

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA**

BRIAN C. DOLATA,

Plaintiff,

CASE NO:

vs.

CITY OF DELAND, a political
subdivision of the State of Florida,

Defendant.

_____ /

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

Plaintiff, BRIAN C. DOLATA ("Dolata"), through undersigned counsel, hereby sues Defendant, CITY OF DELAND, a political subdivision of the State of Florida, ("Deland"), 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 Volusia County, Florida under Fla. Stat. § 47.011 (2019), because it is where the cause of action accrued, it relates to an order issued the City of Deland, a city within Volusia County, and because all or part of the claim for relief at issue in this litigation arose in Volusia County.

PARTIES

4. Plaintiff, Dolata, is a Florida resident and a resident of Deland. Plaintiff has been negatively impacted by an ordinance issued by Deland, which has caused interference with his personal liberty and business enterprise.

5. Plaintiff is a truck driver who works in Deland and other Florida cities.

6. Deland is a proper Defendant in this action because Deland created and implemented City of Deland Ordinance 2020-12, ("Ordinance 2020-12") on July 2nd, 2020, which deprives Plaintiff's rights guaranteed to him by the Florida Constitution.

FACTS

7. 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).

8. Afterwards, on April 29th, 2020, the Florida Governor Ron DeSantis released Executive Order 20-112 which included a "phased approach" to reopening Florida after the onset of the virus known as COVID-19. This Order 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.

9. Thereafter, on July 2nd, Deland issued Ordinance 2020-12. Unlike existing national and State of Florida emergency orders, Ordinance 2020-12 requires Deland residents to wear face masks in various circumstances.

10. Ordinance 2020-12 reads in part:

Section 2. Definitions.

(i) Face Covering. A “face covering” is a material that covers the nose and mouth and that fits snugly against the sides of the face so there are no gaps. It can be secured to the head with ties or straps or simply wrapped around the lower face. It can be made of a variety of materials, such as cotton, silk, or linen. Coverings with materials made of multiple layers is highly encouraged. A cloth face covering may be factory-made or sewn by hand, or the cloth face covering can be improvised from household items. The CDC has posted additional information regarding how to make, wear, and wash a cloth face covering at <https://www.cdc.gov/coronavirus/2019/-ncov/prevent-getting-sick/about-face-coverings.html>.

(ii) Business Establishment. A “business establishment” means 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” also includes places of worship. The term “business establishment” does NOT include locations where governmental entities conduct business (governmental entities having their own protocols regarding face coverings).

(iii) Lodging Establishment. A “lodging establishment” shall have the same meaning as the term “transient public lodging establishment” has in Section 509.013(4)(a)1, Florida Statutes (2019). Accordingly, for purposes of this Emergency Ordinance, a “lodging establishment” means any unit, group of units, dwelling, building, or group of buildings within a single complex of buildings which is rented to guests more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to guests.

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 two.

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.

d. Persons exercising while observing at least 6 feet of distancing from another person.

e. Restaurant and bar patrons while eating or drinking. It is the intent of this provision that a face covering will be worn while traversing a business establishment for ingress and egress, to use the restroom facilities, and while otherwise standing when persons are unable to maintain at least 6 feet of distancing.

f. Business owners, managers, and employees who are in an area of a business establishment that is not open to customers, patrons, or the public, provided that 6 feet of distance exists between persons. This exception does not apply to employees who are present in the kitchen or other food and beverage preparation area of a business establishment.

g. Medical, dental or other health care facilities or offices, as mask wearing in those facilities will be regulated pursuant to guidance specifically directed to those particular facilities.

h. Persons who are separated from any other person by means of barriers such as plastic face shields, plastic or glass barriers, or other devices that effectively prevent the transmission of the COVID-19 virus.

i. A person in a lodging establishment who is inside of the lodging unit, including but not limited to, a hotel room, motel room, vacation rental unit, timeshare unit, or similar unit.

(iii) Every business establishment is required to post signage notifying all persons of the requirement to wear a face covering as provided in this section.

(iv) Nothing herein shall require or allow a person to wear a face covering to conceal the identity of the wearer in violation of Chapter 876, Florida Statutes.

Section 4. Penalties and Enforcement.

(i) A violation of this Emergency Ordinance is a noncriminal infraction. A violation of this Emergency Ordinance does not authorize the search or arrest of an individual. Prior to the issuance of a citation, the individual will be asked to comply with the Emergency Ordinance or be able to explain how an exception in Section 3(ii) applies to them. Failure to comply with the requirements of this Emergency Ordinance presents a serious threat to the public health, safety, and welfare, and a citation may be issued for such a violation after the inquiry referenced above.

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

a. For a first offense, a fine of \$25.

b. For a second offense, a fine of \$50.00.

c. For a third and each subsequent offense, a fine of \$100.00.

d. All other remedies available at law or equity, including injunction, remain available to the City, even after issuance of a citation.

(Ordinance 2020-12)

11. Plaintiff is a business owner who is personally and adversely affected by the mandate to wear a mask that is contained within Ordinance 2020-12 and the risk of punishment that exists for not doing so. Plaintiff is presumptively required by Ordinance 2020-12 to wear a mask.

12. In a highly cited paper published by the Center for Disease Control, it was found that medical researchers did "not find evidence that surgical-type face masks are effective in reducing laboratory-confirmed influenza transmission, either when worn by infected persons

(source control) or by persons in the general community to reduce their susceptibility." (The Center for Disease Control, *Policy Review*, " Xiao, J., Shiu, E., Gao, H., Wong, J. Y., Fong, M. W., Ryu, S....Cowling, B. J. (2020). Nonpharmaceutical Measures for Pandemic Influenza in Nonhealthcare Settings—Personal Protective and Environmental Measures. *Emerging Infectious Diseases*, 26(5), 967-975. <https://dx.doi.org/10.3201/eid2605.190994>.)

13. Plaintiff's reasonable expectation of privacy has been invaded and infringed by Deland, which is forcing Plaintiff and other Deland residents to wear a mask for a majority of the day.

LAW

14. Ordinance 2020-12 is unconstitutional because it violates the Privacy Clause of Article 1 § 23 of the Florida Constitution. It is unconstitutional both facially and as-applied. 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). Ordinance 2020-12 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 by forcing them to wear masks. Plaintiff's medical privacy is and will continue to be infringed by Ordinance 2020-12, which requires him to wear a mask or risk receiving civil punishment for not doing so.

15. Ordinance 2020-12 is also unconstitutional, both facially and as-applied, 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). Ordinance 2020-12 is arbitrary and unreasonable because it is not backed by a compelling state interest or any facts proving such an interest. Due process of law protects against the unreasonable legislative deprivation of life, liberty, or property and Ordinance 2020-12 deprives Plaintiff of his liberty. Plaintiff has been deprived of substantive due process by way of Deland's interference with his private action and personal liberty.

16. An additional reason Ordinance 2020-12 is unconstitutional and violates the Due Process Clause of Art. 1 § 9 of the Florida Constitution is because it is void for vagueness and overbroad. It is unconstitutional both facially and as-applied. Ordinance 2020-12 leaves the most significant terms contained within it undefined. Due process is violated when a law "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)). Significant unclear terms and phrases left undefined include: "Persons who have trouble breathing," "chronic pre-existing condition," "documented or demonstrable medical problem" "tolerate a facial covering," and "sensory." The exemption for a person with a medical or sensory issue is confusing, vague, unclear, and undetermined. Such a broadly written exemption gives any government enforcement official limitless discretion in interpreting and applying it however they would like, with arbitrary consequences. These ambiguous phrases

and terms are unclear and Deland has created immediate confusion for the person of common intelligence. Ultimately, the language of Ordinance 2020-12 is too vague for the average citizen to understand, forcing Deland residents and employers to guess at its meaning and then be subject civil punishment. A law 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). Ordinance 2020-12 lends itself to arbitrary enforcement at an officer's discretion due to its vagueness, overbreadth, and indefinite terms. Furthermore, the Ordinance states that "(i)t is up to the discretion of the law enforcement officer to determine whether the circumstances warrant the issuance of a written warning to the individual for noncompliance." This broad discretion will necessarily lend itself to arbitrary enforcement.

17. Additionally, Ordinance 2020-12 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 and to acquire, possess and protect property. No person shall be deprived of any right because of race, religion, national origin, or physical disability." It is unconstitutional both facially and as-applied. This "basic rights" provision of the Florida Constitution is violated by Ordinance 2020-12 because Plaintiff's right to control the property of his own body and face is fundamental. Property rights are among the basic substantive rights expressly protected by the Florida Constitution. *Smith v. Wiker*, 192 So. 3d 603, 604 (Fla. 2d DCA 2016).

18. 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.

19. Plaintiff has a very high likelihood of success on the merits Ordinance 2020-12 is presumptively invalid, implicating an infringement of Plaintiff's privacy right under Article I, Section 23 of Florida's Constitutional, the Due Process Clause of the Florida Constitution, and Florida's Equal Protection Clause. 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, Deland has made no attempt to justify this intrusion on privacy. Vague, unproven messaging from the Deland 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.

20. Plaintiff lacks an adequate remedy at law. No other remedy exists to protect Plaintiff's rights which Deland 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..

21. 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. The likelihood of irreparable harm resulting from the enforcement of Ordinance 2020-12 is significant not only for the Plaintiff, but also for all of Deland's 34,000 residents.

22. A temporary injunction of Ordinance 2020-12 will serve the public interest. The citizens of Deland 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 34,000 Deland residents and employees. The public has a strong interest in protecting their rights and their ability to control their own bodies and health. Additionally, Ordinance 2020-12 will is written so vaguely that it lends itself to arbitrary enforcement at an officer's discretion.

COUNT I
INJUNCTIVE RELIEF

23. Plaintiff realleges and incorporates herein paragraphs 1 – 22.
24. Plaintiff seeks injunctive relief enjoining Deland from enforcing Ordinance 2020-12.

COUNT II
DECLARATORY JUDGMENT

25. Plaintiff realleges and incorporates herein paragraphs 1 – 22.
26. Plaintiff seeks declaratory judgment declaring Ordinance 2020-12, or portions thereof, as unconstitutional and at conflict with the Article 1, Section 2, 9, and 23 of the Florida Constitution.
26. Plaintiff seeks declaratory judgment declaring that Ordinance 2020-12 is illegal and void.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter:

- (a) a declaration that Ordinance 2020-12 violates Article I Sections 2, 9, and 23 of the Florida Constitution.
- (b) a temporary injunction enjoining Deland from enforcing Ordinance 2020-12.
- (c) and any other further relief as this Court deems just and proper.

VERIFICATION

I, BRIAN C. DOLATA, declare under penalty of perjury pursuant to the laws of Florida that the foregoing is true and correct,

By: */s/ Brian C. Dolata*

BRIAN C. DOLATA

DATED this 13th day of July, 2020.

/s/ Anthony F. Sabatini
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