

Anti-Mask: New York Penal Law § 240.35(4)

SUMMARY

New York's anti-mask law criminalizes the wearing of masks or disguises by three or more persons in a public place unless done in connection with a "masquerade party or like entertainment," after obtaining a permit to wear masks from the police or other appropriate authorities. The courts have defined "like entertainment" as "social gatherings, dances, and performances that involve masks or costumes." Under the current law, wearing a bandana tied around one's face falls within the scope of the mask prohibition.

The courts have held that the anti-mask law furthers the important governmental interest of deterring violence and facilitating the apprehension of wrong-doers who seek to hide their identity. Since 2001, both the New York City Criminal Court and the Second Circuit Court of Appeals have held that the anti-mask law is not overly broad or facially unconstitutional. Moreover, both courts have rejected all case-specific challenges that the law was unconstitutional "as applied." Nonetheless, both courts recognize that the law could theoretically be applied in a manner that violates the First Amendment's protection of expressive conduct, also referred to as communicative conduct or symbolic speech.

In order to successfully challenge an application of the anti-mask law as unconstitutionally interfered with expressive conduct, the mask wearer would have to show that wearing the mask communicated a particularized message that viewers were highly likely to understand. Assuming that expressive conduct is shown, the government will then have the burden of demonstrating: (1) that the specific application of the anti-mask law furthered the important governmental interest of deterring violence and facilitating the apprehension of wrong-doers, (2) that this interest was unrelated to the suppression of free expression, (3) that there was a sufficient nexus between this interest and the specific application of the law and (4) that the incidental restriction on First Amendment freedoms was no greater than necessary to further this interest. Only if the government fails to establish these four elements will the specific application of the law be held unconstitutional. Per the Second Circuit, the First Amendment's protection of anonymous speech in furtherance of the right of freedom of association is not implicated when individual's seek to conceal their physical identity during public demonstrations.

When deciding whether or not to wear a mask, protestors and demonstrators should keep the following facts in mind. The plain language of the anti-mask law, as well as its legislative history, indicate that no violation occurs until three or more masked persons remain or congregate in a public space. You should politely inform the police of this fact if they arrest you in the presence of less than two other masked individuals. It remains an open question, however, how physically close together masked individuals must be in order to trigger a violation.

If you are arrested for wearing a mask, it will be your burden to establish, hopefully with the help of an attorney: (1) that there were less than two other masked people with you and hence no violation occurred, or (2) that wearing the mask constituted expressive conduct and that the government has failed to show that its interference with this conduct was no greater than necessary to further an important government interest unrelated to the suppression of the

conduct's content. As suggested by the RNCNotWelcome Collective, some of the same ends achieved by wearing a mask -- e.g., anonymity, solidarity with others, a spirit of fun and creativity -- may be realized by wearing non-criminalized attire such as large hats and outlandish sunglasses.

BACKGROUND

New York's current anti-mask law, enacted in 1965, states

[a] person is guilty of loitering when he:

[b]eing masked or in any manner disguised by unusual or unnatural attire or facial alteration, loiters, remains or congregates in a public place with other persons so masked or disguised, or knowingly permits or aids persons so masked or disguised to congregate in a public place; except that such conduct is not unlawful when it occurs in connection with a masquerade party or like entertainment if, when such entertainment is held in a city which has promulgated regulations in connection with such affairs, permission is first obtained from the police or other appropriate authorities

New York Penal Law § 240.35(4) (emphasis added).¹

¹ The statute that the current anti-mask law replaced stated

An assemblage in public houses or other places of three or more persons disguised by having their faces painted, discolored, colored or concealed, is unlawful, and every individual so disguised, present thereat, is guilty of a misdemeanor; but nothing contained in this section shall be construed as prohibiting any peaceful assemblage for a masquerade or fancy dress ball or entertainment, or any assemblage therefor of persons masked, or as prohibiting the wearing of masks, fancy dresses, or other disguise by persons on their way to or returning from such ball or other entertainment; if, when such masquerade, fancy dress ball or entertainment is held in any of the cities of this state, permission is first obtained from the police authorities in such cities respectively for the holding or giving thereof, under such regulations as may be prescribed by such police authorities.

N.Y. Penal Law § 710 (McKinney 1944) (emphasis added). Persons convicted under this version of the law included men wearing women's clothing and make-up in public. See People v. Gillespi, 15 N.Y.2d 529, 254 N.Y.S.2d 121 (1964); People v. Archibald, 58 Misc.2d 862, 863-64, 296 N.Y.S.2d 834, 836-37 (1st Dept. 1968), aff'd, 27 N.Y.2d 504, 312 N.Y.S.2d 678 (1970). To this author's knowledge, no such convictions have occurred under the current anti-mask law although the current statutory language -- "disguised by unusual or unnatural attire or facial alteration" -- could arguably support at least the arrest of a cross-dressed individual. It remains an open question, however, whether a court would uphold such a charge given the growing recognition of civil rights for transgendered persons. See New York City Local Law Report No.

The current anti-mask law evolved from legislation passed in 1845 to discourage armed insurrections in the Hudson River Valley by impoverished tenant farmers. See Church of the American Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197, 203 (2d Cir. 2004). During the period of 1839 to 1865, depressed wheat prices and decreased soil productivity left many farmers unable to pay their rent, resulting in their indebtedness to the manorial estate landlords. Facing the threat of eviction, many farmers formed anti-rent associations to raise money for litigation and to pressure state and local legislators to pass laws protecting their livelihood. Some farmers also organized bands of so-called “Indians.” Comprised of men dressed in calico gowns and leather masks, these bands would engage in forcible intimidation, including tarring and feathering, of landlords and local law enforcement officials. Three people, including a sheriff, were killed between 1844-45. See id. at 203-04.

In response to this civil unrest, in January 1845 the New York legislature passed “An Act to Prevent Persons Appearing Disguised and Armed,” which authorized the pursuit and arrest of any person who “having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent him from being identified, shall appear in any road or public highway, or in any field, lot wood or enclosure.” Id. at 204 (quoting Laws of the State of New York, 68th sess., at 5-7 (C. Van Benthuyzen & Co. 1845)). The law provided for imprisonment for up to six months for single offenders and for up to one year for masked individuals who appeared in groups “of three or more persons.” Id.

According to then Governor Silas Wright, the 1845 Act was necessary because “the disguises of . . . organized bands, calling themselves Indians, are [worn] for purposes unlawful and highly criminal . . . After [an] offense, or other and higher crime has been perpetrated, the disguise is laid aside, and even eye witnesses up[on the spot, may not be able to identify the guilty.” Id. (quoting 4 Messages from the Governors 149 (Charles Z. Lincoln ed., J.B. Lyon Co. 1909 (1845)). Based on this legislative history, the Second Circuit has concluded that the anti-mask law was enacted to deter violence and to facilitate the apprehension of wrongdoers, not to suppress any particular viewpoint. See id. at 205.

RELEVANT CASE LAW

I. New York State Court – *People v. Aboaf* (2001)

On May 1, 2000, at least five individuals were arrested while participating in a May Day demonstration in Union Square Park. They were charged with, among other things, violating the anti-mask law by wearing bandanas that covered their faces except for their eyes and forehead.

24 (2002) (discussing need to define the term "gender" in the City's Human Rights law to include transgendered individuals, thereby explicitly prohibiting discrimination against such individuals).

See People v. Aboaf, 187 Misc.2d 173, 175, 721 N.Y.S.2d 725, 727 (N.Y. City Crim. Ct. 2001). The defendants argued that the anti-mask law: (1) impeded their First Amendment right to free association, (2) contained an impermissibly vague exception for permits and (3) was unconstitutionally overbroad. See id.² The New York City Criminal Court rejected each of these challenges.

A. Freedom of Association (NO LONGER A VIABLE ARGUMENT)

The Aboaf defendants, who identified themselves as “anarchists,” argued that the bandanas facilitated their right of freedom of association by concealing their faces and thus affording them anonymity, and presumably protection, in expressing their purportedly unpopular beliefs and ideas. See Aboaf, 187 Misc.2d at 175-75, 721 N.Y.S.2d at 727-28 (noting that at the May Day event defendants had allegedly shouted slogans like “take back the streets” and “police state”).

In support of their freedom-of-association argument, the defendants cited two United States Supreme Court cases. The first, NAACP v. Alabama, held that the Alabama State Attorney General could not compel the state chapter of the NAACP to disclose a list of its members because, in light of the political and racial hostilities existing in late-1950’s Alabama, such disclosure was likely to adversely affect the members’ ability “to pursue their collective effort to foster beliefs which they admittedly have the right to advocate.” 357 U.S. 449, 462-63 (1958). The second case cited by the Aboaf defendants, Brown v. Socialist Workers ’74 Campaign Committee (Ohio), upheld the Ohio District Court’s restraining order against the enforcement of Ohio’s Campaign Expense Reporting Law that required every candidate for political office to file a statement identifying each contributor and each recipient of a disbursement of campaign funds. The Supreme Court held that, based on the evidence in the record of private and government hostility toward the Socialist Workers Party (“SWP”) and its members during the four years preceding the trial, compelling the disclosure of contributions and disbursements would subject SWP members who were identified to the reasonable probability of threats, harassment and reprisals. See 459 U.S. 87, 98-102 (1982).

The Aboaf court held that neither NAACP nor Brown applied because the defendants had offered no evidence of a pattern of harassment against them such as existed in the two Supreme Court cases. Rather, the defendants had merely described their political philosophy as “anarchism” and had set forth a list of famous anarchists of the past. See 187 Misc.2d at 178, 721 N.Y.S.2d at 729. However, as discussed below, since Aboaf, the Second Circuit has held that the protection for anonymous speech articulated in NAACP and Brown does not apply to persons who wish to conceal their physical identity during a public demonstration. See American

² The defendants did not allege that their wearing of the bandanas constituted constitutionally-protected expressive conduct -- i.e., symbolic speech. See 187 Misc.2d at 175-76, 185, 721 N.Y.S.2d at 728, 734. Compare Aryan v. Mackey, 462 F.Supp. 90, 92-94 (N.D. Tex. 1978) (holding that Texas Tech University could not prohibit demonstrators from wearing masks as a symbol of protest against the Shah of Iran because the masks served a constitutionally protected communicative function).

Knights, 356 F.3d at 209. Thus, under current law, the Aboaf defendants would not have been entitled to First Amendment protection based on a freedom-of-association argument even if they had presented extensive documentation of a pattern of harassment against them.

B. Impermissibly Vague

The Aboaf defendants next argued that the anti-mask law's permit exception for a "masquerade party or like entertainment" was so vague as to enable administrators impermissibly to deny permits for masked activities based on the message of the activity, in violation of the First Amendment's freedom of speech. See id. at 178, 721 N.Y.S.2d at 730. In essence, the defendants posited that the exception allowed authorities selectively to grant a permit based on whether they approved of the proposed activity's content. In rejecting the defendants' challenge, the court recognized that "a law subjecting the exercise of the First Amendment freedoms to the prior restraint of a license must contain 'narrow, objective and definite standards to guide the licensing authority.'" Id. at 179, 721 N.Y.S.2d at 730 (quoting Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 131 (1992)). The court further noted that "[a] government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" Id. (quoting Forsyth County, 505 U.S. at 130). The court held, however, that the word "masquerade," which the Merriam Webster's Collegiate Dictionary (10th ed. 1994) defines as "a social gathering of persons wearing masks and often fanciful costumes," and the word "entertainment," which the same dictionary defines as "a public performance," are specific enough to prevent an administrator of permits from exercising unbridled discretion. See id. at 180, 721 N.Y.S.2d at 730-31. The court further defined the phrase "like entertainment" as "social gatherings, dances, and performances that involve masks or costumes," and held that it encompasses political performances such as those performed by the Bread and Puppet Theatre, a pantomime troupe, in protest of the Vietnam War. See id. at 180, 721 N.Y.S.2d at 731 (citing Schumann v. State of New York, 270 F.Supp. 730, 733 (S.D.N.Y. 1967) (denying the Bread and Puppet Theatre's request for a preliminary injunction against the permit requirement contained in the anti-mask law on the grounds that the permit application process did not unreasonably burden the troupe's First Amendment rights)).

C. Overly Broad

Finally, the Aboaf defendants challenged the anti-mask law as overbroad because it prohibits the wearing of masks that have expressive content, as well as the wearing of masks that provide anonymity to individuals whose ability to exercise their right of free association would otherwise be chilled. See 187 Misc.2d at 181, 721 N.Y.S.2d at 731. In response, the court noted that the anti-mask law restricted conduct, not speech, and that as such, a facially-overbroad challenge could only succeed if the overbreadth was "real and substantial" and the statute was incapable of a reasonable limiting construction. See id. at 181, 721 N.Y.S.2d at 732 (citing Broadrick v. State of Oklahoma, 413 U.S. 601, 615 (1973)). The court then held that the effect of the anti-mask law on protected First Amendment activity is not "real and substantial" because it does not prohibit the wearing of costumes in public spaces nor the wearing of masks in non-public spaces. The court did acknowledge that the statute conceivably could be impermissibly applied to the wearing of masks for symbolic expression in non-exempt activities. It concluded,

however, that these potentially unconstitutional applications were not so numerous as to invalidate the entire statute. See id. at 182-83, 721 N.Y.S.2d at 732.

Significantly, the court also held that the anti-mask law is capable of being reasonably construed as prohibiting only the wearing of masks “for no legitimate purpose.”³ The court stated that this construction is consistent with the legislature’s purpose in enacting the statute -- which was to deter violence and facilitate the apprehension of wrong-doers -- but excludes from the statute’s prohibition the wearing of masks for communicative purposes and for necessary anonymity.⁴ The court stated that any impermissible applications of the statute so construed must be remedied on an “as applied” or case-by-case basis. See id. at 184, 721 N.Y.S.2d at 733-34.

In the event of a case-specific expressive-conduct challenge to the anti-mask law, the mask wearer would have the burden of establishing that the mask constituted expressive conduct in that it communicated a particularized message that had a high probability of being understood by viewers. See Texas v. Johnson, 491 U.S. 397, 404 (1989); Church of the American Knights, 356 F.3d at 205. Assuming that this showing could be made, the burden would then shift to the government to demonstrate: (1) that the specific application of the anti-mask law furthered the important governmental interest of deterring violence and facilitating the apprehension of wrong-doers, (2) that this interest was unrelated to the suppression of free expression, (3) that there was a sufficient nexus between this interest and the specific application of the law and (4) that the incidental restriction on First Amendment freedoms was no greater than necessary to further this interest.. See Tinker v. Des Moines Community School District, 393 U.S. 503, 508-09 (1969); United States v. O’Brien, 391 U.S. 367, 376-77 (1968). Only if the government fails to establish these four elements will the specific application of the law be held unconstitutional.

II. Federal Law – Church of the American Knights of the KKK v. Kerik (2004)

On September 24, 1999, the Church of the American Knights of the Ku Klux Klan (“American Knights”) applied to the New York City Police Department (“NYPD”) for a parade permit and a sound device permit for an event to be held on Saturday, October 23, 1999, on the

³ This construction arguably places the burden on the defendant to proffer a legitimate reason for wearing a mask and is consistent with the state court’s prior rulings that criminal intent -- i.e., the intent to use the mask to commit an illegal act -- is not an element of the anti-mask law. See Gillespi, 15 N.Y.2d 529, 254 N.Y.S.2d 121 (1964) (affirming conviction under Penal Law § 710, the statutory predecessor to the current anti-mask law); People v. Archibald, 58 Misc.2d at 863-64, 296 N.Y.S.2d at 836-37 (1st Dept. 1968), aff’d, 27 N.Y.2d 504, 312 N.Y.S.2d 678 (1970) (affirming conviction under section 887[7] of Code of Criminal Procedure, which was repealed in 1967, in favor of Penal Law § 710). In other words, if a group of three or more individuals has no legitimate reason, such as expressive conduct or necessary anonymity, for wearing their masks, then the State does not have to prove that the mask wearers intended to use their masks to commit a crime in order to obtain a conviction.

⁴ Infringement of the right to anonymous speech is no longer a viable challenge to the anti-mask law after the Second Circuit’s 2004 decision in American Knights. See 356 F.3d at 209.

steps of the New York County Courthouse at 60 Centre Street. On October 15, 1999 the NYPD informed the American Knights that its plan to wear masks would violate New York's anti-mask law. On October 19, 1999, the American Knights sought a preliminary injunction to force the NYPD to allow its members to demonstrate while wearing masks. A hearing was held on October 21 before two judges in the United States District Court for the Southern District of New York, the Honorable Harold Baer, Jr. and the Honorable Alvin K. Hellerstein. Judge Baer issued a preliminary injunction that allowed the Knights to wear masks during their planned event. The following day, a three judge panel on the Second Circuit Court of Appeals stayed the injunction. The Knights then applied to Justice Ruth Bader Ginsberg, the Circuit Supreme Court Justice, to reinstate the injunction, but on October 23, 1999, she declined to do so. The American Knights conducted their event as planned, with seventeen members participating and wearing robes and hoods, but not masks. After the demonstration, both the American Knights and the NYPD moved for summary judgment on the former's request for declaratory relief and a permanent injunction. The District Court granted summary judgment in favor of the American Knights on four independent and alternative First Amendment grounds. The NYPD appealed to the Second Circuit, which reversed. See American Knights, 356 F.3d at 199, 200-02.

A. The District Court's Holding

The District Court held that the American Knights' mask wearing was protected by the right to anonymous speech, such as was upheld in *NAACP v. Alabama*. See Church of the American Knights, 232 F. Supp.2d 205, 210 (S.D.N.Y. 2002). The court also held that the wearing of masks was protected as expressive conduct or symbolic speech. See id. at 216. Third, the court held that the anti-mask law was facially invalid, since it "distinguishes on its face between types of expression -- it allows masks for entertainment events but for no others." Id. at 218. Finally, it held that the City of New York "engaged in viewpoint discrimination by selectively applying the statute to the American Knights while not to other similarly situated groups. Id.

B. The Second Circuit's Reversal

1. Expressive Conduct

The Second Circuit acknowledged that expressive conduct is protected under the First Amendment but stated that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." American Knights, 356 F.3d at 205 (quoting *O'Brien*, 391 U.S. at 376). Rather, the Circuit clarified, the First Amendment protects expressive conduct only where "[a]n intent to convey a particularized message was present, and the likelihood was great that the message would be understood by those who viewed it." Id. (quoting *Texas v. Johnson*, 491 U.S. at 404). Applying this standard, the Circuit court held that the particularized, understandable message that the American Knights wished to portray -- i.e., that they follow the ideological tradition of the KKK and share many of the Klan's views about racial separation and white pride -- was

clearly communicated by their wearing the robe and hood. See id. at 206. As such, the court found that the mask “add[ed] no expressive force to the message portrayed by the rest of the outfit,” and was therefore “redundant.” Id.⁵ Consequently, the court held “where, as here, a statute banning conduct imposes a burden on the wearing of an element of an expressive uniform, which element has no independent or incremental expressive value, the First Amendment is not implicated . . .” Id. at 208.

2. Anonymous Speech

The Circuit Court recognized the line of Supreme Court cases, starting with NAACP v. Alabama, that have carved out a right to anonymous speech by enjoining government efforts to compel disclosure of names in numerous speech-related settings, including the names of an organization’s members, the names of campaign contributors, the names of producers of political leaflets and the names of persons who circulate petitions. See id. at 208-09.⁶ The court, however, distinguished these cases on the ground that the Supreme Court has never held, nor has any circuit court of appeals, that freedom of association or the right to engage in anonymous speech entails a right to conceal one’s appearance in a public demonstration. See id. at 209. In so doing, the Second Circuit rejected the view that “the First Amendment is implicated every time a law makes someone -- including a member of a politically unpopular group -- less willing to exercise his or her free speech rights.” Id. The court reasoned that while the First Amendment protects an individual’s right to express his or her viewpoint, however unpopular, “it does not guarantee ideal conditions for doing so, since the individual’s right to speech must always be balanced against the state’s interest in safety, and its right to regulate conduct that it legitimately considers potentially dangerous.” Id.

3. Facial Validity

⁵ The Second Circuit noted that the American Knights had not argued that the mask communicated an additional message of intimidation or fear, separate from the rest of the Klan regalia, but commented that such an argument would likely have failed because a message of intimidation might constitute a “true threat” and thus would not be protected by the First Amendment. See id. at 207, n.8.

⁶ These cases include: McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) (invalidating an Ohio statute that prohibited the distribution of anonymous campaign literature); Talley v. California, 362 U.S. 60 (1960) (invalidating a Los Angeles ordinance that prohibited the distribution of handbills without the names and addresses of persons who prepared, distributed, or sponsored the handbills); Bates v. City of Little Rock, 361 U.S. 516 (1960) (upholding the NAACP’s refusal to provide the names of its members to municipal tax officials). See also Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182 (1999) (holding that the First Amendment was violated by a Colorado statute that required persons who circulated petitions for an initiative to wear identification badges revealing their names); Buckley v. Valeo, 424 U.S. 1, 64 (1976) (“[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”).

The Second Circuit held that New York's anti-mask law regulates conduct (the wearing of masks in groups) rather than pure speech and as such, is not facially invalid for distinguishing between types of conduct. Thus, the court held that the state legislature may legitimately create an exception for mask wearing that "occurs in connection with a masquerade party or like entertainment." See id. at 209-10.

4. Viewpoint Discrimination

The Second Circuit rejected the District Court's holding that the City had engaged in viewpoint discrimination or selective enforcement of the anti-mask law because the American Knights had identified no other groups which had provided advance warning to the police of their intent to wear masks and then been denied a permit. See id. at 210-11.

Significantly, however, the American Knights had cited multiple demonstrations in New York City in which participants had worn masks or covered their faces but were not arrested. These included: Iranian students protesting the Shah in 1977, protestors rallying after the funeral of Amadou Diallo in 1999, protestors opposing the October 23, 1999 American Knight's rally who wore rubber face masks satirizing Mayor Giuliani and pro-Palestinian protestors who wore keffiyahs or head scarves on October 13, 2000, when they gathered in Times Square, and again on October 20, 2000, when they demonstrated at the Israeli Consulate. See American Knights, 232 F. Supp.2d at 219. While these examples do not establish "selective enforcement" or "viewpoint discrimination" in the NYPD's granting of permits -- since these examples apparently did not involve requests for a permit -- they do provide some insight as to the circumstances under which the police will deem it appropriate not to enforce the anti-mask law. Demonstrators at the 2004 Republican National Convention, however, should be aware that these are merely anecdotal examples and thus provide no guarantee that the use of masks in similar contexts -- e.g., wearing burkas to protest the occupation of Iraq; wearing hoods to protest the torture of prisoners at Abu Ghraib, wearing plastic masks to satirize President Bush or other administration officials -- will not result in arrests.

CONCLUSION

New York's anti-mask law requires that three or more persons be wearing masks within an unspecified proximity to one another before a violation occurs. Protestors should politely inform the police of this fact if they are arrested in the presence of less than two other masked individuals..

Since 2001, both the New York City Criminal Court and the Second Circuit Court of Appeals have upheld New York's anti-mask law as facially valid and as constitutional as applied to anarchists wearing bandanas over their faces and Klansmen wearing white masks.

Both courts have acknowledged -- the city court directly and the circuit court obliquely -- that the anti-mask law could conceivably be applied in the future in a manner that would unconstitutionally prohibit expressive conduct. To prevail on such a challenge, the mask wearer

would have the burden of establishing that the mask constituted expressive conduct in that it communicated a particularized message that had a high probability of being understood by viewers. Assuming that this showing could be made, the burden would then shift to the government to demonstrate: (1) that the specific application of the anti-mask law furthered the important governmental interest of deterring violence and facilitating the apprehension of wrongdoers, (2) that this interest was unrelated to the suppression of free expression, (3) that there was a sufficient nexus between this interest and the specific application of the law and (4) that the incidental restriction on First Amendment freedoms was no greater than necessary to further this interest. Only if the government failed to establish these four elements would the specific application of the anti-mask law be held unconstitutional.

If you are arrested for wearing a mask, it will be your burden to establish, hopefully with the help of an attorney: (1) that there were less than two other masked people with or around you and hence no violation occurred, or (2) that wearing the mask constituted expressive conduct and that the government has failed to show that its interference with this conduct was no greater than necessary to further an important government interest unrelated to the suppression of the conduct's content. As suggested by the RNCNotWelcome Collective, some of the same ends achieved by wearing a mask -- e.g., anonymity, solidarity with others, a spirit of fun and creativity -- may be realized by wearing non-criminalized attire such as large hats and outlandish sunglasses.

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