Published on *The National Law Review* https://natlawreview.com

Masks Up, Pens Down: (Still) Litigating Mask Mandates in 2021

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From the moment state and local governments enacted mask mandates, their legality has been questioned. Then questioned again.

And again.

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Since March 2020, while many Americans stayed home or donned their masks when they couldn't, a small, but increasingly vocal, few were filing legal challenges against mask mandates that ranged the full gamut of constitutional and state claims. Over the last year and half, courts have heard increasingly tenuous arguments against mask mandates, from claims that masks interfere with travel to assertions that masks amount to unwanted medical treatment.[1] Many of these lawsuits also relied on constitutional arguments, including claims that mask mandates violate the First Amendment rights of freedom of assembly, religion, and speech; equal protection; and substantive due process. With few exceptions, courts across the country have rejected these claims.

A spike in cases caused by new COVID-19 variants and hardening political opposition to vaccination has prompted public officials to reimplement mask mandates, bringing yet another wave of litigation from mask opponents to block these new mandates. So far, this renewed opposition has mainly relied on the same legal theories used against the first wave of mask mandates. This article will explore the claims that most frequently recur in mask mandate lawsuits and the reasons courts have rejected them. In the end, this article poses the question of whether, after more than eighteen months of consistent failure, parties still bringing these claims can satisfy the reasonableness standard under Federal Rule 11.

Constitutional Claims

Across the board, constitutional claims against mask mandates of general applicability have failed. Courts have routinely analyzed mask mandates of general applicability under rational basis review, the lowest tier of scrutiny applied to governmental actions.[2] Under this highly deferential standard, a

government's action need only rationally relate to a conceivable, legitimate governmental interest.[3] A plaintiff, on the other hand, must negate "every conceivable basis" which might support the governmental action in question.[4] Mask mandates of general applicability, which aim to stem the spread of COVID-19, have easily cleared the low bar of rational basis review.

"But they don't work!" Disputing the Efficacy of Masks

Though many plaintiffs have tried to contest mask mandates by disputing their efficacy in slowing the spread of COVID-19, this argument is irrelevant in rational basis review. It's not the courts' function to decide if the decisions of public officials are wise, correct, or the best fit to solve a problem.[5] As Chief Justice Roberts pointed out, this is especially true when public officials are acting "in areas fraught with medical and scientific uncertainties," where their latitude "must be especially broad."[6] Further, courts have reiterated that it is rational for public officials to follow recommendations to mask from public health agencies, including the Centers for Disease Control and Prevention.[7]

Pandemic Precautions are Both "Legitimate" and "Compelling"

While rational basis review only requires that state action be based on a "legitimate government interest," courts have gone beyond that baseline to find that protecting the public from a deadly pandemic is a compelling governmental interest.[8] In balancing that compelling interest against the minimal inconvenience a mask mandate requires, "the government's ability to prevent the spread of a presently incurable, deadly and highly communicable virus far outweighs any individual's right to simply do as they please."[9] Because courts all over the country have found mask mandates of general applicability to roundly pass rational basis review, if that is the highest level of scrutiny plaintiffs can invoke, their challenges will almost certainly fail.

First Amendment Claims — Masks Don't Curb Speech

Courts have roundly rejected claims that masks unlawfully regulate speech or expression. Mask mandates regulate conduct, not speech, and therefore do not implicate the Free Speech Clause at all.[10] Courts in several jurisdictions have found that masks neither have a significant expressive element,[11] nor constitute a political symbol or symbolized speech,[12] and that plenty of alternative channels of communication are still open because, masked or not, a person can still speak.[13]

Claims based on the Free Exercise of Religion Clause have fared no better. For instance, in *Denis v. Ige*, the plaintiff alleged that a mask infringed on his right to breathe oxygen without restriction, which is in violation of his covenant with his creator.[14] In *Delaney v. Baker*, the plaintiff claimed the mask mandate burdened his religious beliefs by forcing him to wear one to attend mass.[15] In both cases and others like them, these arguments failed because the mask mandates were generally applicable, did not target religious conduct, and did not substantially burden the plaintiffs' practice of religion. As the courts have noted, the "religious, like the irreligious or agnostic, must comply with neutral, generally applicable restrictions," even if the restriction has "the incidental effect of burdening a particular religion or religious practice."[16] Because these mandates are generally applicable, they are only subject to rational basis review, which as demonstrated above, COVID-19 precautions easily satisfy. [17]

Plaintiffs have been more successful in cases where they've shown COVID-19 safety precautions beyond mask mandates treated religious institutions less favorably than secular institutions or were

spurred by religious animus. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Supreme Court applied strict scrutiny instead of rational basis review because the state action in question placed more stringent capacity caps on houses of worship than secular businesses.[18] Since then, courts have been careful to apply strict scrutiny to any COVID-19 orders that are not generally applicable and appear to burden religious practices or places of worship more than their secular counterparts.[19] No court, however, has used this reasoning to apply heightened scrutiny to a mask mandate of general applicability.

Some plaintiffs have argued that mask mandates violate their freedom of association and assembly. As one court noted, though, these claims are "a real headscratcher."[20] A mask mandate does not prevent an individual from associating or assembling with others; "rather, it places a minor restriction on the way they occur."[21] Government can incidentally inhibit conduct that might make it more difficult for individuals to associate, but to be actionable, the interference must be direct, substantial, and significant.[22] Mask mandates, by themselves, simply are not sufficient.

Masks Do Not Amount to Unwanted Medical Treatment

Another unsuccessful tactic plaintiffs have used to contest mask mandates is to allege they amount to unwanted medical treatment using both state and constitutional bases for their arguments. Ranging from allegations of interference in making personal medical decisions to coerced treatment by individuals without a medical license, these claims have found no success.[23] Courts have found that a mask requirement is a "far cry" from the types of medical treatment contemplated by Due Process Clause precedent, such as forced behavior modification in a mental hospital and other comparable intrusions into personal autonomy.[24] Many courts have openly doubted whether a mask requirement could be considered "medical treatment" at all.[25] As one court noted, requiring masks is not primarily directed at treating a medical condition—it's intended to prevent the transmission of germs to others.[26] As with prohibitions on smoking in certain places, there may be some incidental benefit to the smoker, but the primary effect is to protect others.[27] The same is true with masks.

In other cases, plaintiffs have tried to read new rights into existing legislation. For example, plaintiffs have asserted that mask mandates violate their rights under the Health Insurance Portability and Accountability Act of 1996, despite well-settled law that HIPAA does not permit an individual cause of action.[28] Other plaintiffs have tried to read rights into the Ninth Amendment, Tenth Amendment, and 42 U.S.C. 1983, which courts have similarly foreclosed as sources of substantive rights claims long ago.[29]

Equal Protection… From Masks?

Allegations that mask mandates infringe the Equal Protection Clause of the Fourteenth Amendment are another common refrain in these lawsuits. Plaintiffs have found no success in arguing that generally applicable mask mandates discriminate against a protected class or infringe on a fundamental right. As a result, courts have unanimously analyzed equal protection challenges to mask mandates using the rational basis standard of review.[30] As noted, mask mandates have easily passed this standard because face coverings bear an obvious, rational connection to the legitimate goal of mitigating the public's exposure to COVID-19.

Substantive Due Process — The Fundamental Right Not to Wear a Mask?

Plaintiffs have attacked mask mandates in schools specifically by claiming they violate substantive due process by infringing on the fundamental right to receive an education. However, courts are hesitant to expand substantive due process rights beyond limits established by prior decisions.[31] The Supreme Court has rejected the proposition that education is a fundamental right under the Fourteenth Amendment.[32] For that reason, lower courts have shied away from recognizing a federal constitutional right to public education.[33] Legal challenges to mask mandates premised on the notion that education is a fundamental right are doomed to fail.

Another variety of substantive due process challenges to mask mandates in schools rests on the concept of parental liberty. In a series of decisions dating to 1923, the Supreme Court has recognized a fundamental right of parents concerning the education of their children.[34] But courts are especially cautious to expand this right outside of the circumstances addressed by those cases. None of those decisions held that parental liberty prohibits reasonable measures by school officials to curb transmission of a deadly virus in schools. On the contrary, the Court has held that parents have no constitutional right to "education unfettered by reasonable government regulation."[35] In light of prior case law, courts are highly unlikely to find that parental liberty encompasses a right to send their children to public school mask-free.

Other nebulous substantive due process claims based on a "right to choose" or other unrecognized privacy interests have also failed for the same reasons as other constitutional claims—if the government action does not implicate a suspect class or infringe on a recognized fundamental right, the action is subject to rational basis review.[36] Courts are loathe to recognize new fundamental rights. The purported right not to wear a mask during a pandemic comes nowhere close to the type of fundamental liberty interest "deeply rooted in this Nation's history and tradition" or privacy interest "related to the most intimate of human activities and relationships" our courts are willing to protect.[37] For that reason, to date, no federal court has expanded substantive due process to encompass freedom from a mask mandate.[38]

The Potential for Sanctions under Rule 11

With so much precedent stacked against these legal challenges, at what point does initiating yet another mask mandate lawsuit amount to a frivolous action subject to sanctions under Federal Rule 11?

In general, Rule 11 sanctions are appropriate when a plaintiff files a pleading that (1) has no reasonable factual basis; (2) depends on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law; or (3) is filed in bad faith for an improper purpose. The real question here is whether these mask challenges depend on legal theories that "have no reasonable chance of success."

Courts have ruled consistently that generally applicable mask mandates serve a legitimate, and even compelling, governmental interest and resoundingly pass rational basis review. Plaintiffs who rely on the same repeated constitutional arguments cannot reasonably hope to elevate the standard of review from rational basis to intermediate or strict scrutiny. Unless the mask mandate is not generally applicable or burdens religious organizations disproportionately to the secular sector, plaintiffs have little hope of winning any relief, and by now, their counsel ought to know it. After all, as one court put it, "[T]he Bill of Rights is not a suicide pact—the Constitution doesn't kneecap a state's pandemic response."[39] Similarly, tenuous state law claims have failed enough that courts' patience for such liberal misinterpretations of legislation and precedent may be running low. At this point in the COVID-19 litigation era, counsel putting up the same types of arguments against mask mandates

face a higher risk of “winning” sanctions than relief for their clients.

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[1] See Forbes v. Cty. of San Diego, 2021 WL 843175, at *6-7 (S.D. Cal. Mar. 4, 2021); Denis v. Ige, No. CV 21-00011 SOM-RT, 2021 WL 1911884 (D. Haw. May 12, 2021).

[2] Often, the only question the courts ponder in these cases is whether to apply the Supreme Court’s tiers of scrutiny analysis or the older framework articulated in *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 363, 49 L. Ed. 643 (1905), which predates the modern tiers of scrutiny. In *Jacobson*, the governmental action enacted for the public health must have “a real or substantial relation” to the public health goal and must not represent a “plain, palpable invasion of rights secured by the fundamental law.” Id. at 31, 25 S. Ct. 358, 363, 49 L. Ed. 643. Most courts have found, however, regardless of whether you apply tiers of scrutiny or *Jacobson’s* real and substantial relation standard, all roads lead to what amounts to rational basis review, the lowest tier of scrutiny applied to governmental actions. *See Denis v. Ige*, 2021 WL 1911884 (D. Haw. May 12, 2021), for a detailed discussion of how courts are grappling with this analysis. See generally *Oakes v. Collier Cty*., 2021 WL 268387 (M.D. Fla. Jan. 27, 2021); *Machovec v. Palm Beach Cty.*, 310 So. 3d 941, 944 (Fla. Dist. Ct. App. 2021), review denied, No. SC21-254, 2021 WL 2774748 (Fla. July 2, 2021); *Delaney v. Baker*, 511 F. Supp. 3d 55 (D. Mass. 2021).

[3] *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315, 113 S. Ct. 2096, 2102, 124 L. Ed. 2d 211 (1993).

[4] *Id.*

[5] *Oakes*, 2021 WL 268387 at *3

[6] S*. Bay United Pentecostal Church v. Newsom*, —— U.S. ——, 140 S. Ct. 1613, 207 L.Ed.2d 154 (2020).

[7] *Denis*, 2021 WL 1911884, at *9.

[8] *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67, 208 L. Ed. 2d 206 (2020) (“Stemming the spread of COVID-19 is unquestionably a compelling interest”); see also *Denver Bible Church v. Azar*, 494 F. Supp. 3d 816, 830 (D. Colo. 2020), appeal dismissed sub nom. *Church v. Polis*, No. 20-1377, 2020 WL 9257251 (10th Cir. Dec. 23, 2020) (adopting the “undeniable proposition that fighting a pandemic is a compelling state interest.”; accord *Denis*, 2021 WL 1911884, at *7; *Oakes*, 2021 WL 268387, at *3.

[9] *Machovec*, 310 So. 3d at 944.

[10] *Denis*, 2021 WL 1911884, at *10.

[11] *Minnesota Voters All. v. Walz*, 492 F. Supp. 3d 822, 837 (D. Minn. 2020).

[12] *Parker v. Wolf*, 506 F. Supp. 3d 271, 277 (M.D. Pa. 2020).

[13] *Stewart v. Justice*, 2020 WL 6937725, at *5 (S.D.W. Va. Nov. 24, 2020); Antietam Battlefield KOA v. Hogan, 461 F. Supp. 3d 214, 236 (D. Md. 2020).

[14] *Denis*, 2021 WL 1911884, at *8.

[15] *Delaney*, 511 F. Supp. 3d at 67.

[16] *Denver Bible Church*, 494 F. Supp. 3d at 822.

[17] *Delaney*, 511 F. Supp. 3d at 74 (“Therefore, as the orders are of general applicability, they need only be rationally related to the interest in stemming the spread of COVID-19.”)

[18] *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 67, 208 L. Ed. 2d 206.

[19] *Denver Bible Church*, 494 F. Supp. 3d at 828; S. Bay United Pentecostal, 985 F.3d 1128, 1132 (9th Cir. 2021).

[20] *Oakes*, 2021 WL 268387, at *3.

[21] *Id.*

[22] *Denis*, 2021 WL 1911884, at *11.

[23] *Forbes*, 2021 WL 843175, at *8; Parker, 506 F. Supp. 3d at 286-87; Machovec, 310 So. 3d at 947.

[24] *Forbes*, 2021 WL 843175, at *8 ; Machovec, 310 So. 3d at 947.

[25] *Forbes*, 2021 WL 843175, at *8; Machovec, 310 So. 3d, at 946.

[26] *Machovec*, 310 So. 3d at 946.

[27] *Id.*

[28] *Freier v. Colorado*, 804 F. App'x 890, 891 (10th Cir. 2020); *Faber v. Ciox Health*, LLC, 944 F.3d 593, 596 (6th Cir. 2019); *Johnson v. WPIC*, 782 F. App'x 169, 171 (3d Cir. 2019); *Stewart v. Parkview Hosp.*, 940 F.3d 1013, 1015 (7th Cir. 2019); *Bond v. Connecticut Bd. of Nursing*, 622 F. App'x 43, 44 (2d Cir. 2015); *Crawford v. City of Tampa*, 397 F. App'x 621, 623 (11th Cir. 2010); *Dodd v. Jones*, 623 F.3d 563, 569 (8th Cir. 2010); *Miller v. Nichols*, 586 F.3d 53, 59 (1st Cir. 2009); *Webb v. Smart Document Sols., LLC*, 499 F.3d 1078, 1081-82 (9th Cir. 2007); *Acara v. Banks*, 470 F.3d 569, 572 (5th Cir. 2006); *Spencer v. Roche*, 755 F. Supp. 2d 250, 271 (D. Mass. 2010), aff'd, 659 F.3d 142 (1st Cir. 2011).

[29] *Forbes*, 2021 WL 843175, at *3.

[30] See *Big Tyme Invs., L.L.C. v. Edwards*, No. 20-30526, 2021 WL 118628 (5th Cir. Jan. 13, 2021) (state order closing bars was rationally related to reducing spread of COVID-19); *Ham v. Alachua Cty. Bd. of Cty. Commissioners*, No. 1:20CV111-MW/GRJ, 2020 WL 8642917, at *1 (N.D. Fla. June 3, 2020) (equal protection challenge to mask mandate unlikely to succeed on the merits); *Lewis v. Walz*, 491 F. Supp. 3d 464, 471 (D. Minn. 2020) (dismissing 14th Amendment claims challenging stay-at-home order); *Resurrection Sch. v. Gordon*, No. 1:20-CV-1016, 2020 WL 7639923, at *3 (W.D. Mich. Dec. 16, 2020) (mask mandate did not violate equal protection); *Talleywhacker, Inc. v. Cooper*, 465 F. Supp. 3d 523, 540 (E.D.N.C. 2020) (upholding executive order requiring some businesses to close but allowing others to stay open).

[31] *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 842, 118 S. Ct. 1708, 1714, 140 L. Ed. 2d 1043 (1998).

[32] *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 458, 108 S.Ct. 2481, 101 L.Ed.2d 399 (1988).

[33] *Brach v. Newsom*, 6 F.4th 904 (9th Cir. 2021); Robertson v. Hecksel, 420 F.3d 1254, 1260 (11th Cir. 2005).

[34] *Troxel v. Granville*, 530 U.S. 57, 66 (2000); Wisconsin v. Yoder, 406 U.S. 205, 235, (1972); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 403 (1923).

[35] *Runyon v. McCrary*, 427 U.S. 160, 178, 96 S. Ct. 2586, 2598, 49 L. Ed. 2d 415 (1976).

[36] *Denis*, 2021 WL 1911884, at *12.

[37] *Id.*

[38] *Forbes*, 2021 WL 843175, at *5.

[39] *Denver Bible Church*, 494 F. Supp. 3d at 827-828.

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