

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA**

EVAN J. POWER

Plaintiff,

CASE NO: 2020 CA 001200

vs.

LEON COUNTY, a political
subdivision of the State of Florida,

Defendant.

_____ /

**VERIFIED COMPLAINT FOR EMERGENCY INJUNCTIVE RELIEF
AND DECLARATORY JUDGMENT**

Plaintiff, EVAN J. POWER ("Power"), through undersigned counsel, hereby sues Defendant, LEON COUNTY, a political subdivision of the State of Florida, ("Leon County"), and alleges the following:

JURISDICTION AND VENUE

1. This is a lawsuit for injunctive relief over which this Court has jurisdiction.
2. This is a lawsuit for declaratory judgment over which this Court has jurisdiction under Fla. Stat. § 86 (2019).
3. Venue is proper in Leon County, Florida under Fla. Stat. § 47.011 (2019), because it is where the cause of action accrued, it relates to certain orders issued by Leon County, and because all or part of the claim for relief at issue in this litigation arose in Leon County.

PARTIES

4. Plaintiff, Power, is a Florida resident, a resident of Leon County, and business owner who has been negatively impacted by orders issued by Leon County that have caused interference with his personal liberty and business enterprise.

5. Leon County is a proper Defendant in this action because Leon County created and implemented Leon County Emergency Ordinance No. 20-15 ("Emergency Ordinance 20-15") on June 23, 2020, which deprives Plaintiff's rights guaranteed to him by the Florida Constitution.

FACTS

6. On April 16, 2020, The White House released "Guidelines for Opening Up America Again," (hereafter "Guidelines") a publication that included a three-phased approach to opening the country during the response to the virus known as COVID-19 and based on the advice of public health experts. The Guidelines advised that individuals "strongly *consider* using face coverings while in public." *Guidelines for Opening Up America Again*, The White House (4-16-2020.) (emphasis added).

7. Afterwards, on April 29th, 2020, the Florida Governor Ron DeSantis released Executive Order 20-112 which included a "phased approach" to reopening Florida. This did not include the requirement that Floridians wear face masks in any setting. Executive Order 20-112 *Phase 1: Safe. Smart. Step-by-Step. Plan for Florida's Recovery*, State of Florida, (April 29th, 2020). Executive Order 20-112 left it up to an individual's own discretion whether to wear a face mask.

8. Thereafter, on June 23th, Leon County issued Emergency Ordinance 20-15.

Unlike the existing national and State of Florida emergency orders, Emergency Ordinance 20-15 requires Leon County residents to wear face masks in various circumstances.

9. Leon County Emergency Ordinance 20-15 reads in part:

Section 2. Definitions.

(ii.) Business Establishment. A “business establishment” means a location with a roof overhead under which any business is conducted, goods are made or stored or processed or where services are rendered. The term “business establishment” includes transportation network companies, such as Ubers and Lyft, vehicles operated for mass transit, taxis, limousines for hire, rental cars, and other passenger vehicles for hire. The term “business establishment” includes locations where non-profit, governmental, and quasi-governmental entities facilitate public interactions and conduct business. The term “business establishment” also includes *places of worship*.

...(cont.) (emphasis added)

Section 3. Mandatory Requirements.

(i) An individual in a business establishment must wear a face covering while in that business establishment.

(ii) The requirement in this section does not apply to:

a. A child under the age of 6.

b. Persons who have trouble breathing due to a chronic pre-existing condition or individuals with a documented or demonstrable medical problem. It is the intent of this provision that those individuals who cannot tolerate a facial covering for a medical, sensory or any other condition which makes it difficult for them to utilize a face covering and function in public are not required to wear one.

c. Public safety, fire, and other life safety and health care personnel, as their personal protective equipment requirements will be governed by their respective agencies.

... (cont.)

Section 4. Penalties and Enforcement.

(ii) The penalty for a violation of this Emergency Ordinance is:

a. for a first offense, a fine of \$50.00

b. for a second offense, a fine of \$125.00

c. For a third and each subsequent offense, a fine of \$250.00

... (cont.)

10. Plaintiff is a business owner who is personally and negatively affected by the mandate to wear a mask contained within Leon County Emergency Ordinance 20-15.

11. On June 8th, the World Health Organization ("WHO") announced that "From the data we have, it still seems to be rare that an asymptomatic person actually transmits onward to a secondary individual," casting serious doubt on the rationality and effectiveness of wearing masks in public places. William Feuer, *Asymptomatic spread of coronavirus is 'very rare,' WHO says*, CNBC, June 8th, 2020, at 1, <https://www.cnbc.com/2020/06/08/asymptomatic-coronavirus-patients-arent-spreading-new-infections-who-says.html>. The day before, on June 7th, the WHO specifically addressed popular cloth masks when it said, "Non-medical, fabric masks are being used by many people in public areas, but there has been limited evidence on their effectiveness and WHO does not recommend their widespread use among the public for control of COVID-19." In fact, the WHO has warned of the potential risks and disadvantages that should be taken into account during any decision-making process regarding the use of masks. Ultimately, the

WHO said that “At the present time, the widespread use of masks everywhere is not supported by high-quality scientific evidence.” World Health Organization, Q&A: Masks and COVID-19, June 7th, 2020 *at* 1, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-on-covid-19-and-masks>.

LAW

12. Leon County Emergency Ordinance 20-15 is first unconstitutional because it violates the Privacy Clause of Article 1 § 23 of the Florida Constitution. Article 1 § 23 of the Florida Constitution states: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein." The explicit constitutional right of privacy listed in the Florida Constitution embraces more privacy interests and extends more protection than the right of privacy provided under the due process clause of the federal constitution. *Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544, 548 (Fla.1985). Emergency Ordinance 20-15 is a radical infringement of the reasonable and legitimate expectation of privacy that most Floridians expect to have over their own bodily and facial autonomy in addition to their medical privacy.

13. Emergency Ordinance 20-15 is also unconstitutional because it violates the Due Process Clause of Art. 1 § 9 of the Florida Constitution, which reads: "No person shall be deprived of life, liberty or property without due process of law...". The due process clause protects the individual against the arbitrary and unreasonable exercise of governmental power. *Noel v. State*, 191 So. 3d 370, 373 (Fla. 2016). The Emergency Ordinance is arbitrary and unreasonable because it is not backed by a compelling state interest or any facts

proving such an interest. (See Section 11 of this complaint.) The original basis for the state of emergency in Leon County which resulted in the issuance of Leon County Emergency Ordinance 20-15 was to reach a goal of “flattening the curve” of new hospitalizations resulting from COVID-19. The curve has been successfully flattened, with hospitalizations decreasing in Leon County, and a new mask mandate bears no relationship to this goal. As of June 24th, there were 6 COVID-19 patients hospitalized in Leon County. (Tallahassee Reports, June. 24, 2020. <https://tallahassee-reports.com/2020/06/22/leon-county-florida-covid-19-numbers-updated-april-13th/>). Due process of law protects against the unreasonable legislative deprivation of life, liberty, or property and the Emergency Ordinance deprives Plaintiff of his liberty. Plaintiff has been deprived of substantive due process by way of the Leon County's interference with his private action and personal liberty.

14. An additional reason Emergency Ordinance 20-15 is unconstitutional and violates the Due Process Clause of Art. 1 § 9 of the Florida Constitution is because it is void for vagueness. The Emergency Order leaves the most significant terms contained in the Ordinance undefined. Due process is violated when a statute “forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning.” *D'Alemberte v. Anderson*, 349 So.2d 164, 166 (Fla. 1977) (quoting *Cline v. Frink Dairy Co.*, 274 U.S. 445, 47 S.Ct. 681, 71 L.Ed. 1146 (1927)). Section 3 (ii)(b) of the Emergency Ordinance, which contains a list of exceptions to the ordinance, reads: "Persons who have trouble breathing due to a chronic pre-existing condition or individuals with a documented or demonstrable medical problem. It is the intent of this provision that those individuals who cannot tolerate a facial covering for a medical, sensory or any other condition which makes it difficult for them to utilize a face covering and function in public

are not required to wear one." (Leon County Emergency Ord. 20-15, Sec. 3(ii)(b).) Multiple terms here remain undefined, such as 'chronic pre-existing,' 'documented,' 'demonstrable medical problem,' and 'sensory.' Leon County has created immediate confusion for the person of common intelligence. Colloquially, 'documented' means 'described' or 'recorded.' Ultimately, the language of the Emergency Ordinance 20-15 is too vague for the average citizen to understand, forcing Leon County residents to guess at the meaning and then be subject to the heavy civil punishment of up to \$250.00 dollars in civil fines. A statute is void for vagueness when persons of common intelligence must guess as to its meaning and differ as to its application, or if it lends itself to arbitrary enforcement at an officer's discretion. *Davis v. Gilchrist County Sheriff's Office*, 280 So. 3d 524, 532 (Fla. 1st DCA 2019). Emergency Order 20-15 lends itself to arbitrary enforcement at an officer's discretion due to its vagueness.

15. Additionally, Emergency Ordinance 20-15 is unconstitutional because it violates the Equal Protection Clause of Art. 1 § 2 of the Florida Constitution, which reads: "All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry...". However, in Emergency Ordinance 20-15, certain government employees are exempt from wearing masks, namely "public safety, fire, and other life safety and health care personnel...". (Leon County Emergency Ord. 20-15, Sec. 3(ii)(c)). No difference of risk or exposure and infection exists between those required to wear masks and government employees. Additionally, this exception subsection doesn't just limit these certain employees from the requirement that they wear masks on the job; but instead it suspends mask-requirement for them indefinitely: anywhere they visit in the County—at any

time—is exempted from the legal requirement to wear a mask. By arbitrarily requiring only a portion of the population to comply with the mask mandate, Leon County treats similarly situated people and businesses differently without a rational basis and places unique burdens on some individuals and not on others without justification. Such a classification must bear a rational relationship to a legitimate government interest or it will violate Florida Constitution's equal protection clause. *North Broward Hospital District v. Kalitan*, 219 So. 3d 49, 55 (2017). No conceivable state of facts can provide a rational basis for classifying government employees as existing in a different situation than the average patron or employee. Thus, Leon County has no reason for treating government employees differently and the classification is not rationally related to a legitimate end.

16. Finally, the Emergency Order is unconstitutional because it violates the Religious Freedom Clause of Art. 1 § Section 3 of the Florida Constitution which reads: "There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof." The definition of the term "business establishment" in Section 2 of Emergency Order includes all "places of worship." (Leon County Emergency Ord. 20-15, Sec. 2(ii)). Requiring that "An individual in a business establishment must wear a face covering while in that business establishment," appears to clearly include pastors preaching to congregations, people attending religious services, and people gathering their homes for religious services, all of which are deemed "essential activities" under Governor DeSantis Executive Order Number 20-112 and 20-91. Because a violation of Emergency Ordinance 20-15 would result in a noncriminal infraction of a civil fine up to \$250, this is tantamount to "penalizing the free exercise" of religion under Florida's Constitution.

17. To obtain a preliminary injunction, Plaintiff must prove: (1) a substantial likelihood of success on the merits, (2) a lack of an adequate remedy at law, (3) the likelihood of irreparable harm absent the entry of an injunction, and (4) that injunctive relief will serve the public interest. *Sch. Bd. of Hernando Cty. v. Rhea*, 213 So.3d 1032, 1040 (Fla. 1st DCA 2017). All four elements are shown and proved below.

18. Plaintiff has a very high likelihood of success on the merits because the Emergency Order is presumptively invalid, implicating an infringement of Plaintiff's privacy right under Article I, Section 23 of Florida's Constitutional. Due to the fundamental and highly guarded nature of the constitutional right to privacy, any law that implicates the right, regardless of the activity, is subject to strict scrutiny and, therefore, presumptively unconstitutional; thus, the burden of proof rests with the government to justify an intrusion on privacy. *Weaver v. Myers*, 229 So. 3d 1118, 1133 (Fla. 2017). This state constitutional right to privacy includes the right to liberty. *State v. J.P.*, 907 So. 2d 1101, 1115 (Fla. 2004). (holding that the Florida constitutional right to privacy includes the right to liberty and self-determination). An integral component of self-determination is the right to make choices pertaining to one's health and to determine what shall be done with one's own body. *Burton v. State*, 49 So. 3d 263, 265 (Fla. 1st DCA 2010). Furthermore, Leon County has made no attempt to justify this intrusion on privacy. Vague, unproven messaging from the Leon County commission regarding public "safety" has not come close to establishing a compelling state interest justifying the intrusion. Ultimately, this explicit constitutional right of privacy embraces more privacy interests and extends more protection than the right of privacy provided under the due process clause of the federal constitution. *Winfield*, 548.

19. Plaintiff lacks an adequate remedy at law. No other remedy exists to protect Plaintiff's rights which the Leon County government is infringing upon. The test for the unavailability of an adequate remedy at law is whether the "irreparable injury is an injury that cannot be cured by money damages." *Lutsky v. Schoenwetter*, 172 So.3d 534, 534 (Fla. 3d DCA 2015) (citing *Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLLP*, 137 So.3d 1081, 1092 (Fla. 3d DCA 2014)). The deprivation of Plaintiff's rights cannot be remedied by money or any judgment other than an injunction. The ability to move freely has been deprived from the Plaintiff, disallowing him to be "let alone and free." Art. 1 § 23, Fla. Const.

20. Unless an injunction is issued, Plaintiff will suffer irreparable harm because his Constitutional rights are being violated. The mask requirement infringes Plaintiff's right to privacy under the Florida Constitution, Article 1, Section 23. Worse, Plaintiff could be arrested and fined if he does not comply with the unconstitutional mandate. The likelihood of irreparable harm resulting from the Emergency Order's enforcement is significant not only for the Plaintiff, but also for Leon County's other 290,000 residents.

21. A temporary injunction of the Emergency Order will serve the public interest. The citizens of the Leon County public are burdened by the over-reach of their local government unprecedented in Florida history. The mask requirement violates both the Plaintiff's and the public's fundamental Florida Constitutional rights. It unduly burdens 290,000 Leon County residents. The public has a strong interest in protecting their rights and their ability to control their own bodies. Additionally, the Emergency Ordinance is written so vaguely that it lends itself to arbitrary enforcement at an officer's discretion.

COUNT I
INJUNCTIVE RELIEF

22. Plaintiff realleges and incorporates herein paragraphs 1 – 21.

23. Plaintiff seeks injunctive relief enjoining Leon County from enforcing the Emergency Order 20-15.

COUNT II
DECLARATORY JUDGMENT

24. Plaintiff realleges and incorporates herein paragraphs 1 – 21.

25. Plaintiff seeks declaratory judgment declaring Emergency Ordinance 20-15, or portions thereof, as unconstitutional and at conflict with the Article 1, Section 2, 9, and 23 of the Florida Constitution.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter:

(a) a declaration that Emergency Ordinance 20-15 violates Article I Sections 2, 3, 9, and 23 of the Florida Constitution.

(b) a temporary injunction enjoining Leon County from enforcing Emergency Ordinance 20-15

(c) and any other further relief as this Court deems just and proper.

VERIFICATION

I, EVAN POWER, declare under penalty of perjury pursuant to the laws of Florida that the foregoing is true and correct,

By: */s/ Evan J. Power*

EVAN J. POWER

DATED this 25th day of June, 2020.

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