 11

The Governor of New Jersey has the power to make sure the laws be faithfully executed. Therefore, for Gov. Murphy's executive order to be valid, it must be allowed under New Jersey law. I am not an expert on New Jersey law, so let's assume that the law allows the Governor to issue such an executive order. There's still one very serious problem with that mandate: It deprives people of both their liberty and the property they have in their own body without due process of law.

An established course for judicial proceedings or other

governmental activities designed to safeguard the legal rights of the individual.

[Due Process – The Free Legal Dictionary](#)

Blanket mandates, such as those used by the State of New Jersey, violate due process because they do not safeguard the rights of the individual. There is no requirement someone be shown to have COVID-19 nor that they are contagious, before their liberty is infringed. As shown earlier in this article, the assumptions that supported the mask mandates were not based in rigorous scientific studies, but unsubstantiated statements from government agencies that do not legally exist. (The Constitution does not delegate to the United States the power to regulate public health, food, or drugs.)

Furthermore, in the United States, the government is supposed to have the burden of proof before they infringe on your rights. Since no probable cause was established that Mr. Falcone or Ms. Murray-Nolan were contagious, and therefore a danger to others, requiring them to wear masks violated their liberty. Also since wearing a mask can and does have an impact on the wearer, these mandates deprived them both of control of their property, namely their bodies. Even if we accept that at the time of these incidents, the medical establishment believed in the efficacy of wearing masks, the logic of mandates contradicts that assumption. After all, if masks were really that effective, why do they only work if everyone is wearing one? Since there was no due process either in the executive order creating the mask mandate or in its implementation, then the government-mandated health and safety measure was not, as the Circuit Court claimed, valid, and the school districts were not required to enforce them.

Since 42 USC §1983 states that “Every person who”, under color of law, deprives someone of a right protected by the Constitution or laws is liable, that would include not just the Governor, as the court stated, but both the board members

and law enforcement as well.

Conclusion

I'm not saying this argument would have ultimately brought about a different outcome for Mr. Falcone or Ms. Murray-Nolan. However, imagine the scene where they entered the board meeting without masks. What if, rather than a general claim of speaking maskless being a constitutionally protected right, they could have provided both the board and law enforcement with a simple 1-2 page document pointing out that the governor's executive order was unconstitutional and therefore void.

An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed.

[Norton v. Shelby County :: 118 U.S. 425 \(1886\)](#)

What if they could have stood in front of their boards and not only articulated their points in detail, but provided evidence both constitutional and judicial of the rightness of their point? What if, should law enforcement still have been engaged, they could show not only the unconstitutionality of the acts of the governor and the board, but their criminality as well?

An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.

[Ex parte Siebold :: 100 U.S. 371 \(1879\)](#)

Would the outcome of their situations have been different? We will never know. However, I for one have found that a well reasoned and supported case, especially with documentation,

can have a profound impact on those we are trying to persuade.

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