

IN THE CIRCUIT COURT OF  
THE FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 502020CA006920XXXXMB AF

JOSIE MACHOVEC, CARL HOLME,  
RACHEL EADE, and ROBERT SPREITZER

Plaintiffs,

v.

PALM BEACH COUNTY,

Defendant.

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**PALM BEACH COUNTY'S RESPONSE IN OPPOSITION TO PLAINTIFF'S  
VERIFIED<sup>1</sup> EMERGENCY MOTION FOR TEMPORARY INJUNCTION**

To protect public health and uphold the Florida Constitution, the Court must deny Plaintiffs'<sup>2</sup> request to enjoin the County's enforcement of Emergency Order Number 12, an order requiring facial coverings in particular places, because Palm Beach County rationally exercised its police powers in its effort to combat the pandemic threatening people in its jurisdiction and did so without implicating any rights protected by the Florida Constitution. Even if Plaintiffs had shown an infringement upon their rights, which they have not, the County narrowly tailored Emergency Order 12 to further the compelling interest of protecting people from an infectious disease that is rapidly spreading in its jurisdiction. Emergency Order 12 withstands any level of scrutiny and must be upheld.

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<sup>1</sup> Despite this title, the Motion is not signed or sworn by any of the Plaintiffs. Nor was the Motion supported by affidavits.

<sup>2</sup> Only four Plaintiffs have moved for temporary injunction. Plaintiff Karen Holme joined the suit afterward.

## I. INTRODUCTION

Disease and death lurk unseen in droplets expelled by the mouth and nose when a person infected with SARS-CoV-2 (the novel coronavirus) talks, coughs, or sneezes.<sup>3</sup> “At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others.” *S. Bay United Pentecostal Church v Newsom*, 140 S. Ct. 1613 (U.S. 2020) (Roberts, C.J., concurring in denial of application for injunctive relief). “Medical experts agree that to stop the spread of COVID-19, people should practice social distancing and wear face coverings when near other people outside their homes.” *Illinois Republican Party v. Pritzker*, 20 C 3489, 2020 WL 3604106, at \*1 (N.D. Ill. July 2, 2020). It makes sense: to reduce the amount and reach of respiratory droplets that may infect others: cover the source – the nose and mouth.<sup>4</sup>

In the midst of a national,<sup>5</sup> state,<sup>6</sup> and local emergency<sup>7</sup>; in a community where there is a larger percentage of a vulnerable population (persons over the age of 65)<sup>8</sup> and the rates of

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<sup>3</sup> Exhibit Q-3, Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), How to Protect Yourself & Others, Prevention <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited July 5, 2020); Exhibit Q-2, Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), About Cloth Face Coverings, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html> (last visited July 5, 2020); Exhibit O-1, Florida Department of Health, Florida COVID Response, How do I prevent and prepare for COVID-19?, <https://floridahealthcovid19.gov/prevention/> (last visited July 5, 2020); Exhibit L-2, Transcript Excerpt of Megan Gumke Testimony, 6:19—7:1.

<sup>4</sup> Exhibit W, Bush, M.D., FACP., Affidavit, ¶ 8-10. *see also* Exhibit Q-1, Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), Considerations for Wearing Cloth Face Coverings: Help Slow the Spread of COVID-19, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html> (last visited on July 5, 2020).

There exists academic support for this conclusion. *See* Exhibit T-1, Catherine M. Clase, MB BChir, MSc, Edouard L. Fu, BSC, Meera Joseph, MD, Rupert C.L. Beale, MB, PhD, Myrna B. Dolovich, BEng, PEng, Meg Jardine, MBBS, PhD, Johannes F.E. Mann, MD, PhD, Roberto Pecoits-Filho, MD, PhD, Wolfgang C. Winkelmayer, MD, ScD, Juan J. Carrero, Pharm, PhD. *Cloth Masks May Prevent Transmission of COVID-19: An Evidence-Based, Risk-Based Approach*. ACP Journals, Annals Of Internal Medicine. 2020 May 22.10.7326/M20-2567 <https://www.acpjournals.org/doi/10.7326/M20-2567> (“Every virus-laden particle retained in a mask is not available to hang in the air as an aerosol or fall to a surface to be later picked up by touch.”) (last visited on July 7, 2020).

<sup>5</sup> Exhibit A, Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Issued on March 13, 2020, <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last visited on July 7, 2020).

<sup>6</sup> *See* Exhibit B-1, Fla. Exec. Order No. 20-52 (Mar. 9, 2020).

<sup>7</sup> Exhibit C-1, Palm Beach County Declaration of Emergency (March 13, 2020).

hospitalization and death exceed that of the state generally<sup>9</sup>; on a day when 18.6% of test results were positive (353 positive results among 1,896 tested)<sup>10</sup>; after mere recommendations for face coverings had not stymied the spread of deadly disease<sup>11</sup>; the Palm Beach County Board of County Commissioners (“County”) voted unanimously to require covering the mouth and nose while in certain public places. As a result, the County Administrator issued Emergency Order 12.

Plaintiffs ask this Court to second-guess the wisdom of Emergency Order 12 and undo what the representative government of this County deemed appropriate to protect the health, safety, and welfare of the public. A function legislatively entrusted to the County. *See* § 252.38, Fla. Stat. (2020); *see also Henry v. DeSantis*, 20-CV-80729, 2020 WL 2479447, at \*9 (S.D. Fla. May 14, 2020) (“And so long as the people’s elected leaders are working within the confines of the people’s constitutional rights, courts are not here to second-guess or micromanage their already unenviable jobs guiding us through profoundly unprecedented challenges.”).

But, Plaintiffs have not established that the County’s action has “no real or substantial relation to [public health and safety], or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” *See Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 31 (1905) (cited by *State v. Du Bose*, 128 So. 4, 6 (Fla. 1930) (“Before this contention can be upheld, it must be shown that the provisions of the ordinance as applied to the locus in question are clearly arbitrary and unreasonable, and have no substantial relation to the public health, safety,

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<sup>8</sup> 24.4% Palm Beach County’s population is 65 and older, the state’s is 20.9%. *See* Exhibit P, United States Census Bureau, QuickFacts, Palm Beach County, Florida; Florida, <https://www.census.gov/quickfacts/fact/table/palmbeachcountyflorida,FL/PST045219> (last visited on July 10, 2020).

<sup>9</sup> In Palm Beach County, the hospitalization rate of those infected is 10%; the state’s is 7%. The rate of death is 3%, for Palm Beach County; the state’s death rate is 2%. *See* Exhibit N-4, COVID-19 Summary for Florida and Palm Beach County through July 11, 2020.

<sup>10</sup> Exhibit N-2, COVID-19 Summary for Florida and Palm Beach County through July 5, 2020.

<sup>11</sup> On June 23, 2020, the County had been recommending the wearing of facial coverings in public places where social distancing was not possible for more than a month. *See* Exhibit E-8, E-10, Palm Beach County Executive Orders 8 and 10.

morals, or general welfare.”)); *see also In re Abbott*, 954 F.3d 772, 785 (5th Cir. 2020) (holding that *Jacobson* “remains good law” and was the proper legal framework for analyzing an emergency order during the COVID-19 pandemic).

The County’s action in requiring face coverings to be worn in public places is directly and substantially related to the public health<sup>12</sup> and is not an invasion of constitutional rights. Accordingly, there is no legal basis to interfere with the County’s exercise of its emergency police powers in issuing and enforcing Emergency Order 12. *See State Dept. of Agric. & Consumer Services Div. of Animal Indus. v. Denmark*, 366 So. 2d 469, 471 (Fla. 4th DCA 1979) (“It is not within the province of the court to interfere with the judgment of the legislature and its properly delegated authority, absent a clear showing that the subject of the statutory enactments was outside the power of the legislature, or that the rules and regulations promulgated under the statutes were arbitrary or unreasonable or not consistent with the mandate of the legislature.”). Like judges in the United States Northern District of Florida,<sup>13</sup> the Second Judicial Circuit, in and for Leon County,<sup>14</sup> and the Eighth Judicial Circuit in and for Alachua County, Florida,<sup>15</sup> this Court should deny the motion to temporarily enjoin the requirement to wear a face covering in public places.

## II. FACTUAL BACKGROUND

Across the United States of America, state and local governments have taken unprecedented actions to protect people from becoming infected with the novel coronavirus and contracting COVID-19.

In Florida, Governor DeSantis declared a state of emergency on March 9, 2020. *See* Fla. Exec. Order No. 20-52 (Mar. 9, 2020). ... The Governor [took] steps by executive order designed to reduce social gatherings and minimize human-to-human transmission and the disease. *See* Fla. Exec. Order No. 20-68 (Mar. 17,

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<sup>12</sup> *See* Exhibit V, Campazzi, M.D. Affidavit, ¶¶ 15-16.

<sup>13</sup> Exhibit J, *Ham v. Alachua Cty. Bd. of Cty. Comm’s*, Case No 1:20-cv-00111-MW/GRJ (N.D. Fla. May 30, 2020).

<sup>14</sup> Exhibit L-1, Transcript of Ruling in *Power v Leon County*, Case No. 2020-CA-001200 (July 10, 1010).

<sup>15</sup> Exhibit I, *Green v. Alachua Cty.* Case No. 01-2020-CA-001249 (Fla. 8th Cir. Ct. May 26, 2020).



2020) (suspending the sale of alcoholic beverages for on-premises consumption); Fla. Exec. Order No. 20-70 (Mar. 20, 2020) (directing all restaurants, bars, and other food-service businesses in Broward and Palm Beach “to close on-premises service of customers”); Fla. Exec. Order No. 20-71 (Mar. 20, 2020) (extending the on-premises food consumption ban statewide, but authorizing “all vendors licensed to sell alcoholic beverages ... to sell alcoholic beverages in sealed containers”).

.... On March 30, [Governor DeSantis] issued a “safer at home” order for the four Southeast Florida counties of Monroe, Miami-Dade, Broward, and Palm Beach. *See* Fla. Exec. Order No. 20-89 (Mar. 30, 2020). At that moment, these four counties accounted for 60% of Florida’s COVID-19 cases. *Id.* ... Two days later, he announced that he would extend the policy statewide. *See* Fla. Exec. Order No. 20-91 (Apr. 1, 2020).

For the entire month of April 2020, 90% of Americans (and all Floridians) were subject to various state-implemented “safer at home” orders. **But the mitigation strategies appeared to be working. The daily rate of increase in new cases declined precipitously throughout the month.** ...

On April 29, 2020, he announced his plan to “re-open” Florida in three phases. *See* Fla. Exec. Order No. 20-112 (Apr. 29, 2020). In the so-called “Phase 1,” certain types of business that were previously deemed “nonessential” were allowed to open, provided they follow strict guidelines, all in an attempt to not “re-open” imprudently or too quickly. ...

Consistent with the “safer at home” orders initially applying only to Southeast Florida, Phase I expressly exempted Miami-Dade, Broward, and Palm Beach Counties from this first wave of re-openings. *See* Fla. Exec. Order 20-112, at § 2(A)(2) (Apr. 29, 2020). Counties outside of Southeast Florida entered Phase I on Monday, May 4, 2020. As of May 11, Palm Beach County was included in Phase I. *See* Fla. Exec. Order No. 20-120 (May 9, 2020).

*Henry*, 20-CV-80729, 2020 WL 2479447, at \*2-3 (emphasis added).

The County acted at the local level: declaring a state of emergency on March 13, 2020<sup>16</sup>; closing boat docks and marinas for recreational use, non-critical businesses, as well as parks and golf courses ahead of the Governor’s “safer at home” order, EO 20-1, 20-3; and recommending facial coverings in public places, EO 20-4. *See* Exhibits D-1, D-3, D-4. After more than a month of restricting the permissible purposes for being in public places and with the number of new cases

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<sup>16</sup> Exhibit C-1, Palm Beach County Declaration of Emergency (March 13, 2020).

declining,<sup>17</sup> the County gradually relaxed the limitations: outdoor recreation activities such as boating, golfing, and tennis returned under social-distancing guidelines, EO 20-5; beaches opened under social-distancing guidelines, EO 20-6; and facial coverings continued to be recommended where social distancing was not possible, EO 20-8. Exhibits D-5, D-6, D-8.

The County moved into Full Phase 1 of reopening on May 18, 2020. *See* Exhibit B-6, Fla. Exec. Order 20-123 (May, 14, 2020). Restaurants, in-store retail sale establishments, museums, libraries, and gyms in Palm Beach County were authorized to operate at 50% capacity. *See id.* When the County entered Full Phase 1, the number of daily new cases was averaging less than 100. *See* Exhibit G-3, Dr. Alonso COVID-19 Update to PBCBCC on June 16, 2020, pg. 5; Exhibit H-3, Dr. Alonso COVID-19 Update to PBCBCC on June 23, 2020, pg. 6. By the beginning of June, that metric grew. *Id.*

Efforts were made to protect the public while in government buildings. Effective on June 1, 2020, the Chief Judge of the Fifteenth Judicial Circuit, the Honorable Krista Marx, ordered that all persons entering any of the courthouses shall wear a mask or facial covering in any common area of the courthouse. *See* Administrative Order 12.510-06/2020.12, IV(3). On June 8, 2020, the County extended its facial covering requirement from its transit service to include its buildings. EO 20-10. Exhibit D-10.

The number of COVID-19 cases, the positivity rate among those tested, and the number of COVID-19 patients in hospital and ICU beds climbed. *See* Exhibit G-3, Dr. Alonso COVID-19 Update to PBCBCC on June 16, 2020, pg. 5, 7-8; Exhibit H-3, Dr. Alonso COVID-19 Update to PBCBCC on June 23, 2020, pg. 8, 10; Exhibit N-1, COVID-19: summary for Palm Beach County (Data through June 30, 2020). After receiving an update on the coronavirus impacts in Palm Beach

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<sup>17</sup> Exhibit G-3, Dr. Alonso COVID-19 Update to PBCBCC on June 16, 2020, pg. 8.

County, on June 16, 2020, the County began to discuss requiring face coverings in more public places like its counterparts in Dade and Broward had. *See* Exhibit G-4, Video of June 16, 2020, PBCBCC Meeting,<sup>18</sup> 1:23:30-29:11. The discussion was tabled to allow for public comment. *See id.* at 1:29:12-29:27.

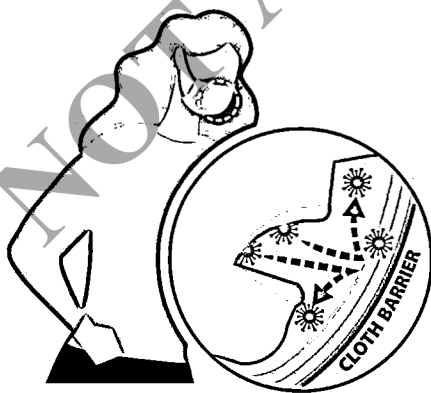
On June 20, 2020, the Florida Surgeon General issued a public health advisory, “Updated Measures to Ensure Protection of Public Health in Response to COVID-19,” that:

All individuals in Florida should wear face coverings in any setting where social distancing is not possible, unless any of the following is applicable:

- A child is under two years of age;
- An individual has one or more medical conditions or disabilities that prevent wearing a face covering;
- An individual is obtaining a service involving the nose or face for which temporary removal of the face covering is necessary to perform the service;
- An individual works in a profession where use of a face covering will not be compatible with the duties of the profession; or
- An individual is engaged in outdoor work or recreation with appropriate social distancing in place.

All individuals should follow CDC guidelines on what type of face coverings are available and should be utilized.

*See* Exhibit M. The Centers for Disease Control and Prevention (“CDC”) recommends cloth face coverings:



Cloth face coverings are recommended as a simple barrier to help prevent respiratory droplets from traveling into the air and onto other people when the person wearing the cloth face covering coughs, sneezes, talks, or raises their voice. This is called source control. This recommendation is based on what we know about the role respiratory droplets play in the spread of the virus that causes COVID-19, paired with emerging evidence from clinical and

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<sup>18</sup> Also available at: <http://discover.pbccgov.org/countycommissioners/Pages/bcc-meeting-videos.aspx?videoid=bcc/2020/20200616-bcc-mtg> (last viewed on July 6, 2020).

laboratory studies<sup>19</sup> that shows cloth face coverings reduce the spray of droplets when worn over the nose and mouth. COVID-19 spreads mainly among people who are in close contact with one another (within about 6 feet), so the use of cloth face coverings is particularly important in settings where people are close to each other or where social distancing is difficult to maintain.<sup>20</sup>

The United States Department of Labor, Occupational Safety and Health Administration, (“OSHA”), “generally recommends that employers encourage workers to wear face coverings at work” for source control of COVID-19 consistent with CDC guidelines.<sup>21</sup> The Mayo Clinic,<sup>22</sup> Cleveland Clinic,<sup>23</sup> and Johns Hopkins<sup>24</sup> also recommend wearing a cloth face covering in public places, where social distancing is difficult to maintain, to reduce the spread of the novel coronavirus.

On June 23, 2020, Florida Department of Health in Palm County Director, Alina Alonso, M.D., advised the County that more than 10,000 residents had contracted COVID-19 and 468 had died. *See* Exhibit H-3, Dr. Alonso COVID-19 Update to PBCBCC on June 23, 2020, pg. 5. The

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<sup>19</sup> The evidence referenced by the CDC included an article titled, “Aerosol Filtration Efficiency of Common Fabrics Used in Respiratory Cloth Masks,” published in April 2020, which concluded “that the use of cloth masks can potentially provide significant protection against the transmission of particles in the aerosol size range.” *See* Exhibit T-2, Konda A, Prakash A, Moss GA, Schmoldt M, Grant GD, Guha S. Aerosol Filtration Efficiency of Common Fabrics Used in Respiratory Cloth Masks. ACS Nano. 2020 Apr 24. PMID: 32329337, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7185834/>.

<sup>20</sup> Text and image from Exhibit Q-1, the Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), Considerations for Wearing Cloth Face Coverings: Help Slow the Spread of COVID-19, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html> (last visited on July 5, 2020).

<sup>21</sup> Exhibit R, OSHA, *COVID-19 Frequently Asked Questions*, last visited on July 8, 2020, <https://www.osha.gov/SLTC/covid-19/covid-19-faq.html>

<sup>22</sup> Exhibit S-1, Mayo Clinic, COVID-19: How much protection do face masks offer? <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-mask/art-20485449?p=1> (last visited on July 6, 2020) (“Asking everyone to wear cloth masks can help reduce the spread of the coronavirus by people who have COVID-19 but don’t realize it.”).

<sup>23</sup> Exhibit S-2, Cleveland Clinic, Health Essentials, Here’s How Wearing a Cloth Mask Helps Fight the Spread of Coronavirus, <https://health.clevelandclinic.org/heres-how-wearing-a-cloth-mask-helps-fight-the-spread-of-coronavirus/> (last visited on July 7, 2020); Exhibit S-3, 5 Myths about Coronavirus and Face Masks Debunked, <https://health.clevelandclinic.org/5-myths-about-coronavirus-and-face-masks-debunked/> (last visited on July 7, 2020).

<sup>24</sup> Exhibit S-4, Johns Hopkins Medicine, Coronavirus Face Masks & Protection FAQs, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-face-masks-what-you-need-to-know> (last visited on July 6, 2020) (“Yes, if you are in a public place where you will encounter other people, you should wear a mask.”).

numbers have names. Lest we become numb to the significance of the death statistics, The Palm Beach Post chronicled the lives of some of the people in Palm Beach County who lost their lives to the novel coronavirus,<sup>25</sup> including:

- Sheila Aaronson, 93,

Sheila was active in politics alongside her husband, and was known to be his biggest fan and most influential person in his life. She was very devoted to her marriage and took pride in their partnership.<sup>26</sup>

- Glorivi Andujar, 39, and Alexander Andujar, 41,

The closest two of five siblings, they did everything together and supported each other through life. Alexander loved God since he was little, and worked most of his life as a pastor. Glorivi's dream was to go to Paris someday.<sup>27</sup>

- Honey Fleischmann, 87,

Honey was a mother of three who was always there for her kids. She was a crafty, musical, and adventurous mom.<sup>28</sup>

- Peter Mermelstein, 72,

Peter was a husband and father of four. He worked hard – After retiring from limo driving in New York, he had taken up driving for a ride-sharing firm in Delray Beach. When he fell ill, his wife hid his car keys so he could rest and recover, only to find him and her car missing one night. Peter had driven himself to the hospital.<sup>29</sup>

- Carlos Morales, 62,

Carlos was a self-taught musician with a love for the guitar. It was like his fourth language – He had quickly learned both English and Creole after he brought his family over to the U.S. from Nicaragua.<sup>30</sup>

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<sup>25</sup> These and additional stories available at The Palm Beach Post webpage on the topic of coronavirus deaths, <https://www.palmbeachpost.com/topics/coronavirus-deaths> (last visited on July 13, 2020).

<sup>26</sup> <https://www.palmbeachpost.com/news/20200618/lost-to-coronavirus-sheila-aaronson-widow-of-county-political-powerhouse-burt-dies> (last visited on July 6, 2020).

<sup>27</sup> <https://www.palmbeachpost.com/news/20200508/lost-to-coronavirus-its-not-easy-says-mother-of-son-daughter-who-died-days-apart> (last visited on July 6, 2020).

<sup>28</sup> <https://www.palmbeachpost.com/news/20200604/lost-to-coronavirus-mother-a-model-that-they-just-dont-make-anymore> (last visited on July 6, 2020).

<sup>29</sup> <https://www.palmbeachpost.com/news/20200704/lost-to-coronavirus-retired-limo-driver-didnt-want-to-give-up-keys> (last visited on July 6, 2020).

<sup>30</sup> <https://www.palmbeachpost.com/news/20200428/lost-to-coronavirus-wellington-equestrian-scene-staple-sought-help-just-one-day-too-late> (last visited on July 6, 2020).

- Richard Alexander Ross Jr., 66,

Karate was a way of life for Rick, a highly ranked instructor, and he ran his own school in Boynton Beach. In addition to serving his family as a father and grandfather, he had also served the community as a police officer.<sup>31</sup>

- Fay Savin, 87,

Fay's dream for something bigger led her from her life in Jamaica to the U.S., where she began working at the United Nations. Her family describes her as woman ahead of her time, elegant, smart, and witty. She enjoyed doing crossword puzzles and would find art no matter where she went.<sup>32</sup>

Those are snippets of the stories of just 8 people lost to this virus. There are at least 600 more who have died.<sup>33</sup> COVID-19 causes suffering and death. *See* Exhibit V, Campazzi, M.D. Affidavit, ¶ 10. We are experiencing, without a doubt, a pandemic that threatens the public health. *Id.* at ¶ 9.

“Facial coverings are KEY at preventing the spread of respiratory diseases such as Covid-19, and called for by the over 13,000 Infectious Diseases specialist physician members of the [Infectious Diseases Society of America] IDSA, the approximate 25,000 physician members of the [Florida Medical Association] FMA, and 1,500 physician members of the [Palm Beach County Medical Society] PBCMS who care for patients locally in Palm Beach County, Florida.” Exhibit W, Bush, M.D., FACP., Affidavit, ¶ 10. A Board Certified Infectious Disease Specialist, with 32 years of experience, Dr. Larry Bush, opined that “requiring the wearing of a facial covering when in public, except for when there is a defined respiratory or other medical contraindication is necessary, prudent, and required to prevent the ongoing spread of COVID-19.” *Id.* at ¶ 11. “Moreover, due to the rapid increase in COVID-19 infections and the resulting mortality rate of 3

<sup>31</sup> <https://www.palmbeachpost.com/news/20200505/lost-to-coronavirus-former-boynton-police-officer-lsquo-lifelong-public-servant-squo-rick-ross> (last visited on July 6, 2020)

<sup>32</sup> <https://www.palmbeachpost.com/news/20200610/lost-to-coronavirus-elegant-and-progressive-from-jamaica-to-un> (last visited on July 6, 2020).

<sup>33</sup> *See* COVID-19 Summary for Palm Beach County, Data through July 12, 2020, verified as of July 13, 2020, at 9:25 a.m. [http://ww11.doh.state.fl.us/comm/\\_partners/covid19\\_report\\_archive/county\\_reports\\_latest.pdf](http://ww11.doh.state.fl.us/comm/_partners/covid19_report_archive/county_reports_latest.pdf) (last visited on July 13, 2020).

percent in Palm Beach County, [he] firmly believe[s] requiring facial covering to reduce the risk of infection and the spread of the disease is necessary for the overall public health of Palm Beach County residents.” *Id.* at ¶ 12.

At the June 23, 2020, workshop concerning whether to require face coverings, Dr. Alonso counseled the County that all indicators showed rising numbers after reopening. Exhibit H-5, Transcript of June 23, 2020, Meeting, 8:12-13. Though younger populations were bearing the burden of the increase, some young individuals, even previously healthy people, were being hospitalized, filling ICU beds, and dying. *Id.* at 8:23—9:1. Dr. Alonso showed the County that the metrics for influenza-like illnesses, COVID-19-like illnesses, and new COVID-19 cases were all increasing, which meant that the County was not on track to move to Phase 2 of reopening. *Id.* at 12:1-8. Dr. Alonso opined that Palm Beach County needed to act now to get the numbers moving in the right direction. *Id.* at 11:10-13. She “highly recommend[ed]” mandatory facial coverings for maintaining and containing the spread of COVID-19. *Id.* at 16:19-21. Dr. Alonso informed the County that the Florida Surgeon General and the CDC recommended face coverings. *Id.* at 32:1-14, 20-23. **“The information now is that facial coverings in public help stop the spread of the virus,”** Dr. Alonso advised the County. *Id.* at 16:8-10 (emphasis added).

For approximately two hours, the County heard from numerous members of the community, including Plaintiffs Josie Machovec and Rachel Eade. *See* Exhibit H-4, Video of June 23, 2020, PBCBCC Workshop, 1:48:36, 1:56:12.<sup>34</sup> Machovec voluntarily revealed in her public comment that she has a medical condition and will not wear a face covering. *Id.* at 1:50:06.<sup>35</sup> Many voiced their concerns and preference not to wear a face covering.

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<sup>34</sup> Available at <http://discover.pbcbcc.org/countycommissioners/Pages/bcc-meeting-videos.aspx?videoid=BCC/2020/20200623-bcc-workshop-mtg> (last visited on July 10, 2020).

<sup>35</sup> Though she has not averred the nature of her condition in any filing, she nevertheless made it publicly known so that the Palm Beach Post could report about it. *See* <https://www.palmbeachpost.com/news/20200710/mask-foes->

A handful of speakers voiced support. One speaker shared with the County that there were more supporters outside who were unable to enter because the chambers were full. *Id.* at 2:32:50-35:00. She reminded the County of the real, human impacts of the spread of the disease: three loved ones lost, and three others on ventilators. *See id.* Another speaker referenced a letter sent to the County by Congress members Lois Frankel, Alcee Hastings, and Theodore Deutch, which stated, “It is not sufficient that Palm Beach County requires masks on public transit and in government buildings, but only ‘encourages’ masks for other essential services.” *See id.* at 2:07:11-7:20; Exhibit U.

Commissioner McKinlay stated that she had received 1,205 total emails regarding the issue, “1,016 in favor of masks” and “189 opposed to masks.” Exhibit H-5, Transcript of June 23, 2020, Meeting, 56:2-6, 20-21. After further discussion, each member of the Board of County Commissioners voted in favor of requiring face coverings in public. *Id.* at 63:20.

The County Administrator thus issued Emergency Order 12 (EO 20-12), which requires face coverings to be worn by everyone except:

1. Children under two (2) years of age and any child while under the custody of a licensed childcare facility, including daycare centers;
2. Persons prohibited from wearing facial coverings by Federal or State safety or health regulations;
3. Public safety, fire, or other life safety personnel that have personal protective equipment requirements governed by their respective agencies;
4. Individuals while actively engaged in exercise and maintaining social distancing in accordance with CDC guidelines;
5. Persons receiving goods or services from a business or establishment for the shortest practical period of time during which the receipt of such goods or services necessarily precludes the wearing of a facial covering such as, but

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[shrug-off-national-tv-“bullies”-poking-fun-at-“crazytown”-palm-beach-county](#) (last visited on July 11, 2020).



not limited to, consuming food or beverage or receiving a facial grooming or treatment;

6. Persons who have a medical condition that makes the wearing of a facial covering unsafe such as, but not limited to, asthma, COPD, other conditions that reduce breathing or lung capacity;
7. Persons for whom wearing a facial covering conflicts with their religious beliefs or practices; and
8. Facial coverings may be removed temporarily while assisting persons who are hearing impaired or who rely on reading lips in order to communicate.

EO 20-12, Section 4e. There are four types of public places where non-exempt persons must wear face coverings:

- a. **Businesses and Establishments - Facial Coverings Required.** Facial coverings must be worn by all persons, other than those specifically exempted in Section 4e. while obtaining any good or service or otherwise visiting or working in any business or establishment, including entering, exiting, and otherwise moving around within the establishment. Businesses or establishments of any type, including but not limited to, those permitted to operate under Executive Order of the Governor or any Palm Beach County Emergency Order are subject to this provision. Such businesses and establishments include, but are not limited to, restaurants, retail establishments, hotels, grocery stores, gyms, pharmacies, indoor recreational facilities, and vehicles for hire.
- b. **Public Places -Facial Coverings Required.** Facial coverings must be worn by all persons in public places where social distancing in accordance with CDC guidelines is not possible or not being practiced. For purposes of this provision, public places shall include any outdoor areas that are open and regularly accessible, including, but not limited to, common areas within private communities accessible to more than one housing unit.
- c. **Palm Tran - Facial Coverings Required.** All persons utilizing the County's Palm Tran transit services including fixed route, Palm Tran Connection, Go Glades, and any other transit service provided by Palm Tran, shall wear facial coverings at all times when entering, riding, or exiting the bus or transit vehicle, unless a medical accommodation is arranged in advance by contacting Palm Tran at (561) 841-4287.
- d. **County and Municipal Governmental Facilities - Facial Coverings Required.** All persons accessing governmental buildings for the purposes of conducting public business, visitation, contracting and maintenance, delivery, or any other activity requiring a presence in a governmental building shall wear facial coverings as defined by the CDC at all times while present in the building. For purposes of this

section, governmental buildings shall mean any Palm Beach County or municipal-owned and operated buildings including, but not limited to, office buildings, service centers, and libraries.

EO 20-12, Sec. 4.

Though viewed or portrayed as a “mask mandate,” the order does not mandate a mask. The order requires facial coverings. A facial covering is “any covering which snugly covers the nose and mouth, whether store bought or homemade, mask or clothing covering including but not limited to, a scarf, bandana, handkerchief, or other similar cloth covering and which is secured in place,” or, alternatively, a person may choose to wear a face shield, a “clear, plastic face shields, consisting of a piece of rigid, clear plastic attached to a headband that extends below the chin, whether store bought or homemade.” *Id.* at Sec. 5.<sup>36</sup> Compliance may be enforced through civil citations and fines not to exceed two hundred fifty dollars (\$250) for the first violation and five hundred dollars (\$500) for each additional violation. *Id.* at Sec. 8. To educate the public about the requirements and consequences, the County published a Summary and FAQs for EO 20-12, which are accessible online.<sup>37</sup>

A week after the County voted to require face coverings in public, Plaintiffs filed their complaint<sup>38</sup> and the pending motion to enjoin the County from enforcing Emergency Order 12. Plaintiffs did not sign or verify the complaint or the motion. Currently, the County and this Court

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<sup>36</sup> There exists support for the use of face shields. A viewpoint article published by the JAMA Network discussed the efficacy of face shields in protecting the wearer from inhalation exposure and recommended further study on source control efficacy. It concluded that face shields should be included as part of strategies to safely and significantly reduce transmission in the community setting. *See* Exhibit T-3, Eli N. Perencevich, MD, MS; Daniel J. Diekema, MD, MS; Michael B. Edmond, MD, MPH, MPA. Moving Personal Protective Equipment Into the Community: Face Shields and Containment of COVID-19. JAMA Network. 2020 April 29. doi:[10.1001/jama.2020.7477](https://doi.org/10.1001/jama.2020.7477) (last visited on July 10, 2020).

<sup>37</sup> Exhibit E-2, Summary, <http://discover.pbcgov.org/PDF/COVID19/Summary-on-Required-Wearing-of-Facial-Coverings-in-Palm-Beach-County.docx.pdf>; Exhibit E-3, FAQs, <http://discover.pbcgov.org/PDF/COVID19/PBC-Facial-Coverings-FAQs.pdf> (last visited on July 6, 2020).

<sup>38</sup> The operative complaint in this case may be the Amended Complaint, which was filed at 5:26 p.m. pm Sunday, July 12, 2020. The primary substantive change is the addition of a fifth Plaintiff, Karen Holme, Exhibit F, a few additional paragraphs referencing the new party. The motion for temporary injunction references the Complaint, but the County will reference the corresponding paragraphs in the Amended Complaint since the claims and counts remain the same.

have no sworn evidence from Plaintiffs about themselves, whether they fall within an exception to the order,<sup>39</sup> have tested negative for COVID-19, have had any symptoms of COVID-19, or otherwise. Additionally, the moving Plaintiffs have not averred how they are affected or injured by Emergency Order 12.

In support of this response, the County has separately filed Exhibits A through W as well as a motion for the Court to take judicial notice of Exhibits A through U. (Exhibits V and W are affidavits.)

### **III. MEMORANDUM OF LAW**

The extraordinary remedy of a temporary injunction “should be granted sparingly and only after the moving party has alleged and proved facts entitling it to relief.” *Hiles v. Auto Bahn Fed'n, Inc.*, 498 So. 2d 997, 998 (Fla. 4th DCA 1986). To establish entitlement to a temporary injunction, Plaintiffs must satisfy a “four-part test under Florida law: a substantial likelihood of success on the merits; lack of an adequate remedy at law; irreparable harm absent the entry of an injunction; and that injunctive relief will serve the public interest.” *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1258 (Fla. 2017) (quoting *Reform Party of Fla. v. Black*, 885 So.2d 303, 305 (Fla. 2004)). Plaintiffs “must prove each element with competent, substantial evidence Clear, definite, and unequivocally sufficient factual findings must support each of the four conclusions necessary to justify entry of a preliminary injunction. If [Plaintiffs fail] to prove one of the requirements, the motion for injunction must be denied.” See *State, Dep’t of Health v. Bayfront HMA Med. Ctr., LLC*, 236 So. 3d 466, 472 (Fla. 1st DCA 2018), *reh’g denied* (Feb. 21, 2018) (citations and internal quotation marks omitted).

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<sup>39</sup> Plaintiffs’ attorney indicated that Plaintiffs “do not fall within any of the ... exceptions.” Am. Compl., ¶ 130.

Here, Plaintiffs fail to carry their burden on two of the requirements. They do not demonstrate a substantial likelihood of success on the merits or that the injunction would serve the public interest.

Three courts reached the same conclusion on similar constitutional challenges to Alachua County and Leon County's respective requirements to wear facial coverings: that the plaintiffs failed to establish the factors required for an injunction. *See* Exhibit L-1, Transcript of Judge John C. Cooper July 10, 2020, Ruling, p. 9:15—10:23 (denying motion for injunction by plaintiff who claimed that the requirement was vague and violated their right to due process, privacy, equal protection and freedom of religion); Exhibit J, *Ham v. Alachua Cty. Bd. of Cty. Comm's*, Case No 1:20-cv-00111-MW/GRJ (N.D. Fla. May 30, 2020) (denying motion for preliminary injunction by plaintiff who claimed substantive and procedural due process defects and violations of their right to travel and right to privacy); Exhibit I, *Green v. Alachua Cty.* Case No. 01-2020-CA-001249 (Fla. 8th Cir. Ct. May 26, 2020) (denying motion for temporary injunction by plaintiff who claimed a taking, violation of their right to privacy, an equal protection violation, and that the order exceeded the county's authority). The law compels this Court to do the same.

**A. Plaintiffs Fail to Show a Substantial Likelihood of Success on the Merits.**

"A substantial likelihood of success on the merits is shown if good reasons for anticipating that result are demonstrated." *City of Jacksonville v. Naegele Outdoor Advert. Co.*, 634 So 2d 750, 753 (Fla. 1st DCA 1994). "It is not enough that a merely colorable claim is advanced." *Id.* Plaintiffs must show "a clear legal right to the relief sought." *Jouvence Ctr. For Advanced Health, LLC v. Jouvence Rejuvenation Centers, LLC*, 14 So. 3d 1097, 1099 (Fla. 4th DCA 2009). They have not.

To begin the analysis of the merits, Plaintiffs' claims must be viewed through the appropriate lens: the framework applied to evaluate government action to protect the public health during a public emergency. The Fourth District has recognized that "there are circumstances in which a public emergency, for instance, a fire, **the spread of infectious or contagious diseases** or other potential public calamity, presents an exigent circumstance before which all private rights must immediately give way under the government's police power." *Davis v. City of S. Bay*, 433 So. 2d 1364, 1366 (Fla. 4th DCA 1983) (emphasis added); *see also State Dept. of Agric. & Consumer Services Div. of Animal Indus. v. Denmark*, 366 So. 2d 469, 470 (Fla. 4th DCA 1979) ("It is within the police power of the State to enact laws to prevent the spread of infectious or contagious diseases.").

In 1905, in *Jacobson*, the United States Supreme Court developed a framework for evaluating the exercise of emergency authority during a public health crisis. In rejecting a constitutional challenge to a requirement to be vaccinated during the smallpox epidemic, the *Jacobson* Court said:

[T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. **Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.**

*Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 26 (1905) (emphasis added). Under *Jacobson*, courts recognize that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members" and courts are reluctant to "usurp the functions of another branch of government" by passing judgment on the necessity of the mode adopted by

another branch of government to protect the public. *See id.* at 27-28. The *Jacobson* framework has endured the century and continues to be applied when courts review emergency actions, including those taken in the COVID-19 pandemic. *See e.g., Illinois Republican Party v. Pritzker.*, 20 C 3489, 2020 WL 3604106, at \*3 (N.D. Ill. July 2, 2020); *Henry v. DeSantis*, 20-CV-80729, 2020 WL 2479447, at \*8 (S.D. Fla. May 14, 2020); *Givens v. Newsom*, 220CV00852JAMCKD, 2020 WL 2307224, at \*4 (E.D. Cal. May 8, 2020) (listing cases).

Pursuant to *Jacobson*, Plaintiffs must show that Emergency Order 12 bears [1] “no real or substantial relation to [public health and safety], or [2] is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” *See Jacobson*, 197 U.S. at 31. Plaintiffs failed to do either, and thus failed to demonstrate a substantial likelihood of success on the merits.

**1. The County acted to safeguard the public health during emergency.**

The State Emergency Management Act provides that, “[s]afeguarding the life and property of its citizens is an innate **responsibility** of the governing body of each political subdivision of the state.” § 252.38, Fla. Stat. (2020) (emphasis added). Palm Beach County is a political subdivision of the state. *See* Art. VIII, § 1, Fla. Const.; § 252.34(9), Fla. Stat. (2020); Code of Laws and Ordinances Relating to Palm Beach County Government (“County Code”), Art. I. Sec. 1.1. Generally, the County has broad home rule authority and is authorized to “[p]erform any other acts not inconsistent with law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law.” *See* Art. VIII, § 1; § 125.01(w), Fla. Stat. (2020).

Specifically during an emergency, the County has the authority to “provide for the health and safety of persons and property[.]” *See* § 252.38(3)(a)(1). Additionally, the County “has the power and authority to waive the procedures and formalities otherwise required .. to ... tak[e]

whatever prudent action is necessary to ensure the health, safety, and welfare of the community.” § 252.38(5)(a). The statutes setting forth these emergency powers are given liberal construction to effectuate their purposes. *See* § 252.52.

Pursuant to the State Emergency Management Act, the County enacted the “Palm Beach County Emergency Management Ordinance” authorizing the chairman of the Board of County Commissioners, the Mayor, to declare a state of emergency during “any occurrence, or threat thereof, whether accidental, **natural**, or caused by man, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property.” County Code, Ch. 9, Art. II, Sec. 9-34 (emphasis added); *id.* at 9-35(a). The Florida Supreme Court recently ruled that “a pandemic is a ‘natural emergency’ within the meaning of” the State Emergency Management Act. *Abramson v. DeSantis*, SC20-646, 2020 WL 3464376, at \*1 (Fla. June 25, 2020).

During a declared state of emergency, the County Administrator may institute countywide restrictions to insure the public safety:

**In order to insure the public safety during a state of emergency declared pursuant to this article**, the county administrator, in collaboration with municipalities located within the county, may establish a countywide curfew or a specific area curfew, to restrict travel and movement within the county. **Other restrictions** including, but not limited to, the sale, purchase, or possession of alcoholic beverages or flammable substances, **may be instituted by the county administrator** or his designee. The duration and application of such emergency restrictions shall be tailored to meet the specific crisis and may be modified from time to time.

Exhibit F, County Code Ch. 9, Art. II, Sec. 9-35(d) (emphasis added).

On March 13, 2020, pursuant to County Code and Florida Statute, Mayor Dave Kerner declared a state of local emergency related to the COVID-19 pandemic. Exhibit C-1. Since then, the state of emergency has been extended every seven (7) days. Exhibit C-2. Pursuant to the

County Code, the County Administrator had the authority to institute a countywide restriction to insure the public safety in the local COVID-19 state of emergency. *See id.* Emergency Order 12, on its face, sets forth the law authorizing it. Plaintiffs have identified no general law with which Emergency Order 12 conflicts. *See* Art. VIII, § 1, Fla. Const.; Amended Complaint, ¶ 104.

The next aspect of the Court's analysis of the County's authority is the relationship between the action and the public health. Emergency Order 12 sets forth the connection to insuring public health and safety:

**WHEREAS** on June 16, 2020 and June 23, 2020, during meetings of the Board of County Commissioners, the Florida Department of Health's Palm Beach County Director, Dr. Alina Alonso, continued to stress the importance of social distancing and wearing facial coverings as the best methods to reduce the spread of Coronavirus in the absence of a vaccine against the disease; and

**WHEREAS**, the Centers for Disease Control and Prevention (CDC) also continue to encourage the use of cloth face coverings to help slow the spread of Coronavirus; and

**WHEREAS**, Palm Beach County has experienced a sharp increase in the number of positive cases of COVID-19 in late May and June 2020. The Board of County Commissioners has determined that additional measures are needed to minimize the spread of COVID-19 and has directed the County Administrator to issue an additional order mandating the wearing of facial coverings in all businesses and establishments and in outdoor places where social distancing is not possible.

EO 20-12, pg. 2.

The relation between the requirement and the public health is rational:

- A deadly virus is being spread by droplets coming out of the nose and mouth.
- Covering the nose and mouth prevents some of these droplets from reaching others.
- Ergo, covering the nose and mouth prevents some of the spread of a deadly virus.

Face coverings need not prevent *all* transmission to further the County's interest. *See League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 20-1581, 2020 WL 3468281, at \*3 (6th Cir.



June 24, 2020) (“Even if imperfect, the Governor’s Order passes muster under the rational basis test.”) (reviewing order to close indoor fitness facilities).

The Mayo Clinic, Cleveland Clinic, Johns Hopkins, CDC, Florida Surgeon General, and the Florida Department of Health Palm Beach County Director all recommend wearing face coverings in public to reduce community spread of the novel coronavirus. *See* Exhibit M; Exhibit O-1; Exhibit Q-1, Q-2, Q-3; Composite Exhibit S; Exhibit H-5; Transcript of June 23, 2020, PBCBCC Meeting, 16:19-21.

Even a federal court has recognized that “[m]edical experts agree that to stop the spread of COVID-19, people should practice social distancing and **wear face coverings** when near other people outside their homes.” *Illinois Republican Party v. Pritzker*, 20 C 3489, 2020 WL 3604106, at \*1 (N.D. Ill. July 2, 2020) (emphasis added); *see also* Exhibit L-1, Transcript of Judge John C. Cooper July 10, 2020, Ruling, p. 9:15—10:23.

Dr. Campazzi and Dr. Bush opined that “requiring facial coverings to reduce the risk of infection and the spread of the disease is necessary for the overall public health of Palm Beach County residents.” Exhibit V, Campazzi, M.D. Affidavit, ¶ 16; Exhibit W, Bush, M.D., FACP. Affidavit, ¶ 12.

Sixteen (16) other Florida counties agreed that requiring face coverings protects the public: Alachua, Broward, Gadsden, Hillsborough, Indian River, Leon, Martin, Miami-Dade, Monroe, Nassau, Orange, Osceola, Pasco, Pinellas, St. Lucie, and Seminole.<sup>40</sup>

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<sup>40</sup> *See e.g.* Alachua Cnty. EO No. 2020-21; Broward Cnty. Administrator’s EO 20-20; Gadsden Cnty. Resolution No. 20-37; Indian River Cnty. EO 2020-15; Leon Cnty. Emergency Ordinance No. 20-15; Martin Cnty. Ordinance No. 1136; Miami-Dade Cnty. EO 20-20; Monroe Cnty. Emergency Management Emergency Directive 20-10; Nassau Cnty. EO No. 16; Orange Cnty. Emergency EO No. 2020-23; Osceola Cnty. EO No. 4; Pinellas Cnty. Ordinance No. 20-14; St. Lucie Cnty. Emergency Ordinance No. 2020-020; Seminole Cnty. EO 2020-030; Executive Order of the Hillsborough Cnty. Emergency Policy Group Requiring the Wearing of Protective Face Coverings as Extended and Amended at its July 6, 2020 Meeting, available at <https://www.hillsboroughcounty.org/library/hillsborough/media-center/documents/covid-19/epg-order-for-face->

Plaintiffs disagree. Hearing Plaintiffs' concerns, the County briefly addresses them.

- To their “it does not sufficiently protect me” complaints (Am. Compl., ¶ 21, 32): the County asks them to protect others (and suggests a face shield to protect their own eyes). Further, Plaintiffs will be protected by everyone else wearing their own face coverings in public.
- To their fears about N95 masks, surgical masks, and respirators designed according to Australian standards (*Id.* at ¶¶ 23-24, 27-31, 33): the County has not required those.
- To their concerns about protection in healthcare settings and for healthcare workers (*Id.* at ¶¶ 34-35): exemptions are made for these in Section 4e.
- To their alarms about cold and influenza studies (*Id.* at ¶¶ 22, 26-28): the face covering requirement aims to halt the spread of a *novel* virus.
- To their concern for cancer patients (*Id.* at ¶ 25): persons who have a medical condition that makes the wearing of a facial covering unsafe are not required to wear one.
- To their “muffled voice” and “muzzle” laments (*Id.* at ¶ 140-142): a face shield is an option.

While Plaintiffs are entitled to their opinions, they have no right to a judicial “veto” of the County’s rational conclusion. *See City of Jacksonville v. Bowden*, 64 So. 769, 772 (Fla. 1914) (“The courts have no veto power, and do not assume to regulate state policy; but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law.”). The Court does not determine the wisdom of public policy. *Burnett v. Greene*, 122 So. 570 (Fla. 1929) (“Court is body for administration of justice, not for determination of wisdom of legislative measures.”); *see also Lowe v. Broward County*, 766 So. 2d 1199, 1206 (Fla. 4th DCA 2000) (“The Act is a political decision by an elected body. Its wisdom is more properly addressed at the ballot box and not by a court as a matter of constitutional principle.”).

Plaintiffs fail to carry their burden of showing that Emergency Order 12 has no real or substantial relationship to protecting public health. Accordingly, the law defers to the County's reasonable decision so long as there is no clear invasion of constitutional rights. *See State Dept. of Agric. & Consumer Services Div. of Animal Indus. v. Denmark*, 366 So. 2d 469, 471 (Fla. 4th DCA 1979) ("It is not within the province of the court to interfere with the judgment of the legislature and its properly delegated authority, absent a clear showing that the subject of the statutory enactments was outside the power of the legislature, or that the rules and regulations promulgated under the statutes were arbitrary or unreasonable or not consistent with the mandate of the legislature."); *Henry v. DeSantis*, 20-CV-80729, 2020 WL 2479447, at \*9 (S.D. Fla. May 14, 2020) ("And so long as the people's elected leaders are working within the confines of the people's constitutional rights, courts are not here to second-guess or micromanage their already unenviable jobs guiding us through profoundly unprecedented challenges.").

**2. Plaintiffs fail to show that Emergency Order 12 clearly invades their rights.**

Like the plaintiffs challenging the face covering requirement in Alachua and Leon County, Plaintiffs here fail to show that Emergency Order 12 violates or even implicates their rights. *See* Exhibit L-1, Transcript of Judge John C. Cooper July 10, 2020, Ruling, p. 13:22-24, 14:5-8; Exhibit J, *Ham v. Alachua Cty. Bd. of Cty. Comm's*, Case No 1:20-cv-00111-MW/GRJ (N.D. Fla. May 30, 2020); Exhibit I, *Green v. Alachua Cty.* Case No. 01-2020-CA-001249 (Fla. 8th Cir. Ct. May 26, 2020).

The rights upon which Plaintiffs base their motion for temporary injunction and argue that they have a substantial likelihood of success on the merits are (a) the right to privacy and (b) the right to due process. Though Plaintiffs' claims do not warrant it, the County additionally elucidates how its face covering requirement satisfies strict scrutiny in section (c) below.

(a) Plaintiffs' right to privacy is not implicated by Emergency Order 12.

Plaintiffs assert their “right to privacy” guaranteed by Article I, Section 23 of the Florida Constitution, which states: “[e]very natural person has the right to be let alone and free from governmental intrusion into his private life.” “Although Florida’s privacy right provides greater protection than the federal constitution, it was not intended to be a guarantee against all intrusion into the life of an individual.” *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1027–28 (Fla. 1995) (citing *Florida Bd. of Bar Examiners re Applicant*, 443 So.2d 71 (Fla.1983)). Thus, “before the right of privacy is attached and the [strict scrutiny] standard applied, a reasonable expectation of privacy must exist.” *Winfield v. Div. of Pari-Mutuel Wagering, Dept. of Bus. Regulation*, 477 So. 2d 544, 547 (Fla. 1985).

Determining whether an individual has a legitimate expectation of privacy in a given case must be made by considering all the circumstances, especially objective manifestations of that expectation. Although a person’s subjective expectation of privacy is one consideration in deciding whether a constitutional zone of privacy exists, the final determination of an expectation’s legitimacy takes a more global view, placing the individual in the context of a society and the values that the society seeks to foster. A protected expectation of privacy is one that society is prepared to consider as reasonable.

*Daniel v. Daniel*, 922 So. 2d 1041, 1044–45 (Fla. 4th DCA 2006) (citations omitted).

The assertion that Plaintiffs legitimately and reasonably expect privacy in their appearance when in public places is not one that society is prepared to accept. Nor is society prepared to accept that Plaintiffs have an expectation of privacy in the decision to unwittingly subject others to illness, and possibly death. Finally, our society does not accept the assertion that protective equipment like seatbelts, helmets, gloves, and face coverings are medical treatments.

As further explained below, Plaintiffs’ show no invasion of their right to privacy because (1) they do not have an expectation of privacy in the conduct and places covered by the Emergency

Order, (2) they do not have a right to do whatever they please in public, and (3) a face covering is not a medical treatment.

*1. Plaintiffs have no reasonable expectation of privacy in the public places identified in Emergency Order 12.*

Plaintiffs have articulated no reasonable expectation of privacy in the conduct of covering their nose and mouth while in certain public places. Nor can they. Public exposure vitiates the legitimacy of any expectation of privacy. *See U.S. v. O'Kane*, 439 F. Supp. 211, 213 (S.D. Fla. 1977) (“Because of that public exposure, there can be no expectation of privacy concerning an individual’s voice, handwriting, or physical appearance.”); *e.g., Bd. of County Com’rs of Palm Beach County v. D.B.*, 784 So. 2d 585, 590 (Fla. 4th DCA 2001) (“The very fact that an adult entertainer may use a stage name while performing in public dispels any privacy right in the stage name.”). For example, one cannot maintain a legitimate expectation of privacy in photographs posted on a social networking site, even if only shared with certain “friends” or “followers,” because there is no guarantee that the site, friends, or followers will not share the photographs. *See Nucci v. Target Corp.*, 162 So. 3d 146, 153–54 (Fla. 4th DCA 2015). There is no legitimate, reasonable, or recognized expectation of privacy in what one does on a County bus, in a government building, in an establishment open to the public, and outdoors in public areas when fewer than 6 feet from others. *See Pottinger v. City of Miami*, 810 F. Supp. 1551, 1574 (S.D. Fla. 1992) (no legitimate expectation of privacy in activities such as sleeping and eating in public).

*2. Plaintiffs has no right to self-determine that they should be free to infect others.*

Perhaps recognizing the problem of claiming they expect privacy when they are in public, Plaintiffs focus on the “right to liberty and self-determination” included in the right to privacy. Motion, p. 6. “The right to privacy has not made each person a solipsistic island of self-determination.” *State v. Conforti*, 688 So. 2d 350, 359 (Fla. 4th DCA 1997).

A person's "right to be let alone is no more precious than the corresponding right of his fellow citizen not to become infected by that person and possibly hospitalized." Exhibit I, *Green v. Alachua Cty.* Case No. 01-2020-CA-001249 (Fla. 8th Cir. Ct. May 26, 2020). The Eighth Judicial Circuit in and for Alachua County, in its review of a similar motion to temporarily enjoin the enforcement of Alachua's face covering requirement, held that "[t]here is no recognized constitutional right *not* to wear a facial covering in *public* locations or to expose other citizens of the county to a contagious and potentially lethal virus during a declared pandemic emergency." *Id.* (emphasis original).

Plaintiffs have no right to spread disease. A person suffering from a contagious or communicable disease may not work at a public lodging or food service establishment in any capacity where there is a likelihood that they may transmit the disease to others. § 509.221(8), Fla. Stat. (2020). A person may not spread a sexually transmitted disease through intercourse without the informed consent of the other person. § 384.24(1), Fla. Stat. (2020).

Plaintiffs do not have the right to expel anything they please from their mouths. There is no right to spit on another without consent. *See, e.g., Mohansingh v. State*, 824 So. 2d 1053, 1054 (Fla. 5th DCA 2002) (upholding battery conviction of individual who gave a "raspberry" that resulted in spittle on the victim's clothing). There is no right to intentionally blow unwelcome smoke in another's face. *See generally Eichenwald v. Rivello*, 318 F. Supp. 3d 766, 774 (D. Md. 2018) ("[C]ourts around the Country have found that second-hand smoke (*i.e.*, causing a person to come into contact with harmful smoke) can constitute a battery."); *see Irene Sharf, Breathe Deeply: The Tort of Smokers' Battery*, 32 Hous. L. Rev. 615, 663 n.263 (1995) (citing cases.); *see also Nelson v. Dep't of Bus. & Prof'l Regulation*, 707 So. 2d 378, 379 (Fla. 5th DCA 1998) (individual charged and plead nolo contendere to battery by smoke bomb).

Indeed, Plaintiffs do not even have the unregulated right to inhale and exhale tobacco smoke wherever they want because the state has an interest in protecting “people from the health hazards of secondhand tobacco smoke and vapor.” *See* § 386.202, 386.204, Fla. Stat. (2020) (“A person may not smoke or vape in an enclosed indoor workplace, except as otherwise provided in s. 386.2045.”). Florida’s right to privacy is not implicated by the government’s request that an applicant reveal whether they smoke. *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1028 (Fla. 1995).

Plaintiffs do not have the right to wear whatever they desire in public. The state regulates when a person may disguise their identity with a mask, §§ 876.12-.16, Fla. Stat. (2020), and when they may expose their sexual organs, § 800.03, Fla. Stat. (2020). The state requires Plaintiffs to wear safety devices such as seatbelts and helmets. *See* § 316.614, Fla. Stat. (2020); *Picou v. Gillum*, 874 F.2d 1519, 1521 (11th Cir. 1989) (rejecting a claim that one has a “right to be let alone” from Florida’s helmet laws and stating, “[t]here is little that could be termed private in the decision whether to wear safety equipment on the open road.”).

Helmets provide a useful analogy, and the Eighth Judicial Circuit Court that denied a temporary injunction of the Alachua requirement to wear a facial covering cited *Picou* at length. In *Picou*, the court explained that “the right to be let alone,” while an appealing rhetorical device, has “no meaning outside of specific activities.” *Picou*, 874 F.2d at 1521–22. The activity of riding a motorcycle implicates others – fellow travelers and the authorities that maintain and police the public streets. *Id.* So, the state has an interest in preventing a rider from becoming dislodged from their motorcycle and causing collision with others as well as minimizing the costs of the injury borne by the public. *Id.* Thus, the state may balance the interests of public safety and individual autonomy and rationally exercise its police powers to require the wearing of a helmet. *Id.*

Face coverings are like helmets. They are worn. The harm in not wearing a helmet is not realized until there is an accident, a circumstance that cannot always be foreseen. The harm in not wearing a face covering, spreading a deadly disease, is not realized until someone else is infected, an occurrence that may not be anticipated by an asymptomatic or pre-symptomatic carrier of the virus. In short, wearing a helmet or face covering is a preventative measure. And, not wearing a helmet or face covering can harm others. So, the government can require these harm-preventative items to be worn temporarily, while in public, when engaging in conduct likely to affect another. There is no broad right to be “let alone” to endanger others.

Plaintiffs have failed to show that they have a privacy right recognized by the Florida Constitution to shed and spray their respiratory droplets in public during a time when such droplets may contain a contagion, for which there is no known vaccine or cure.

*3. A facial covering is not a medical treatment.*

As the only remaining angle to implicate Florida’s right to privacy, Plaintiffs claim that a facial covering is a medical treatment that they have the right to refuse. The cases Plaintiffs cite concerning medical treatment involve a woman’s right to make decisions regarding her pregnancy (*Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1244 (Fla. 2017); *N. Florida Women's Health & Counseling Services, Inc. v. State*, 866 So. 2d 612, 615 (Fla. 2003); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989)) and an individual’s right to terminate life support (*In re Guardianship of Browning*, 568 So. 2d 4, 11 (Fla. 1990)). The right to choose one’s medical treatment is not unbounded. See *Krischer v. McIver*, 697 So. 2d 97, 104 (Fla. 1997) (declining to construe the right to privacy as covering the right to assisted suicide). While Plaintiffs assert their right to make “all relevant decisions concerning **one’s** health,” *In re Guardianship of Browning*, 568 So. 2d at 11



(Fla. 1990) (emphasis added), Plaintiffs cite no authority to support their “right” to make decisions that affect **another’s** health.

Furthermore, a face covering is not medical treatment. This is the legal conclusion reached by the Honorable Circuit Court Judge Donna Keim. Exhibit I, *Green v. Alachua Cty.* Case No. 01-2020-CA-001249, p. 5 (Fla. 8th Cir. Ct. May 26, 2020) (finding that a facial covering is not a medical treatment). It is the factual statement of both Dr. Earl Campazzi and Dr. Larry Bush. Exhibits V-W. Dr. Campazzi, who is Board Certified by the American Board of Preventative Medicine in Public Health and General Preventive Medicine, Occupational Medicine, Hospice & Palliative Care and Clinical Informatics, and who has a Master of Public Health Degree from Johns Hopkins; and Dr. Larry Bush, who is a Board Certified Infectious Disease Specialist with 32 years of experience, explained that a “medical treatment” is generally a treatment directed by a medical professional for a specific patient, and a facial covering is not a “medical treatment” in this context. Exhibit V, Campazzi, M.D. Affidavit, ¶¶ 6-8, 11-12; Exhibit W, Bush, M.D. Affidavit, ¶¶ 15-16.

Here, Plaintiffs are not faced with a treatment that a medical professional is directing to them specifically. They are being asked to wear an item intended to prevent them from infecting others. A face covering can be a “medical device” without being a “medical treatment” from a physician. For example, medical professionals don “medical devices” such as PPE without the wearing of such equipment being considered “medical treatments” for the physician. The County has the police power to act in the interest of public health. The fact that it acts in the interest of the public health does not convert its action into medical treatment.

Because Plaintiffs’ privacy rights are not implicated by the requirement that they wear a face covering in certain public places, strict scrutiny is not applied. *See Winfield*, 477 So. 2d 544, 547 (Fla. 1985).

**(b) Plaintiffs' due process rights are not implicated by Emergency Order 12.**

Plaintiffs next base their request for temporary injunction on their substantive due process rights, asserting that Emergency Order 12 is [1] vague, [2] “arbitrary and unreasonable, and [3] is not backed by any compelling state interests or facts proving such an interest.” *See* Motion, p. 6. Each of these three due process attacks is taken in turn:

1. *Emergency Order 12 is not unconstitutionally vague.*

“The standard for testing vagueness under Florida law is whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct.” *Jones v. Williams Pawn & Gun, Inc.*, 800 So. 2d 267, 270 (Fla. 4th DCA 2001). In the absence of definitions, words are construed in their plain and ordinary sense and their meaning may be ascertained by reference to a dictionary. *See id.* “The fact that several interpretations ... may be possible does not render a law void for vagueness. Words inevitably contain germs of uncertainty but when regulations are set out in terms that the ordinary person **exercising ordinary common sense** can sufficiently understand and comply with, there is no sacrifice to the public interest.” *City of Daytona Beach v. Del Percio*, 476 So. 2d 197, 200 (Fla. 1985) (internal citation marks, brackets, and citation omitted, emphasis added).

Plaintiffs list several terms they claim to be vague. *See* Am. Compl., ¶ 129. But, they devote more than the label “vague” to only 4 specific terms, to which they pose hypothetical questions. *See id.* at ¶¶ 131-135. Although Plaintiffs must demonstrate “that no set of circumstances exists in which the [law] can be constitutionally valid,” *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 243 So. 3d 894, 897 (Fla. 2018), rather than merely posing hypothetical questions; the County provides the common sense answers:

- i. Is a non-citizen a person? *See* Am. Compl., ¶ 133. Yes.

- ii. What are “public places”? *See id.* at 134. Places that are public.
- Are there “public places” in condominiums? *See id.* at ¶ 132. Yes, the Emergency Order says it includes “common areas within private communities accessible to more than one housing unit.” EO 20-12 Sec. 4.b.; *see also* Exhibit E-3, Palm Beach County Facial Coverings Frequently Asked Questions, p. 4.
- iii. What is a “business” or “establishment?” Am, Compl., ¶ 131. As used in Emergency Order 12, Section 4.e., one understands from context that it is a place where one can obtain a good or service, visit, or work; and enter, exit, and otherwise move around within. Examples expressly included are “restaurants, retail establishments, hotels, grocery stores, gyms, pharmacies, indoor recreational facilities, and vehicles for hire.” EO 20-12 Sec. 4.a. Reference is made to the other businesses and establishments permitted to be open by the State and County orders. *See* Exhibit B-3, Fla. Exec. Order No. 20-91 (Apr. 1, 2020); Exhibit B-6, Fla. Exec. Order 20-123 (May, 14, 2020).
- Is a food truck an establishment? Am, Compl., ¶ 131. Yes, the interior of the truck is. One can enter, exit, and work within a food truck, just like a vehicle for hire. The exterior of the truck may be in a “public place.”
  - Is a “storage locker” an establishment? *Id.* A storage locker business is like a hotel. Part of the space a person encounters is a “business” or “establishment” where one can visit, work, obtain a service, enter, exit, and move about. Another part, the individually rented locker, is like a private hotel room, where a face covering is not required. *See* Exhibit E-3, Palm Beach County Facial Coverings Frequently Asked Questions, p. 4.
- iv. Plaintiffs claim that the exception for persons “who have a medical condition that makes the wearing of a facial covering unsafe” is “vague.” Am, Compl., at ¶¶ 128, 135. But, they had no trouble applying it to Mr. Williams when opposing his motion to intervene. *See* Plaintiffs’ Response in Opposition to Motion to Intervene, ¶ 3. Plaintiffs’ argument is actually an attack on the rationale of the exception and is addressed in section 2 below.

Plaintiffs are not left to guess about what is required (wear a face covering or shield), where it is required (places identified in Section 4a-d.), and for whom it is required (everyone not falling within an exception in Section 4e.). There is nothing inherently vague about the words they ask this Court to scrutinize, which can be given their ordinary and plain meanings. Emergency Order 12 is not unconstitutionally vague.

2. *Emergency Order 12 is rationally related to a legitimate governmental interest, and is not arbitrary, capricious, or discriminatory.*

“Under substantive due process, the test ‘is whether the statute bears a rational relation to a permissible legislative objective that is not discriminatory, arbitrary, capricious, or oppressive.’ Courts will not be concerned with whether the particular legislation in question is the most prudent choice, or is a perfect panacea, to cure the ill or achieve the interest intended. If there is a legitimate state interest that the legislation aims to effect, and if the legislation is a reasonably related means to achieve the intended end, it will be upheld.” *Jackson v. State*, 191 So. 3d 423, 428 (Fla. 2016) (citation omitted). Emergency Order 12 sails through rational basis review.

Protecting the public health and seeking to slow the spread of COVID-19 in the community is not only a legitimate governmental interest but a compelling one. *See S. Bay United Pentecostal Church v Newsom*, 140 S. Ct. 1613, 1614 (U.S. 2020) (Kavanaugh, J., dissenting from denial of injunctive relief) (“California undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens.”). Dr. Alina Alonso, the Florida Department of Health in Palm Beach County Director, advised the County that it could further its interest in slowing the spread of COVID-19 in the community by requiring the wearing of face coverings in public. Exhibit H-5, Transcript of June 23, 2020, Meeting, 8:12-13, 11:10-13, 16:8-21; *see also* Exhibit E-1, EO 20-12, p. 2. (Whereas clauses). Requiring a face covering while in public places, which is a method recommended for slowing the spread of COVID-19, advances the County’s interest in slowing the spread of COVID-19.

Plaintiffs attack the rationale of two of the exceptions. First, regarding the exception for persons with medical conditions that make it unsafe to wear a mask, Plaintiffs claim that the County irrationally allows persons suffering from COVID-19 to walk around infecting others, allegedly negating the purpose of Emergency Order 12. Not so. The Emergency Order still

combats the spread from asymptomatic and pre-symptomatic carriers of the virus, which is significant.<sup>41</sup> Further, in the that event a person is (a) suffering from breathing difficulties due to COVID-19 to the extent that it is “unsafe” for them to wear a face covering, and that person (b) is not hospitalized, (c) is disregarding physician, CDC<sup>42</sup> and state<sup>43</sup> guidance to stay home and quarantine, and (d) needs to go to a grocery store, pharmacy, or other public place, a scenario anticipated to be rare; the County may reasonably decide that the actual risk to the person with the medical condition making it unsafe for them to cover their face outweighs the potential harm to others. Moreover, this rationale is founded upon CDC guidance<sup>44</sup> and the Florida Surgeon General’s Public Health Advisory.<sup>45</sup>

Second, Plaintiffs claim that the Emergency Order is “arbitrary and absurdly discriminates<sup>46</sup> against anyone over the age of 2.” Am. Compl., ¶ 130. Because “age is not a suspect classification,” there only needs to be a rational basis for the exception. *See White Egret Condo., Inc. v. Franklin*, 379 So. 2d 346, 351 (Fla. 1979). There is. Face coverings are not

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<sup>41</sup> Exhibit Q-3, Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), How to Protect Yourself & Others, Prevention <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

Furthermore, there exists a “Brief Report” from the Proceedings of the National Academy of Sciences of the United States of America “PNAS” regarding the implications of the “silent spread” of COVID-19. Exhibit T-5, Seyed M. Moghadas, Meagan C. Fitzpatrick, Pratha Sah, Abhishek Pandey, Affan Shoukat, Burton H. Singer, Alison P. Galvani. The implications of silent transmission for the control of COVID-19 outbreaks. Proceedings of the National Academy of Sciences. 2020 July 02. DOI: 10.1073/pnas.2008373117, <https://www.pnas.org/content/early/2020/07/02/2008373117> (Exhibit T-5).

<sup>42</sup> Exhibit Q-4, The Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), Your Health, Quarantine If You Might Be Sick: Stay home if you might have been exposed to COVID-19, <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html> (last visited on July 10, 2020).

<sup>43</sup> Exhibit O-2, Florida Department of Health, Florida COVID-19 Response, What do I do if I’m sick?, <https://floridahealthcovid19.gov/treatment/> (last visited on July 10, 2020).

<sup>44</sup> “Cloth face coverings should NOT be worn by children under the age of 2 or anyone who has trouble breathing, is unconscious, incapacitated, or otherwise unable to remove the mask without assistance.” Exhibit Q-3, Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), How to Protect Yourself & Others, Prevention <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html> (last visited on July 10, 2020).

<sup>45</sup> Exhibit M.

<sup>46</sup> Without any argument in their motion or explanation in their complaint, Plaintiffs state that the Emergency Order “discriminates” against multi-family housing. Am. Compl., ¶ 134. The rationale for doing so is evident on the face of the order.

recommended for children under the age of 2 by the Florida Surgeon General<sup>47</sup> or the CDC.<sup>48</sup> Thus, the County rationally exempted infants and toddlers under 2 years old from the requirement.

Plaintiffs fail to carry their burden “to show that there is *no* conceivable factual predicate which would rationally support” the exception for persons with medical conditions that make it unsafe for them to wear a mask and children under the age of 2 years old. *See The Florida High Sch. Activities Ass’n, Inc. v. Thomas By & Through Thomas*, 434 So. 2d 306, 308 (Fla. 1983). Accordingly, Emergency Order 12 should be upheld as a rational exercise of the County’s police power. *See Jackson*, 191 So. 3d at 428; Exhibit L-1, Transcript of Judge John C. Cooper July 10, 2020, Ruling, p. 11:5-9.

3. *Emergency Order 12 does not implicate any fundamental rights.*

“Substantive due process protects fundamental rights that are so implicit in the concept of ordered liberty that neither liberty nor justice would exist if they were sacrificed.” *Jackson v. State*, 191 So. 3d 423, 428 (Fla. 2016) (internal quotation marks and citations omitted). In paragraph 67 of their Amended Complaint, Plaintiffs concede that:

Those fundamental rights to which this test [strict scrutiny] applies have been carefully and narrowly defined by the Supreme Court of the United States and have included rights of a uniquely private nature such as **abortions**. *See e.g. Roe v. Wade*, 410 U.S. 113 (1973); the **right to vote**, *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Bullock v. Carter*, 405 U.S. 134 (1972); the right of **interstate travel**, *Shapiro v. Thompson*, 394 U.S. 618 (1969); **free speech** rights, *Williams v. Rhodes*, 393 U.S. 23 (1968); and **procreation**, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *See also In re Estate of Greenberg*, 390 So.2d 40 (Fla. 1980).

(emphasis added). Of these, Plaintiffs assert their free speech rights. *See Motion*, pgs. 3, 7. But, to ascertain how Plaintiffs claim their free speech rights are abridged, one must reference Count VII. There, Plaintiffs say that face coverings physically discourage speech, face expressions are

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<sup>47</sup> *See* Exhibit M.

<sup>48</sup> *See* footnote 44, *supra*.

“discriminated against,” a mask is a form of speech, and that children need to see facial expressions and mouths moving to learn to communicate. *See* Am. Compl., ¶¶ 137-143. Three of these four issues are solved by wearing a clear, plastic face shield, which does not obscure facial expressions and is not required to be worn snugly around the nose and mouth. *See* EO 20-12, Sec. 5.

Plaintiffs fail to state, let alone show, how a face covering is speech. Plaintiffs can choose the color, fabric, pattern, or script of their face covering, or opt for a clear plastic shield. To the extent Plaintiffs mean that the act of wearing a face covering is itself expressive, they are silent as to the particular message it is intended to communicate or symbolize. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) (“In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether ‘[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.’”) (citation omitted).

Face coverings and face shields are not black arm bands, crosses, or American flags. Without knowing what message is intended by the Plaintiffs, neither the County nor this Court can analyze whether there is any likelihood that it would be understood by those who view Plaintiffs’ conduct. We can conclude, however, that, because there are multiple lawful exceptions to the wearing of a face covering, the ordinary viewer of Plaintiffs’ conduct (in wearing or not wearing a face covering) would not glean any *particular* message. Accordingly, even if Plaintiffs attempt to articulate the expressive nature of wearing or not wearing a face covering, they are unlikely to find traction in the body of case law on expressive conduct. *See, e.g., Brandt v. Bd. of Educ. of City of Chicago*, 480 F.3d 460, 465 (7th Cir. 2007) (“Although ... clothes are certainly a way in which people express themselves, clothing as such is not—not normally at any rate—constitutionally protected expression.”); *Zalewska v. County of Sullivan, New York*, 316 F.3d 314,

320 (2d Cir. 2003) (United States Supreme Court precedent “suggests that a person’s choice of dress or appearance in an ordinary context does not possess the communicative elements necessary to be considered speech-like conduct entitled to First Amendment protection.”). Accordingly, Plaintiffs fail to show a substantial likelihood of success on the merits of their claim that their free speech rights are implicated and that due process is thus violated.

This Court, like the Eighth Judicial Circuit, should find that requirement to wear a face covering does not implicate speech. *See* Exhibit I, *Green v. Alachua Cty.* Case No. 01-2020-CA-001249 (Fla. 8th Cir. Ct. May 26, 2020). Also like the three Florida courts that have considered a face covering requirement imposed by a County, this Court should reject Plaintiffs’ due process claim because Plaintiffs have failed to show that a fundamental right was implicated – much less impinged – by the County’s action. *See id.*; Exhibit J, *Ham v. Alachua Cty. Bd. of Cty. Comm’s*, Case No 1:20-cv-00111-MW/GRJ (N.D. Fla. May 30, 2020); Exhibit L-1, Transcript of Ruling by the Honorable Judge Cooper in *Power v. Leon County*, 2020CA001200 (July 10, 2020).

**(c) The Emergency Order survives strict scrutiny.**

The law dictates that Emergency Order 12 be reviewed and upheld under the rational basis standard. Without conceding that Plaintiffs’ claims warrant the application of strict scrutiny, the County nevertheless addresses it for the benefit of the Court.

“To withstand strict scrutiny, a law must be necessary to promote a compelling governmental interest and must be narrowly tailored to advance that interest.” *State v. J.P.*, 907 So. 2d 1101, 1110 (Fla. 2004) (citation omitted). The County’s interest in combatting the spread of COVID-19 and protecting the health of its citizens is compelling. *See S. Bay United Pentecostal Church v Newsom*, 140 S. Ct. 1613, 1614 (U.S. 2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief).



For a disease that spreads via respiratory droplets there are a handful of proven and accepted methods to prevent its spread: “(1) respiratory precautions utilizing facial coverings such as cloth masks that can obstruct many of the droplets from the mouth and nose that spread the virus, especially in enclosed spaces and in community settings; (2) maintaining appropriate social distance from others; and (3) good hand hygiene accomplished with thorough hand washing and / or the utilization of antiseptic hand sanitizers.” *See* Exhibit W, Bush, M.D., FACP. Affidavit, ¶ 9. Widespread use of face coverings in public is **necessary** to combat the spread of COVID-19 and protect public health. *See id.* at ¶¶ 9-12; Exhibit V, Campazzi, M.D., Affidavit, ¶¶ 15-16.

Given the current scientific consensus about these interventions, the County’s incremental and proportional measures at each turn of this pandemic – of which the facial covering order is an example – demonstrate its lawful response, even under strict scrutiny. The County initially attempted to strongly urge the use of facial coverings. Exhibit D-4, EO 20-4; Exhibit D-8, EO 20-8; Exhibit D-10, EO 20-10. But, that did not work. As businesses and establishments were permitted to operate at greater capacities and people returned to public places, more and more people became infected. With no cure and no vaccine for this disease,<sup>49</sup> the County must promote its compelling interests through requiring respiratory precautions in enclosed spaces and in community settings.<sup>50</sup>

The County tailored the requirement narrowly so that it only applied where there is a risk of community spread: public transportation, where people from different households sit in an enclosed space with circulated air; public places, where people are not keeping a social distance;

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<sup>49</sup> Exhibit L-2, Transcript Excerpt of Megan Gumke Testimony, p. 7:2-11.

<sup>50</sup> There exists a study that supports the efficacy of face covering requirements. It asserts that it “provides evidence that states in the US mandating use of face masks in public had a greater decline in daily COVID-19 growth rates after issuing these mandates compared to states that did not issue mandates.” Exhibit T-4, Wei Lyu & George L. Wehby, *Community Use of Face Masks and COVID-19: Evidence From a Natural Experiment of State Mandates in the U.S.*, Health Affairs (June 16, 2020), <https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00818> (last visited on July 6, 2020).

government facilities, where government employees work and provide services to people from different households, activities which routinely involve face-to-face interactions and persons moving about in enclosed spaces; and at businesses and establishments that one can enter and move around within, where persons from multiple households are visiting, working, and obtaining goods and services, activities which routinely require persons to be closer than 6 feet away from one another. In these public places, the 6 foot bubble may be unexpectedly intruded upon in a split second by the conduct of others.

The County also narrowly tailored its facial covering requirement by carving out exceptions that would ensure it applied only in instances that would progress the County's interests. The County excepted categories of persons for whom wearing a facial covering would create a greater risk to their own health than the risk to the general public: children under the age of 2; persons exercising more than 6 feet away from others, and persons with medical conditions making it unsafe to wear a face covering. The County also recognizes that persons must be permitted to obtain goods and services (such as food and grooming) and to communicate with those who are hearing impaired or read lips to communicate, and so permits the temporary and brief removal of a facial covering for these purposes. Finally, the County expressly exempted from the requirement persons whose facial-covering wearing-practices are commanded by their religious beliefs or by other agency, State or Federal health or safety regulations. These exceptions reflect the recommendations of the State Surgeon General. *See Exhibit M.*

At this current stage of the COVID-19 crisis, requiring people to wear facial coverings in particular settings is less restrictive than prohibiting persons from being closer than 6 feet from others. The face covering requirement is certainly less restrictive than taking steps backward by (i.) limiting the occupancy or operating capacity of the businesses and establishments that are

providing goods and services to the public or (ii.) closing certain public places altogether – restrictions that may become necessary if the virus cannot be contained through the County’s current, proportional measures.

Emergency Order 12 is, at present, the least restrictive means of furthering the County’s compelling interest in protecting the public health, withstands strict scrutiny, and should be upheld.

**B. Enforcement of the Emergency Order Serves the Public Interest**

To serve the public interest, the Court must allow the County to enforce the requirement to wear face coverings in public places. *See* Exhibit J, *Ham v. Alachua Cty. Bd. of Cty. Comm’s*, Case No 1:20-cv-00111-MW/GRJ (N.D. Fla. May 30, 2020); Exhibit I, *Green v. Alachua Cty.* Case No. 01-2020-CA-001249 (Fla. 8th Cir. Ct. May 26, 2020).

“It is without a doubt that we are experiencing a pandemic and that our County, and truly our Country, is in a state of emergency. As the number of COVID-19 cases in Palm Beach County, Florida, continues to climb, [Dr. Bush] along with [his] Infectious Diseases and other physician colleagues *implore the public to take the only simple and effective steps we currently have at our disposal to slow the spread of coronavirus, save lives and preserve medical resources in our local hospitals – key among them, ‘wear a mask’.*” Exhibit W, Bush, M.D., FACP., Affidavit, ¶ 17. The County has asked the public to wear face coverings in public since April. Let the County do more than merely implore. Lives and livelihoods depend on how the community acts, the coronavirus spreads, and the County responds.

The rising number of infections in the County affects not only the infected and their families, but also those who are unable (or reluctant) to obtain the non-COVID-19-related medical care they need. *See* Exhibit W, Bush, M.D., FACP., Affidavit, ¶ 13; *see also* Exhibits N-3, N-4.

The public's interest in its own health and safety outweighs the Plaintiffs' individual interest in appearing in public barefaced. *See Dragomirecky v. Town of Ponce Inlet*, 882 So. 2d 495, 497 (Fla. 5th DCA 2004) ("Where the potential injury to the public outweighs an individual's right to relief, the injunction will be denied."). "Whatever injury they sustain ... is temporary and relatively minimal compared to the potential harms that may result if there is increased exposure to this communicable virus." Exhibit K, *Dodero v. Walton County*, 3:20-cv-05358-RV-HTC, DE 23 (N.D. Fla. Apr. 17, 2020) (denying preliminary injunction regarding temporary closure of beaches based upon claims of "privacy rights," a "seizure," and conflict with Governor's orders). Death is irreparable. This factor militates against an injunction.

#### IV. CONCLUSION

The Court cannot grant a temporary injunction because Plaintiffs have not shown a clear legal right to one. They have not shown a substantial likelihood of success on the merits of their privacy or due process claims. Nor have they shown the injunction serves the public interest. Emergency Order 12 is substantially related to the public health and is not, beyond all question, a plain, palpable invasion of constitutional rights. *See Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 31 (1905).

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974).

*S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (U.S. 2020) (Roberts, C.J., concurring in denial of application for injunctive relief).

From 1905 to present, the United States Supreme Court has upheld the government's authority to protect the people during a public health crisis. *See id.* The County respectfully requests this Court to do the same: deny the motion.

Respectfully submitted on July 13, 2020,

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PALM BEACH COUNTY

/s/ Anaili M. Cure  
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#### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Opposition to Plaintiffs' Motion for Temporary Injunction has been furnished via the E-Filing Portal to: Joel Medgebow, Esquire, [joel@medgebowlaw.com](mailto:joel@medgebowlaw.com), Louis Leo IV, Esquire, [louis@floridacivilrights.org](mailto:louis@floridacivilrights.org), Melissa Martz, Esquire, [melissamartessq@gmail.com](mailto:melissamartessq@gmail.com), Cory C. Strolla, Esquire, [strollalaw@yahoo.com](mailto:strollalaw@yahoo.com), Florida Civil Rights Coalition, P.L.L.C., 4171 West Hillsboro Boulevard, Suite 9, Coconut Creek, Florida 33073, on this 13<sup>th</sup> day of July, 2020.

/s/ Rachel M. Fahey  
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