

IN THE CIRCUIT COURT OF THE 15<sup>TH</sup> JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, FLORIDA

JOSIE MACHOVEC, et al.,

CIVIL DIV. AF

Plaintiffs,

CASE NO. 2020CA006920AXX

v.

PALM BEACH COUNTY,  
a political subdivision of the  
State of Florida,

Defendant.

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**AMICUS CURIAE BRIEF OF ALACHUA COUNTY, FLORIDA  
SUPPORTING THE POSITION OF PALM BEACH COUNTY**

The world is in the grip of a pandemic the like of which has not been seen in over a century. In the six months that this novel corona virus has been active in the United States, there have been over 3,397,000 infection cases and over 135,000 deaths. Florida has been particularly hard hit, and is currently undergoing a significant spike in new infections with 291,629 cases and 4,409 deaths according to the Department of Health.<sup>1</sup>

COVID-19 has impacted every one of the sixty-seven counties in Florida. Large and small counties alike have had to deal with its impact on their residents and businesses. While Governor DeSantis has set broad policies, he has also left it up to local governments to take additional actions pursuant to their authority under Section 252.38, Florida Statutes. Over the timeframe of this rolling disaster, various local governments have exercised their emergency powers in various ways. The issue before this Court is the ability of a county government to impose the requirement of wearing a facial covering in order to slow the spread of the COVID-19 virus.

<sup>1</sup> <https://experience.arcgis.com/experience/96dd742462124fa0b38ddedb9b25e429> (Last accessed 7/14/20).

This issue has been dealt with by three courts in Florida, involving the emergency orders of two counties. A number of other lawsuits have been filed in other counties, challenging the emergency orders of those counties to mandate facial coverings. The issues raised in this case are no different than those raised in the Alachua and Leon County cases. A review of the orders in those cases show the thoughtful approach that the state circuit and federal judges took, and their dismantling of the argument that the orders in question were either vague and violated substantive due process, or involved any sort of medical treatment which could even remotely touch on the right to privacy embodied in the Florida Constitution.

At present, these are the only three decisions on the issue of facial coverings decided in Florida. No appellate court has weighed in on the issue. Given the lack of any Florida appellate decision on this issue, the decisions of sister circuit courts, or the U.S. District Court are persuasive. However, given the detailed orders and the analysis of issues, along with the lack of any case law supporting a contrary position under these circumstances, it is vital that this Court consider the importance of uniformity of decisions at this time. The elected leadership of the counties and cities are using every option they have available to them within the bounds of the law to slow down the infection rate, the burden on the hospitals, and the deaths caused by COVID-19. Even these numbers don't tell the full story of the impact of the disease. Those hospitalized by COVID-19 may be left with devastating impacts on their health and never fully recover. The impact is not fully understood at present. <sup>23</sup>

In both *Smith v. Avino*, 91 F3rd 105, (11<sup>th</sup> Circuit 1996) and *South Bay United Pentecostal v. Newsome* 590 U.S. \_\_\_\_\_, No. 19A1044 (5/29/20), the Courts took pains to point out the

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<sup>2</sup> <https://www.healthline.com/health-news/what-we-know-about-the-long-term-effects-of-covid-19> (Last accessed 7/15/20).

<sup>3</sup> <https://news.umihealth.org/en/what-are-the-long-term-effects-of-covid-19/> (Last accessed 7/15/20).

importance that the courts, in the absence of a real impairment of a constitutional right, allow the local governments to take appropriate action. In *Smith v Avino*, it was a curfew order and the freedom of movement<sup>4</sup>; in *South Bay Pentecostal*, the claim was a violation of the First Amendment freedom of exercise of religion<sup>5</sup>. Both cases acknowledged a fundamental right, however neither Court granted the respective petitioners relief. Unlike these more restrictive local government actions, requiring the wearing of facial coverings when one is among other people in order to protect those other people is a minor inconvenience. While Alachua County believes that the matter before the Court has been well briefed, there is one specific issue it wishes to touch upon. The Plaintiffs make an argument that the mandatory facial covering order is somehow a violation of the First Amendment freedom of expression. This argument is specious and was discarded by Judge Keim in the Green decision in Alachua County. As more facial covering orders make their way through the courts, more case law rejects arguments such as this. A recent case is *Antietam Battlefield KOA v. Hogan*, CV CCB-20-1130, 2020 WL 2556496 (U.S. Dist. Md. 5/20/20). Quoting from the Supreme Court in *City of Dallas v. Stanglin*, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." 490 U.S. 19, 25 (1989).<sup>6</sup> Much

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<sup>4</sup> “when a curfew is imposed as an emergency measure in response to a natural disaster, the scope of review in cases challenging its constitutionality “is limited to a determination whether the [executive’s] actions were taken in good faith and whether there is some factual basis for the decision that the restrictions ... imposed were necessary to maintain order. *Smith* at 109

<sup>5</sup> Chief Justice Roberts stated that “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 “the safety and the health of the people” to the Politically accountable officials of the States “to guard and protect.” . . . When those officials “undertake[] to act in areas fraught with medical and scientific uncertainties,” their latitude “must be especially broad.” Where those broad limits are not exceeded, they should not be subject to second-guessing by an “unelected federal judiciary,” which lacks the background, competence, and expertise to assess public health and is not accountable to the people. *S. Bay United Pentecostal Church*, 2020 WL 2813056, at 1.

<sup>6</sup> “b. Face coverings

like the facial covering requirement in the *Antietam Battlefield KOA*, the facial covering requirement at issue in this case is conduct which does not possess sufficient communicative elements to bring the First Amendment into play since there is no intent to convey a particularized message and there is little likelihood that a particular communicative message would be understood by those who viewed it. *See Antietam Battlefield KOA*, 2020 WL 2556496 (citing *Texas v. Johnson*, 491 U.S. 397 (1989)).

More and more cities and counties in Florida are resorting to orders requiring the use of facial covering. These include Orange County, Osceola County, Seminole County, Pinellas County, Hillsborough County, the City of Tampa, the City of St. Petersburg, and others.<sup>7</sup>

Were this Court to determine that judicial intervention is appropriate, it would be second guessing the well documented and considered action taken by the Palm Beach County Board of County Commissioners, and would open the door to additional litigation across the state as other potential plaintiffs would use the opinion to support challenging similar orders. Lack of uniformity of rulings would cause some local government to second guess employing these vital public health measures. This is not a sunny day when actions like these can be debated in the abstract, or an

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The plaintiffs argue that the face covering requirement violates their freedom of speech. “In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [the Supreme Court has] 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.” *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (citation omitted). Therefore, the Supreme Court has found that allowing military recruiters on campus was not expressive conduct protected by the First Amendment, see *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.* (“FAIR”), 547 U.S. 47, 66, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006), and the Fourth Circuit has found that recreational dancing was not either, *Willis v. Town Of Marshall, N.C.*, 426 F.3d 251, 257 (4th Cir. 2005). As to the military recruiting, the Court found that schools’ refusal to allow recruiting on campus was expressive only because the schools’ conduct was accompanied by speech. FAIR, 547 U.S. at 66, 126 S.Ct. 1297. But “[t]he fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection” as symbolic speech. *Id.*

Similarly, while wearing a face covering might be to several of the plaintiffs a “sign of capture on the battlefield, and subservience to the captor,” (Compl. ¶ 73), that meaning is not “overwhelmingly apparent.” FAIR, 547 U.S. at 66, 126 S.Ct. 1297 (quoting *Johnson*, 491 U.S. at 406, 109 S.Ct. 2533). Instead, especially in the context of COVID-19, wearing a face covering would be viewed as a means of preventing the spread of COVID-19, not as expressing any message.”

<sup>7</sup> <https://floridapolitics.com/archives/342364-beyond-the-veil-what-face-mask-requirements-are-in-place-in-florida> (Last accessed 7/15/20).

obscure case where the actual impact is limited. The impact of a ruling in favor of the Plaintiffs will be felt across the state, and provide a grievous blow to those counties and cities working to prevent the spread of this deadly virus. Additionally, this is not a case where a novel issue has been raised. The arguments presented in this case were argued before Judge Keim in Alachua County and Judge Cooper in Leon County.

**CONCLUSION**

For the reasons set forth above, Alachua County supports the position of Palm Beach County, and requests this Court consider the rulings made concerning the Alachua and Leon County cases and find that the Plaintiffs' request for temporary injunction must be denied.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the Palm Beach County Clerk of Court by using the Florida Courts E-Filing Portal, which will also serve a copy to all counsel of record, this 16<sup>th</sup> day of July, 2020.

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